"We Are One, But We Are Many": Conceptions of Australia's Sovereign People and the Proposed Voice to Parliament

David Moignard Ferrell*

Abstract

This article examines the defeat of the 2023 referendum on the Aboriginal and Torres Strait Islander Voice to Parliament ('Voice') in terms of competing conceptions of 'the people' in Australian constitutional law. Applying James Tully's theory of popular sovereignty to Australian law and history, this article advances the tension between two views of the sovereign people — as homogenous and formally equal, or plural and differentiated — as a lens to analyse developments in Australian constitutional law. It begins by briefly surveying the history of Indigenous Australian sovereign difference under the *Australian Constitution*, situating the recognition sought through the Voice. It then identifies, drawing on Tully's critique of 'modern constitutional' popular sovereignty, an orthodox conception of the sovereign people persisting in Australian law as a homogenous, formally equal entity authorising the supremacy of representative Parliament. Finally, it suggests a competing strain of Australian constitutional thought which, constructing the sovereign people as plural, enables alternative forms of constitutional governance. Such plural modes of constitutionalism, it argues, were embodied by the Voice and informed the No campaign's arguments in the terms of a 'unified' constitutional 'people'. Through examination of the Voice, this article articulates competing constructions of 'the people' as a lens for interrogating developments in Australian constitutional law.

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I Introduction

This article examines the defeat of the October 2023 referendum on the Aboriginal and Torres Strait Islander Voice to Parliament ('Voice') in terms of competing conceptions of 'the people' in Australian constitutional law. By introducing James Tully's critique of 'modern constitutional' popular sovereignty to existing Australian scholarship, this article advances the tension between two views of the sovereign people — as homogenous and formally equal, or plural and differentiated — as a lens to analyse developments in Australian constitutional law.

In May 2022, the Albanese Labor Government announced a referendum to decide whether to insert a Voice to Parliament into the *Australian Constitution*. The proposed amendment was framed '[i]n recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia'. In 1992, the High Court had recognised 'the people' as sovereign in the *Constitution*.[1] Who 'the people' were and what their 'sovereignty' entailed, however, was 'ambiguous'[2] and 'opaque'.[3] Today, this article argues, the prevailing picture of Australia's sovereign 'people' is as a homogenous, formally equal entity, channelling its sovereignty through the representative government of Commonwealth Parliament — a picture mirroring that criticised by Tully in *Strange Multiplicity*.[4] The Voice proposal challenged this orthodoxy, promising to formalise plurality within the Australian people by recognising a distinct constitutional status for Aboriginal and Torres Strait Islander peoples.

In October 2023, the Voice proposal was defeated at referendum. This article analyses the defeat as reflecting a continuing disagreement about the character of the sovereign 'people' in Australian constitutional culture: whether they are to be constructed as homogenous and formally equal, or as plural and differentiated. Both views have foundations in Australia's constitutional text and history, and reflect competing ideals in Australia's constitutional culture. Ultimately, in 2023, the Australian polity rejected the constitutional pluralism embodied by the Voice proposal, preferring values of formal equality, homogeneity and the centralised authority of representative Parliament integrated into a 'unified' conception of 'the people'.

Part II briefly surveys the history of Indigenous Australian sovereign difference under the *Australian Constitution*, detailing how Aboriginal and Torres Strait Islander peoples' distinct sovereignty claims have been suppressed in Australian constitutional history, culminating in the Voice proposal's promise to recognise Aboriginal and Torres Strait Islander peoples as Australia's 'First Peoples'. Part III applies Tully's analysis of 'modern constitutionalism' to Australian law, arguing that, in tension with the plurality of the Voice proposal, the

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1 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*') 137–8 (Mason CJ).

2 George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) *Federal Law Review* 1, 4.

3 Sarah Murray, '"The People" as a Source of Constitutional Principle: The Australian Constitution and the Contours of Representative Government' (2017) 29 (Special Issue) *Singapore Academy of Law Journal* 882, 882.

4 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995).

orthodox conception of the sovereign people in Australian law, inherited from a 'modern constitutional' tradition, is as a homogenous, formally equal and unitary entity, legitimising the supreme authority of representative Parliament.

Finally, Part IV argues that a plural conception of the sovereign people also exists in Australian law, generating different modes of constitutional law and governance aimed at more accurately representing the multiform people. Two such theoretical approaches — deliberative constitutionalism and democratic constitutionalism — it is suggested, were imprinted into and projected upon the Voice proposal. Consequently, the rejection of the Voice, in the terms of the No campaign, expressed a commitment to a 'unified' account of 'the people', and the mode of constitutionalism it engenders.

Popular sovereignty is a 'notoriously ambiguous concept'.[5] For the purposes of this article, popular sovereignty concerns 'the source from which the *Constitution* derives its authority'.[6] The related notion of 'constituent power', the power to amend the *Constitution*, is a specific manifestation of this authority.[7] 'Constitutional culture' refers to the understandings of a legal system by the population under that system, rather than the understandings only of the elites who directly practise constitutional norms.[8] Whereas constitutional history has generally focused on the roles of elites,[9] the notion of constitutional culture draws attention to broader cultural conceptions informing the development of constitutional law.[10]

I am conscious that I write as a non-Indigenous person in the field of colonial law. It is not the purpose of this article to suggest or advocate for particular forms of recognition of First Nations sovereignty, or to speak for the intentions of the *Uluru Statement from the Heart* ('*Uluru Statement*'). Nor is it the purpose of this article to suggest which view of the sovereign people is correct or preferable. Questions about appropriate recognition of Indigenous Australians are beyond the scope of this article. Rather, this article takes as its starting point that popular sovereignty and constitutional legitimacy are predominately *colonial* cultural concepts which cannot be assumed in negotiations between Indigenous and non-Indigenous peoples.

The purpose of this article is not to advocate any one conception of the sovereign 'people' as monolithically correct or preferable. Rather, this article emphasises that the contradiction between the multitude and the singular is central, inextricable and jurisgenerative to the concept of a sovereign 'people', and inseparable from Australia's settler-colonial history. Consequently, the tension cannot be 'resolved' in law or by referendum. Rather, an understanding of this paradox, and the values and commitment which circulate it, directs attention towards the legal-cultural inheritances operating in Australian constitutional thought and

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5 Winterton (n 2) 4. See also Benjamin B Saunders and Simon P Kennedy, 'Popular Sovereignty, "The People" and the Australian Constitution: A Historical Reassessment' (2019) 30(1) *Public Law Review* 36, 38.

6 Winterton (n 2) 4.

7 George Duke and Carlo Dellora, 'Constituent Power and the *Commonwealth Constitution*: A Preliminary Investigation' (2022) 44(2) *Sydney Law Review* 199, 204.

8 Jason Mazzone, 'The Creation of a Constitutional Culture' (2005) 40(4) *Tulsa Law Review* 671, 672.

9 Ibid 684.

10 Ibid 685–96.

provides a lens through which to understand developments in Australian constitutional law.

This article is indebted to recent scholarship on Australian popular sovereignty, particularly Elisa Arcioni's investigations of 'the people', including as 'plural' or 'unified' in the context of *Love v Commonwealth*,[11] and analyses by Nicholas Aroney, Benjamin Saunders, Simon Kennedy, Ron Levy and William Partlett, among others, of the role of popular sovereignty in Australia's *Constitution*. This article aims to supplement this discussion by introducing the scholarship of Tully alongside an analysis of the historical roots, implications for constitutional practice, and inhabitations of these characterisations of 'the people' in Australian constitutional law, thereby developing a fuller picture of competing conceptions of Australia's sovereign people.

II Indigenous Sovereign Difference and the Voice Proposal

Continuing Aboriginal claims to sovereignty represent a 'constitutional legitimacy crisis' for Australian law.[12] Section A of this Part will argue that the historical response of the Australian state to this 'crisis' has been repression of sovereign Aboriginal identity, initially by segregation from, and later by assimilation into, an imagined, uniform Australian people, but that these policies necessarily failed to dissolve the distinctiveness of Aboriginal sovereign claims in Australian law. Consequently, Section B will argue that the Voice proposal promised, in contrast, to recognise Aboriginal and Torres Strait Islander peoples as the 'First Peoples' of the Australian population, entrenching a form of plurality in the *Constitution*.

A *Aboriginal Sovereign Difference*

In 1788, Arthur Phillip arrived in Botany Bay carrying a commission declaring British sovereignty over Australia from the eastern shore to a longitude of 135 degrees east. It was an 'incredible' legal claim.[13] Contemporary international law would only have granted sovereignty over the surrounding watershed,[14] and would only have been effective against European nations, not sovereign first nations.[15] The commission for settlement, informed by accounts of offshore explorers, assumed an empty land, home to few, rudimentary people.[16] Accounts of explorers and administrators, including Arthur Phillip, increasingly expressed anxiety at the

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[11] See Elisa Arcioni, 'Competing Visions of "The People" in Australia: First Nations and the State' (2023) 1(1) *Comparative Constitutional Studies* 75 ('Competing Visions').

[12] Gabrielle Appleby, Ron Levy and Helen Whalan, 'Voice versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis' (2023) 46(3) *UNSW Law Journal* 761, 765.

[13] Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons, 1966) 631. See also Henry Reynolds, *Truth-Telling: History, Sovereignty and the Uluru Statement* (NewSouth Publishing, 2021) 24.

[14] WE Hall, *A Treatise on International Law*, ed A Pierce Higgins (Oxford University Press, 8th ed, 2001 reprint of 1924) 129–30.

[15] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 33–8 (Brennan J) ('*Mabo No 2*'); *Worcester v Georgia*, 31 US 515 (1832) 543–4 (Marshall CJ).

[16] Reynolds (n 13) 18–20.

apparent inaccuracy of that assumption.[17] Early judgments of colonial courts distinguished between Aboriginal people and British subjects, and recognised Indigenous legal autonomy.[18] Shortly, however, the rulings turned; settled territories became 'newly discovered and unpeopled'.[19] These rulings informed the decision of the Privy Council in *Cooper v Stuart* that Australia was a 'tract of territory practically unoccupied without settled inhabitants'.[20] Thereafter, Indigenous groups would have no sovereignty within Australia's legal order. In 1824 and 1829, Australia's sovereign claim was extended westward by proclamation to annex the remainder of the continent. Although the Australian Government would not exercise effective control over the entire continent until into World War II,[21] according to colonial law any sovereignty of Indigenous nations had vanished.

Aboriginal and Torres Strait Islander peoples continued, however, to claim distinct sovereign identity.[22] Claims that First Nations' sovereignty was never ceded underscore the 'shaky' legality of the foundation of the Australian colonies.[23] Contrary to the principle of consent by the governed, these claims demonstrate a segment of the population whose members have not consented to Australia's constitutional order:[24] who insist upon their distinct authority or constituent power even where the dominant constitution implies this is impossible.[25] The historical response of the Australian state to this 'constitutional legitimacy crisis' has been to exclude Aboriginal peoples from and later assimilate them within a 'unified' conception of the Australian people.[26]

This exclusion has typified Australian legal history.[27] At its most extreme, it comprised erasure through genocide and figuration of a 'dying race'.[28] More recently, it involved segregation of Aboriginal people from the Australian polity. At Federation, Aboriginal people were excluded from voting in both Queensland and Western Australia.[29] Following Federation, the *Commonwealth Franchise Act 1902* (Cth) conferred the right to vote federally on all adult Australians, but actively

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17 Ibid ch 1.

18 See, eg, *R v Ballard* [1829] NSWSupC 26. See also *R v Bonjon* [1841] NSWSupC 92; Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(13) *Indigenous Law Bulletin* 7.

19 *Wilson v Terry* (1849) 1 Legge 505, 508 (Stephen CJ).

20 *Cooper v Stuart* (1889) 14 App Cas 286, 291 (Lord Watson).

21 Reynolds (n 13) 85–6. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 1901, 4806–7 (Alfred Deakin, Attorney-General).

22 See Paul Muldoon and Andrew Schaap, 'Aboriginal Sovereignty and the Politics of Reconciliation: The Constituent Power of the Aboriginal Embassy in Australia' (2012) 30(3) *Environment and Planning D* 534, 534.

23 Michael Dodson, 'Sovereignty' (2002) 4 *Balayi* 13, 18. See also Reynolds (n 13) 4.

24 Muldoon and Schaap (n 22) 543.

25 See Ron Levy, Ian O'Flynn and Hoi L Kong, *Deliberative Peace Referendums* (Oxford University Press, 2021) ch 5; Appleby, Levy and Whalan (n 12).

26 Arcioni, 'Competing Visions' (n 11) 82–6.

27 See Sean Brennan and Megan Davis, 'First Peoples' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 27, 47; Shireen Morris, '*Love* in the High Court: Implications for Indigenous Constitutional Recognition' (2021) 49(3) *Federal Law Review* 410, 418–19.

28 George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018) 137 [4.15]. See also Reynolds (n 13).

29 *Constitution Amendment Act 1893* (WA) s 12; *Elections Act 1885* (Qld) s 6.

excluded Aboriginal people from that date.[30] Though suffrage was conferred upon Aboriginal people in 1963, it was not until 1983 that full legal equality would be enjoyed, through the adoption of compulsory voting, as had been imposed on the rest of the Australian population since 1924.[31]

Aboriginal people were excluded from the operation of the Federal Government's power to make laws for '[t]he people of any race' under s 51(xxvi) of the *Constitution*. Section 25 of the *Constitution* continues to contemplate the exclusion of any race from franchise if they are disqualified from voting at state elections, while the now-removed s 127 provided that '[i]n reckoning the numbers of the people of the Commonwealth … [Aboriginal people] shall not be counted'. To the extent that these provisions represent a constitutionalised acknowledgement of minorities, they do so on terms of subordination and confinement. Government policy concerning Indigenous Australians has been paternalistic and expressly coercive, including such contemporary measures as the Northern Territory National Emergency Response.[32] This policy of exclusion morphed by degrees into one of assimilation and formal equality, crystallising in the 1967 referendums which removed s 127 and included Aboriginal people within the Commonwealth Parliament's races power.[33] Following the 1967 referendums, Australia's *Constitution* contained no references to or express recognition of Aboriginal and Torres Strait Islander peoples.[34] Aboriginal claims to a distinct sovereign identity, however, were not dissolved by attempts at formal integration.[35]

By recognising the persistence of Indigenous native title within common law, but evading determinations regarding Indigenous sovereignty, *Mabo No 2* inflamed challenges of Indigenous sovereignty within the law without resolving them. Brennan J spoke of a 'change in sovereignty'[36] and 'fictions … that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown'.[37] However, the Court refused to determine questions of pre-existing or persisting sovereign claims of Aboriginal people.[38] In subsequent cases, the High Court only hardened its disengagement from questions of Indigenous sovereignty.[39]

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30 *Commonwealth Franchise Act 1902* (Cth) s 4.

31 Williams, Brennan and Lynch (n 28) 136 [4.11].

32 Muldoon and Schaap (n 22) 547. See Desmond Manderson, 'Not Yet: Aboriginal People and the Deferral of the Rule of Law' (2008) 29/30 *Arena Journal* 219.

33 Arcioni, 'Competing Visions' (n 11) 83–4.

34 Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Parliament of Australia, *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Report, May 2023) 12 [2.14] ('*Voice Advisory Report*').

35 Brennan and Davis (n 27) 32–3.

36 Ibid 51.

37 Ibid 58. See also at 99–100 (Deane and Gaudron JJ).

38 Ibid 29 (Brennan J).

39 See, eg, *Coe v Commonwealth* (1993) 68 ALJR 110 ('*Coe*').

B *The Voice to Parliament*

1 *Voice Proposal*

In May 2017, the *Uluru Statement* was released, the product of the First Nations National Constitutional Convention.[40] The statement declared:

> Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent …
>
> This sovereignty is a spiritual notion: the ancestral tie between the land … and the Aboriginal and Torres Strait Islander peoples … It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.[41]

The *Uluru Statement* called for the establishment of a constitutionally enshrined Aboriginal and Torres Strait Islander Voice to Parliament, maintaining that '[w]ith substantive constitutional change ... we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood'.[42] In October 2017, Prime Minister Malcolm Turnbull rejected this call for a Voice, stating that such a body was not 'desirable or capable of winning acceptance at a referendum'.[43] Nevertheless, the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples was established in March 2018, and the co-design process for an entrenched Voice proceeded into 2019.

In May 2022, the Albanese Labor Government announced a referendum on the Voice, to be held within that term of government. In March 2023, the Government released a proposed question and the text of the amendment. The question read:

> A Proposed Law: to alter the *Constitution* to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?

The proposed amendment read:

> **Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples**
>
> 129 Aboriginal and Torres Strait Islander Voice
>
> In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:
>
> (i) there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
>
> (ii) the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
>
> (iii) the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait

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40 *Uluru Statement from the Heart* (Statement, First Nations National Constitutional Convention, 26 May 2017) ('*Uluru Statement*').

41 Ibid.

42 Ibid.

43 Calla Wahlquist, 'Indigenous Voice Proposal "Not Desirable", Says Turnbull', *The Guardian* (online, 26 October 2017) <https://www.theguardian.com/australia-news/2017/oct/26/indigenous-voice-proposal-not-desirable-says-turnbull>.

> Islander Voice, including its composition, functions, power and procedures.

On 19 July 2023, the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 ('Constitution Alteration Bill') passed both houses of Parliament, to be put to the Australian people at referendum under s 128. On 14 October 2023, the referendum was defeated in every state, with 60% of electors voting to reject the proposal.[44] Opposition Leader Peter Dutton, commenting after polling had closed, repeated the central message of the No campaign: 'The proposal and the process should have been designed to unite Australians, not to divide us.'[45]

2 *Recognising Indigenous Australians*

The proposal had effectively conflated two matters: the constitutional recognition of Aboriginal and Torres Strait Islander peoples as a distinct group within the Australian people, and the establishment of the Voice.[46] The substance of the proposed amendment concerned the establishment, composition and powers of the Voice. Consequently, few submissions to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum ('Joint Select Committee') engaged with the legal consequences of recognising Indigenous peoples in the *Constitution*. The locus of the debate was instead the Voice body, and especially the effect of its representations to the executive and Parliament,[47] with the Committee emphasising that '[v]ery few stakeholders disputed that Aboriginal and Torres Strait Islander peoples should be recognised in some form'.[48]

Constitutional recognition was a core function of the proposal. The Explanatory Memorandum to the Constitution Alteration Bill stated that the first purpose of the proposal was 'to recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia'.[49] This recognition sought to remedy the fact that 'the *Constitution* effectively excluded Aboriginal and Torres Strait Islander peoples in significant ways'.[50] The Explanatory Memorandum moreover set out the *Uluru Statement* in full.[51] The second reading speech for the Bill similarly stated that the proposal was targeted to remedy the fact that 'Aboriginal and Torres Strait Islander peoples are not recognised in our *Constitution* … to recognise the First Peoples of Australia [and to] rectify over 120 years of explicit exclusion in provisions of Australia's founding legal document'.[52] Attorney-General Mark Dreyfus observed: 'The introductory words recognise Aboriginal and Torres Strait

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44 Josh Butler, 'Indigenous Voice to Parliament: Australia Rejects Constitutional Change as Albanese Says Vote "Not End of the Road"', *The Guardian* (online, 14 October 2023) <https://www.theguardian.com/australia-news/2023/oct/14/australian-voters-reject-proposal-for-indigenous-voice-to-parliament-at-historic-referendum>.

45 Ibid.

46 *Voice Advisory Report* (n 34) 73.

47 See ibid 17–28 [3.3]–[3.42].

48 Ibid 11 [2.9].

49 Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Cth) 2. See also at 10 [7].

50 Ibid 2. See also at 2–3.

51 Ibid 14.

52 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2023, 2702 (Mark Dreyfus, Attorney-General).

Islander peoples as the First Peoples of Australia. They reflect the fact that establishing the Voice is an act of recognition, in the manner the delegates at Uluru sought in 2017.'[53]

3 *The Constitutional Consequences of Recognition*

What would the consequences of such recognition have been? This article engages with the possibility that this recognition could have essentially informed the constitutional meaning of 'the people'. In their submission to the Joint Select Committee, Nicholas Aroney and Peter Gerangelos suggested that the insertion of the Voice provisions in a discrete chapter would give recognition of Indigenous peoples 'a structural prominence in the *Constitution* similar to three other important constitutional topics' and to 'the other major institutions established by the *Constitution*' — Parliament, the executive and the judiciary — inviting 'constitutional implications'.[54] Unlike the proposed preamble recognising Aboriginal peoples that went to referendum in 1999, the proposed Voice provisions did not contain a non-justiciability clause.[55] Consequently, as Aroney argued elsewhere, 'the introductory words [could] contain implications of their own'.[56] In particular,

> [t]he recognition of 'the First Peoples of Australia' in the proposed section 129 is likely to be interpreted in the context of the reference in the preamble to the [*Constitution*] to the agreement of 'the people' of the several Australian colonies … [I]t is quite possible … that the 'First Peoples' referred to in section 129 will be recognised by the courts as a distinct and yet integral part of the 'Australian People' ... [57]

This suggestion is further supported by the content of extrinsic and campaign materials for the Yes campaign, read through the High Court's approach to previous constitutional amendments. In two cases in which the High Court meaningfully interpreted amendments to the *Constitution*, the Court examined wide extrinsic materials. In 2009, in *Wong v Commonwealth*,[58] the High Court was called on to interpret s 51(xxiiiA), the 'social services power' of Parliament inserted into the *Constitution* by referendum in 1946.[59] All Justices but one used extrinsic materials in interpreting the provision. Their Honours analysed the second reading speech, parliamentary debates surrounding the passage of the Bill, the historical and political context of the passage of the Bill and referendum, the Yes and No cases put to voters in pamphlets, and even the advice of the Solicitor-General and the Attorney-

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53 Ibid 2701.

54 Nicholas Aroney and Peter Gerangelos, Submission No 92 to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (2023) 2 [5], [6].

55 Aroney and Gerangelos (n 54) 3 [10]. See also Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the *Australian Constitution*' (2001) 24(2) *UNSW Law Journal* 382, 394–5.

56 Nicholas Aroney, 'First Peoples and the People of the Australian Commonwealth' (Conference Paper, Queensland Supreme Court and District Court Judges Conference, 14 August 2023) 2–3 ('First Peoples').

57 Ibid 4. See also Aroney and Gerangelos (n 54) 3–4 [10].

58 *Wong v Commonwealth* (2009) 236 CLR 573 ('*Wong*').

59 *Constitution Alteration (Social Services) 1946* (Cth) s 2.

General's department to the Member who introduced the Bill.[60] Likewise, in 1998 in *Kartinyeri v Commonwealth*, a majority of the High Court considered the case for the Yes vote provided to electors ahead of the 1967 referendum in determining the meaning of the amended races power under s 51(xxvi).[61]

Clear references to the recognition of Aboriginal and Torres Strait Islander peoples in the extrinsic materials, as well as the *Yes Pamphlet*,[62] in the context of claimed 'spiritual' sovereignty which 'co-exists' with the Crown,[63] could have supported the judicial recognition of a distinct constitutional status for Aboriginal and Torres Strait Islander peoples among the Australian people. In its submission to the Joint Select Committee, the Law Council of Australia asserted explicitly that the amendment promised to recognise the 'unique status and rights of Aboriginal and Torres Strait Islander peoples as Australia's Indigenous Peoples'.[64] The additional comments from the Australian Greens similarly welcomed

> the inclusion of the preamble sentence as an important recognition of First People's cultural ties to Country along with the inclusion of the Statement from the Heart into the Bill's Explanatory Memorandum, containing as it does, multiple references to First Nations Sovereignty.[65]

What form this recognition of a distinct place within the Australian people could have taken is now unknowable. *Mabo No 2* and *Coe v Commonwealth* rejected the possibility of Indigenous sovereignty separate from the Australian state.[66] Likewise, while invocations of Aboriginal and Torres Strait Islander 'sovereignty' are diverse, scholarship relays that few are aimed at external independence.[67] Rather, sovereignty 'is seen as a footing, a recognition, from which to demand those rights and transference of power from the Australian state, not a footing to separate from it'.[68] Aroney suggested that the introductory phrase of the proposed amendment[69] could support the discovery of domestic dependent nationhood for Aboriginal and

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60 See *Wong* (n 58) 587–91 (French CJ and Gummow J), 623–5 (Hayne, Crennan, and Kiefel JJ), 649–51 (Heydon J). Cf at 604 (Kirby J).

61 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 358 (Brennan CJ and McHugh J), 361–3 (Gaudron J), 382–3 (Gummow and Hayne JJ), 406–7, 413 (Kirby J).

62 Australian Electoral Commission, *Your Official Referendum Booklet* (2023) 8, 10, 12, 14, 16, 18 ('*Yes Pamphlet*'). See also Lorena Allam, Josh Butler, Nick Evershed and Andy Ball, 'The Yes Pamphlet: Campaign's Voice to Parliament Referendum Essay — Annotated and Factchecked', *The Guardian* (online, 20 July 2023) <https://www.theguardian.com/australia-news/ng-interactive/2023/jul/20/the-vote-yes-pamphlet-referendum-voice-to-parliament-voting-essay-aec-published-read-in-full-annotated-fact-checked> ('*Yes Pamphlet Factchecked*').

63 See above n 41 and accompanying text.

64 Law Council of Australia, Submission No 91 to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Parliament of Australia, *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (21 April 2023) 12, quoted in *Voice Advisory Report* (n 34) 13 [2.17].

65 *Voice Advisory Report* (n 34) 85 [1.2].

66 *Mabo No 2* (n 15) 31–4 (Brennan J); *Coe* (n 39) 114–15 (Mason CJ).

67 Sean Brennan, Brenda Gunn and George Williams, '"Sovereignty" and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307, 312.

68 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 99. See further Asmi Wood, 'Self-Determination under International Law and Some Possibilities for Australia's Indigenous Peoples' in Laura Rademaker and Tim Rowse (eds), *Indigenous Self-Determination in Australia* (ANU Press, 2020) 269, 269.

69 'In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia'.

Torres Strait Islander peoples, or fiduciary-like obligations, as in Canada, New Zealand and the United States.[70] However, this coheres uneasily with the suggestion of national 'unity' envisioned by the Yes campaign,[71] and notions of 'fuller nationhood' expressed in the *Uluru Statement*. The submission of the Law Council of Australia to the Joint Select Committee identified that one of the key reasons for the amendment was that 'all Australians "own" the *Constitution*', including Aboriginal and Torres Strait Islander peoples.[72] I argue that the reference in the introductory phrase to 'First Peoples' rather than 'First Nations'[73] could less radically be read to imply a unique status of Aboriginal and Torres Strait Islanders within Australia's *sovereign* people.[74]

III 'Great Underlying Principle': The 'Unified' Account of 'The People'

Part II of this article related how historical policies of exclusion and assimilation failed to resolve the fundamental 'crisis' of legitimacy for the Australian state represented by continuing Aboriginal sovereign claims. It also argued that, by contrast, the Voice proposal stood to recognise and entrench the distinct status of Aboriginal and Torres Strait Islander peoples within 'the people' of Australia. Part III will discuss popular sovereignty under Australian law, detailing how, contrary to the Voice provisions, Australian constitutional culture exhibits a bias towards a 'unified' construction of 'the people' inherited from 'modern constitutional' thought.

Recognition of Indigenous plurality collides with the prevailing understanding of 'the people' in Australian constitutional law and culture: a 'unified' people, undifferentiated for the purposes of law, represented through a single, supreme Parliament. Section A will articulate this construction, drawing on the theory of Tully, as emerging from a 'modern constitutional' tradition, which frames a formal 'unity' of 'the people' in order to enable abstracted and centralised constitutional modes, prioritising the unitary state, stable representative government and formal equality. Section B will identify this 'unitary' construction of 'the people' in the jurisprudence of popular sovereignty in Australia, aligning it with the endorsement of the supremacy of Commonwealth Parliament.

A *The Modern Constitutional Unitary People*

In *Strange Multiplicity*, Tully set out to answer 'one of the most difficult and pressing questions' of our age: 'Can a modern constitution recognise and accommodate cultural diversity?'[75] Tully perceives, in contemporary Western constitutionalism, an inability to recognise multiple, diverse peoples, and a predilection 'to exclude and

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70 Aroney, 'First Peoples (n 56) 6–8. See also Aroney and Gerangelos (n 54) 5 [14].
71 *Yes Pamphlet* (n 62).
72 Law Council of Australia (n 64) 7, quoted in *Voice Advisory Report* (n 34) 12 [2.16].
73 See *Voice Advisory Report* (n 34) 85 [1.2].
74 See ibid 11–13 [2.10]–[2.17].
75 Tully (n 4) 1.

assimilate cultural diversity in the name of uniformity'.[76] This tendency originates, Tully diagnoses, in a dominant strain of 'modern constitutional' theory.[77]

'Modern constitutionalism' generally refers to the political and legal tradition emerging during the period of the Enlightenment in Western Europe, concerned broadly with limited government, the rule of law and the protection of basic liberties.[78] In *Strange Multiplicity*, Tully criticises a strain of this tradition, typified by the works of Thomas Paine, but broadly 'given theoretical expression in the writings of the modern European political theorists from John Locke to John Stuart Mill',[79] which consciously defined itself in opposition to 'the "ancient constitution" based on custom, tradition and irregularity', and framed the sovereign people as uniform, singular and homogenous.[80]

As noted by David Lee, '[f]ew doctrines [were] as foundational to modern constitutional theory [as] popular sovereignty'.[81] The 'notion that the ultimate source of all authority exercised through the public institutions of the state originates in the people' provided a secular foundation for modern constitutionalism's most influential theorists.[82] However, the 'diffuse and scattered' nature of 'the people' complicated attempts to attribute to them supreme power or authority.[83] The core project of modern constitutionalism was the formation of a theory of centralised public authority, 'limited and circumscribed within the bounds of law':[84] the establishment of 'a constitution that is legally and politically uniform' and free from 'the irregularity of an ancient constitution'.[85] The multiplicity of the population and their customary practices, observes Tully, contradicted this ideal.[86] Modern constitutionalism and popular sovereignty were 'fundamentally at odds with each other'.[87] To resolve this tension, modern constitutional theory constructed the

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76 Ibid 31.

77 See especially ibid ch 3.

78 David T ButleRitchie, 'The Confines of Modern Constitutionalism' (2004) 3(1) *Pierce Law Review* 1, 6.

79 Tully (n 4) 42.

80 Ibid 41–2. See also at 67. Tully does not suggest that this widely drawn collection of temporally aligned 'modern constitutional' thinkers, including 'Paine's contemporaries, especially Jean-Jacques Rousseau, Adam Smith, Immanuel Kant, Benjamin Constant and Georg Wilhelm Friedrich Hegel, as well as several of his predecessors, such as John Locke and Thomas Hobbes' (at 42) are entirely monolithic in their advancement of a unitary sovereign people. Rather, he sees these strains of modern constitutional theory as having 'elbowed aside entire areas of the broader language of constitutionalism — such as the common law, earlier varieties of whiggism and civic humanism — which provide the means of recognising and accommodating cultural diversity' (at 37) and that '[d]espite the dominant trend to uniformity, subordinate areas of constitutional theory and practice have been open to the recognition and accommodation of different cultures' (at 31). Consequently, as will be articulated in Part III, expressing pluralism does not necessarily involve inventing whole new ways of thinking, but rather 'recover[ing] and reconstruct[ing]' those strains of 'common law' and constitutionalism which allowed 'intercultural negotiations on just forms of constitutional association' (at 31).

81 Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press, 2016) 1. See also Tully (n 4) 59.

82 Lee (n 81) 1.

83 ButleRitchie (n 78) 26–7.

84 Lee (n 81) 1. See also at 7.

85 Tully (n 4) 66. See also at 67.

86 Ibid ch 3, 64–7.

87 Lee (n 81) 1.

sovereign 'people' with 'a formal, narrowly defined character'.[88] The people, though a multitude in fact, were, as a sovereign entity, conceptualised as 'unified' and 'unitary':[89] 'indivisible and necessarily dominant within a territory'.[90]

This construction of 'the people' allowed the formulation of the unitary state. The period of medieval constitutionalism preceding modern constitutionalism was defined by 'horrifyingly bloody ... wars. The prime reason for this was that there was no *uniform* concept of the "state"'.[91] Perceiving 'conflicting jurisdictions and authorities of the ancient constitutions [as] the cause of wars', says Tully, modern constitutional theorists were motivated to theorise a unitary nation-state, whereby authority was 'organised and centralised by the constitution in some sovereign body: in a single person or assembly, a system of mixed or balanced institutions, or in the undifferentiated people'.[92] Thomas Hobbes, for example, sought to arrest the fracturing of public authority which he witnessed in the English Civil War. He posited society as formed by a 'covenant' between every individual member of the 'multitude', whereby each agreed to 'confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will'.[93] This act constituted a unitary sovereign ruler, 'one indivisible entity with a unitary will and personality'[94] aligned with a unitary 'Commonwealth' capable of stably and authoritatively wielding public authority.[95]

This unitary quality of the sovereign authority was imposed back upon the sovereign 'people'. Jean-Jacques Rousseau seminally theorised the continuing sovereignty of 'the people' — separating constituent from governing constituted power[96] — through the 'general will' of the population.[97] For Rousseau, sovereignty was 'nothing less than the exercise of the general will'.[98] He maintained, however, the unitary structure of sovereign will. The notion of 'a single superior and sovereign will capable of expressing the permanent and common interests of the entire nation' remained attractive as a bulwark against political division.[99] The 'general will' subordinated individual wills to the 'common interest'.[100] Sovereignty was 'indivisible'[101] and suffered no 'partial wills' or 'partial society'[102] even if, in fact, subsets of the community did conflict with the 'general will'.[103]

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88 ButleRitchie (n 78) 29. See also Tully (n 4) 67.
89 See especially Tully (n 4) 67.
90 Levy, O'Flynn and Kong (n 25) 130–1.
91 Lee (n 81) 7 (emphasis in original). See also Tully (n 4) 66–7.
92 Tully (n 4) 67.
93 Thomas Hobbes, *Leviathan*, ed David Johnston (Norton, 2nd ed, 2020) 118. See also Tully (n 4) 84.
94 Lee (n 81) 11.
95 Hobbes (n 93) 118.
96 Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press, 2020) 29; Murray Forsyth, 'Hobbes's Contractarianism: A Comparative Analysis' in David Boucher and Paul Kelly (eds), *The Social Contract from Hobbes to Rawls* (Routledge, 2004) 39, 42.
97 Jean-Jacques Rousseau, *The Social Contract*, tr Jonathan Bennett (Early Modern Texts, 2017) 7. See also Forsyth (n 96) 42.
98 Rousseau (n 97) 12.
99 Jeremy Jennings, 'Rousseau, Social Contract and the Modern Leviathan' in David Boucher and Paul Kelly (eds), *The Social Contract from Hobbes to Rawls* (Routledge, 2004) 117, 118.
100 Rousseau (n 97) 7, 16.
101 Ibid 12.
102 Ibid 14.
103 Ibid 8.

Modern constitutional theorists sought to integrate this 'ideal' of popular sovereignty into the framework of the modern constitution[104] but, remaining 'distrustful of "the masses"' [saw] radical democratic participation and will formation [as] destructive and troublesome'.[105] Representative democratic government, as an institution, allowed popular sovereignty to be 'built into the apparatus of modern constitutionalism', but reduced the plurality of the sovereign 'people' to abstracted majoritarianism.[106] Consequently, 'democratic institutions were nothing more than positivist structures that allowed for the determination of popular sentiment'[107] and '[r]epresentative government [was] an acknowledgement that constitutionalism [was] prime'.[108]

In the United Kingdom, modern constitutional popular sovereignty underwrote explanations of parliamentary sovereignty.[109] Jeremy Bentham theorised a 'split' in the sovereignty of the United Kingdom, where 'the people' chose assemblies in periodic elections but did not control lawmaking functions.[110] Albert Venn Dicey similarly posited a distinction between 'legal' and 'political sovereignty': the sovereignty of the British Parliament was a 'merely legal conception [meaning] simply the power of law-making unrestricted by any legal limit'.[111] Political sovereignty was possessed by the body whose will 'is ultimately obeyed by the citizens of the state',[112] and this was 'the people', or more particularly, 'electors [who] can in the long run always enforce their will'.[113] Underlying this was the modern constitutional notion of 'the people', or the nation, as one. The 'essence of representative government', said Dicey, is that Parliament should 'give effect to the will of … the electoral body, or of the nation'.[114] Because of the majoritarian structure of the people's sovereign will, Walter Bagehot identified the House of Commons, and not the unelected House of Lords or the Crown, as the sovereign institution.[115]

This positivist treatment of the sovereign 'people' was upheld by formal equality and unity.[116] For Hobbes, in order to sustain the 'unity' by which the sovereign institution was legitimated, it was necessary that 'the people' be formally equal.[117] To allow a hierarchy of differences in society would allow the assertion of superior places within the social order, and those with inferior places would refuse

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104 ButleRitchie (n 78) 27.
105 Ibid.
106 Ibid.
107 Ibid.
108 Ibid 29.
109 See Saunders and Kennedy (n 5) 44.
110 Ibid.
111 AV Dicey, *Introduction to the Study of the Law of the Constitution*, ed Roger Michener (Liberty Fund, 8th ed, 1982) 27.
112 Ibid.
113 Ibid 27–8.
114 Dicey (n 111) 285.
115 Walter Bagehot, *The English Constitution* (Chapman & Hall, 1867) 164, 270, cited in Saunders and Kennedy (n 5) 46.
116 Forsyth (n 96) 38. See further Tully (n 4) 84–5.
117 Kinch Hoekstra, 'Hobbesian Equality' in SA Lloyd (ed), *Hobbes Today: Insights for the 21st Century* (Cambridge University Press, 2012) 76.

the covenant of society.[118] This would reintroduce the pluralism Hobbes' theory sought to eradicate.[119] Hobbes' equality was not a natural fact but a formal construction: an 'acknowledgement', 'allowance' and 'attribution' between covenanters.[120]

For John Stuart Mill, similarly, sovereignty was to be vested in 'the entire aggregate community' through franchise[121] — the 'whole people' must have 'ultimate power'.[122] Dicey advocated for the referendum as a process of constitutional change, in part because he believed a greater proportion of the population, particularly minorities outweighed in regular elections, would turn out to participate.[123] This electoral equality allowed 'the people' to be constructed as homogenous 'in the sense that culture is irrelevant [or] capable of being transcended'.[124] Diversity being served sufficiently 'by an implicit and substantive common good and a shared set of authoritative European institutions',[125] the modern constitution eliminates 'diversity as a constitutive aspect of politics'.[126]

Moreover, Tully perceives this restriction as a tool of colonial enterprise: having been 'designed to exclude or assimilate cultural diversity'[127] and 'justify the extinction or assimilation of different cultures',[128] it was 'employed, and continue[s] to be employed, to dispossess the Aboriginal nations of their sovereignty and territory and to subject them to European constitutional nation states and their traditions of interpretation'.[129] As colonial European thinkers faced Aboriginal peoples that considered themselves 'sovereign nations with jurisdiction over their territories', a justification was required to establish European sovereignty.[130] The distinction upheld between 'ancient' constitutions, founded on custom and perceived irregularity, and 'modern' constitutions, defined by formality, abstraction and equality, and the superiority of the latter, served to relegate Aboriginal political associations to an 'earlier stage of [historical] development',[131] a 'state of nature'.[132] Such ideas 'vacate[d]' lands 'for settlement without consent by removing the sovereignty and property of Aboriginal peoples',[133] and allowed for the figuration of uniformity of 'the people' as an indication of having achieved modernity.[134] Any failure of Aboriginal peoples to conform to the uniformity of 'the people', and to accede to the European institutions of a modern constitution, is viewed as evidence

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118 Ibid 99–100.
119 Ibid.
120 Ibid 102 (citations omitted).
121 John Stuart Mill, *Considerations on Representative Government*, ed Geraint Williams, *Utilitarianism, On Liberty, Considerations on Representative Government* (Dent, 1996) 223.
122 Ibid 226. See also Saunders and Kennedy (n 5) 45–6.
123 Rivka Weill, 'Dicey Was Not Diceyan' (2003) 62(2) *Cambridge Law Journal* 474, 489.
124 Tully (n 4) 63.
125 Ibid 64.
126 Ibid 63.
127 Ibid 58.
128 Ibid 70.
129 Ibid 70.
130 Ibid 71.
131 Ibid 69. See also 64–8.
132 Ibid 69.
133 Ibid 74.
134 Ibid 67.

of their inadequacy for sovereignty, and justification for their exclusion or assimilation. In this way, the vision of a people upheld by modern constitutionalism 'legitimates the modernising processes of discipline, rationalisation and state building that are designed to create in practice the cultural and institutional uniformity identified as modern in theory'.[135]

Modern constitutionalism was therefore, says Tully, '[t]he picture … of a culturally homogenous and sovereign people [whose] constitution founds an independent and self-governing nation state with a set of uniform legal and representative political institutions in which all citizens are treated equally'.[136] It defined itself in opposition to the 'multiform … assemblage' of 'ancient constitutions'.[137] Concepts of 'popular sovereignty, citizenship, unity, equality, recognition, and democracy' came to

> presuppose the uniformity of a nation state [and its people, such that] multi-national federalism [and] demands for cultural recognition … appear *ad hoc*, even as a threat to democracy, equality and liberty, rather than as forms of recognition that can be explained and justified in accordance with principles of constitutionalism.[138]

B *The Unitary Sovereign People in Australian Law*

This modern constitutional construction of popular sovereignty occupies the *Australian Constitution*. British constitutional ideas were 'second nature to the colonial politicians who negotiated, debated and drafted our *Constitution*'.[139] Recent scholarship by Saunders and Kennedy, and by Partlett, has revived attention to the ways that British and American notions of popular sovereignty animated the framers and inhabit the *Constitution* today.[140] It was not until 1992, however, that popular sovereignty was internally accepted as the foundation for the authority of the *Australian Constitution*.

In *ACTV*, Mason CJ stated that despite the *Constitution*'s 'initial character as a statute of the Imperial Parliament', the Australia Acts of 1986 had 'marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people'.[141] His Honour departed from the decades-old orthodoxy tracing the authority of the *Australian Constitution* to its passage as an Act of the Imperial Parliament.[142] Mason CJ was soon joined by Deane and Toohey JJ, and later McHugh J, as advocates of popular sovereignty, leading George Winterton to declare in 1998 that 'there is no reason to doubt that the views of Mason CJ, Deane, Toohey and McHugh JJ would be endorsed by most, if not all, of the current justices'.[143]

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135 Ibid 82. See also at 83.
136 Ibid 41.
137 Ibid 142.
138 Ibid 9.
139 James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 594 ('*The High Court and the Constitution*').
140 Saunders and Kennedy (n 5) 37; William Partlett, 'Remembering Australian Constituent Power' (2023) 46(3) *Melbourne University Law Review* 821.
141 *ACTV* (n 1) 137–8 (citations omitted).
142 Brendan Lim, *Australia's Constitution After Whitlam* (Cambridge University Press, 2017) 135–41.
143 Winterton (n 2) 4.

The text of the *Constitution*, however, contained 'sparse'[144] references to 'the people' of the Commonwealth, which did little to clarify the term. The preamble refers to 'the people' of the original states, excluding Western Australia. Sections 7 and 24 provide that the members of the Senate and House of Representatives shall be 'directly chosen by the people'. Section 25 and the former s 127 further provide for the disqualification of races from 'reckoning the numbers of the people … of the Commonwealth'. Though the framers regularly invoked 'the people', the 'will of the people' and the notion of self-rule in the Convention Debates, they failed to 'articulate precisely what they meant by these terms'.[145] A core function of the preamble had been establishment of a single, national people in 'one indissoluble Commonwealth'. John Quick and Robert Garran, writing in 1901, observed that two purposes of the preamble were expressly to declare the agreement of the people of Australia and to declare their purpose to unite.[146] These declarations were to be regarded as 'promulgating principles, ideas, or sentiments operating, at the time of the formation of the instrument, in the minds of the framers, and by them imparted to and approved by the people to whom it was submitted'.[147]

The potential significance of this 'paradigm shift' from parliamentary to popular sovereignty was immediately acknowledged.[148] As a Grundnorm, or foundational norm,[149] popular sovereignty had the potential to significantly alter and direct understandings of Australian constitutional law. The possibility that the *Constitution* was to be interpreted 'for the benefit of the people',[150] or that 'the people' possess an active 'legal sovereignty'[151] or 'constituent power',[152] could pervasively affect constitutional practice.[153] The sovereignty of 'the people' did exhibit legal force. The implied freedom of political communication, and the principle of 'representative government' on which it was based, were interwoven with the sovereignty of 'the people' and used to invalidate the laws of Parliament.[154] Likewise, in *Roach v Electoral Commissioner*[155] and *Rowe v Electoral Commissioner*,[156] the High Court demonstrated a willingness to invalidate electoral laws considered inconsistent with the nature of 'the people' as a political community,

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144 Justice Patrick Keane, 'The People and the *Constitution*' (2016) 42(3) *Monash University Law Review* 529, 538 ('The People and the Constitution'); Arcioni, 'Competing Visions' (n 11) 79.

145 Saunders and Kennedy (n 5) 54.

146 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Australian Book Company, 1901) 286; McKenna, Simpson and Williams (n 55) 385–6.

147 Quick and Garran (n 146) 286.

148 Winterton (n 2) 1.

149 Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 2nd ed, 2015) 'Grundnorm'.

150 Stellios, *The High Court and the Constitution* (n 139) 711.

151 *ACTV* (n 1) 137–8 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J) ('*McGinty*').

152 See Partlett (n 140).

153 See Winterton (n 2) 1–5.

154 See *ACTV* (n 1) 137–8 (Mason CJ).

155 *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*').

156 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 ('*Rowe*').

asserting an implied minimum of franchise,[157] and distinguishing the constitutional concept of 'the people' from the related constitutional concept of 'electors'.[158]

These rulings produced anxiety about an expanded scope for judicial law-making. Early judicial statements of popular sovereignty attributed to 'the people' both 'political' and 'legal' sovereignty.[159] This Diceyan terminology allowed 'the people' both supreme political power, as electors of Parliament, *and* supreme law-making authority,[160] stoking fears of a potential 'full panoply' of judicially implied rights.[161] The internalisation of popular sovereignty appeared to 'break Parliament's theoretical monopoly on law-making' and enabled the Court and, potentially, other constitutional entities such as the Senate[162] to 'claim its own power to speak for the sovereign people'.[163]

Leslie Zines, an exponent of the 'British traditional heritage' of parliamentary sovereignty in Australia, expressed particular disquiet following the *ACTV* case, cautioning that such reasoning departed from the principle of parliamentary supremacy and 'may open up a Pandora's box of implied rights and freedoms'.[164] Zines would, however, come to employ a Diceyan logic to restore the supremacy of Parliament:

> Although the implication of representative government derogates from the principle of parliamentary sovereignty, it can be said, paradoxically, to strengthen the political legitimacy of that principle. The notion that emerges … is that a form of representative government is entrenched in the *Constitution* and, subject to that and any other guarantees and restrictions in the *Constitution*, the supremacy of Parliament prevails.[165]

In 2013, the High Court began to articulate a picture of the sovereign people that accorded with Zines' vision: a body of electors, defined by political equality, who expressed their sovereignty exclusively through representative government. Following nearly two decades playing no noticeable part in the Court's reasoning, the language of popular sovereignty reappeared in *Unions NSW No 1*.[166] In this case, a six-member majority of the Court identified 'a sovereign power residing in the people, exercised by the representatives'.[167] Two years later, in *McCloy v New South*

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157 *Roach* (n 155) 173 (Gleeson CJ); *Rowe* (n 156) 18 (French CJ).

158 *Roach* (n 155) 199 (Gummow, Kirby and Crennan JJ). See also *Roach* (n 155) 179 (Gleeson CJ); *Rowe* (n 156) 52, 58 (Gummow and Bell JJ), 119 (Crennan J), 75 (Hayne J, dissenting). See also Murray (n 3) 896; Elisa Arcioni, 'The Core of the Australian Constitutional People: "The People" as "The Electors"' (2016) 39(1) *UNSW Law Journal* 421.

159 See, eg, *ACTV* (n 1) 137–8 (Mason CJ); *McGinty* (n 151) 230 (McHugh J).

160 Dicey (n 111) 27.

161 Lim (n 142) 157–63.

162 See ibid 79–83.

163 Ibid 163.

164 Leslie Zines, 'A Judicially Created Bill of Rights' (1994) 16(2) *Sydney Law Review* 166, 177.

165 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 565. See further Stellios, *The High Court and the Constitution* (n 139) 600; Ryan Goss, 'What Do Australians Talk about when They Talk about "Parliamentary Sovereignty"?' [2022] (1) *Public Law* 55.

166 *Unions NSW v New South Wales* (2013) 252 CLR 530 ('*Unions NSW No 1*'). See further Stellios, *The High Court and the Constitution* (n 139) 673–4.

167 *Unions NSW No 1* (n 166) 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also at 571 [104] (Keane J).

Wales,[168] this sovereignty was refined further by a consistent bloc of Justices, comprising French CJ and Kiefel, Bell, Keane and Nettle JJ. This bloc began framing the sovereignty of the Australian people as 'political sovereignty',[169] described by Nettle J in *McCloy* as the 'freedom of electors, through communication between themselves and with their political representatives, to implement legislative and political changes'.[170]

In so framing the role of the sovereign people, the Court removed much of the potential consequence of popular sovereignty from the law, as any claim to speak for 'the people' was returned to Parliament.[171] Subsequently, as Partlett identifies, it became 'conventional wisdom' to assert that 'the Australian people exercise a weak version of popular sovereignty understood "in the late 19th-century British constitutional sense"' as acting through electors.[172] 'The main argument for the implied freedoms', asserts James Stellios, became 'in effect the same as the political and moral justification for the common law principle of the supremacy of Parliament, namely the accountability of Parliament to the electorate'.[173]

A feature of 'political sovereignty' articulated by this bloc was 'political equality'. In 1902, Harrison Moore had written of the *Australian Constitution* that '[t]he great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power'.[174] Six members of the Court in *McCloy* endorsed this statement, with French CJ, Kiefel, Bell and Keane JJ asserting that '[e]quality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our *Constitution*'.[175] The exact content of the principle of 'political equality' — other than that it lies 'at the heart of the Australian constitutional conception of political sovereignty'[176] — remained unarticulated.[177] It was, however, reiterated in subsequent implied freedom cases,[178] and broadly reflected 'institutional requirements that flow from an egalitarian ideal', enabling democratic politics.[179]

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168 *McCloy v New South Wales* (2015) 257 CLR 178, 207 [45] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').

169 See *Unions NSW No 1* (n 166) 571 (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508, 593 [196]–[197], 601 [225], 604 [236] (Keane J); *McCloy* ibid 207 [45] (French CJ, Kiefel, Bell and Keane JJ), 257 [216] (Nettle J); *Brown v Tasmania* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, 196 [51] (Kiefel CJ, Bell and Keane JJ); *Unions NSW v New South Wales* (2019) 264 CLR 595, 614 [40] (Kiefel CJ, Bell and Keane JJ) ('*Unions NSW No 2*').

170 *McCloy* (n 168) 257 [216] (Nettle J) (citations omitted).

171 Lim (n 142) 176–80.

172 Partlett (n 140) 824.

173 Stellios, *The High Court and the Constitution* (n 139) 601.

174 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329.

175 *McCloy* (n 168) 207 [45] (citations omitted). See also at 226 [110]–[111] (Gageler J), 258 [219], 273–4 [271] (Nettle J).

176 Ibid 274 [271] (Nettle J).

177 Will Bateman, Dan Meagher and Amelia Simpson, *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 11th ed, 2021) 1238 [10.3.57].

178 *Unions NSW No 2* (n 169) 614 [40] (Kiefel CJ, Bell and Keane JJ); *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 22 [44] (Kiefel CJ, Keane and Gleeson JJ).

179 Joo-Cheong Tham, 'Political Equality as a Constitutional Principle: Cautionary Lessons from *McCloy v New South Wales*' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 151, 160 (citations omitted).

Justice Keane had elsewhere articulated 'political equality' as an attribute of the 'unity' and 'solidarity' necessary for a sovereign people.[180] His commentary clarifies the picture of 'the people' mobilised by the majority in *McCloy*. Keane had been a driving force in the reinvigorated jurisprudence of popular sovereignty. His Honour was the first contemporary justice to expressly declare that the sovereignty of 'the people' implied 'political equality', and it was this statement which was relied upon in the joint judgment of French CJ, Kiefel, Bell and Keane JJ in *McCloy*.[181] In his extra-judicial writing, Keane had contended that the notion of a constitutional 'people' necessarily involved 'social solidarity' and 'political unity'.[182] In the American constitutional context, he stated, 'unity' provided a stronger constitutional basis for desegregation than the reasoning adopted in *Brown v Board of Education*,[183] would have avoided 'the contortions of the later US jurisprudence relating to affirmative action',[184] and even prevented the 'baffling' position of the US Supreme Court regarding the right to bear arms.[185] In the Australian context, 'unity' expressed both a limit on government in dividing 'the people' in public life, as well as obligations of 'civic duty' for 'the people'.[186] Such 'unity' was asserted by Keane as a feature of Australia's constitutional order. While there were 'of course, serious differences between societal groupings',[187] he maintained:

> Our Framers made the brave judgment that the prospect of a tyrannous majority, of so much concern to members of persecuted minorities, was a chimera in a polity in which there were no rigidly defined social strata and antagonistic societal groupings.[188]

The picture of 'the people' articulated by this bloc of Justices and informed by the commentary of Keane thus traces Tully's modern constitutional picture: a unified, formally equivalent and uniform sovereign people, exercising their authority through elections to empower Parliament alone with sovereign authority.

IV 'Strange Multiplicity': Plural Accounts of 'The People' and the Rejection of the Voice

The preceding Part traced Tully's analysis of the modern constitutional 'unitary' sovereign people in Australian law and legal culture. It described the tension in prevailing modern constitutional thought between popular sovereignty and formal constitutionalism, explaining how the construction of the people as 'unitary' provided a conceptual foundation for the authority of the unitary state, representative government, and formal equality. It then extracted these elements in the jurisprudence of popular sovereignty in Australia, which, by synthesising popular

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180 Keane, 'The People and the Constitution' (n 144) 533.
181 But see Tham (n 179) 166.
182 Keane, 'The People and the Constitution' (n 144) 533, 539. See also PA Keane, 'In Celebration of the Constitution' (Speech, Banco Court, Brisbane, 12 June 2008) <http://classic.austlii.edu.au/au/journals/QldJSchol/2008/64.html> ('In Celebration of the Constitution').
183 Keane, 'The People and the Constitution' (n 144) 534.
184 Ibid 536.
185 Ibid.
186 Ibid 539.
187 Keane, 'In Celebration of the Constitution' (n 182) 10.
188 Ibid 2.

sovereignty with parliamentary supremacy and formal equality, invoked the sovereign people as 'unified'.

This 'unified' account is not, however, the only picture of 'the people' operating in Australian constitutional law and culture. In this Part, Section A will argue that an account of 'the people' as plural — divisible into groups possessing distinct constituent power and different capacities under the *Constitution*, referable to that group's unique relationship to the constitutional community and text — pre-exists the Voice in Australian federalism, illustrating how plural constructions of the sovereign people manifest alternative constructions of constitutional law. Section B will argue that the Voice, poised to embed a plurality of 'the people' in the *Constitution*, stood to express and legitimate such alternative constitutional forms. It describes first, how, ahead of the referendum, the Voice was analysed as a vector for deliberative constitutionalism and, second, how the Voice stood to embody a developing form of common law constitutionalism, echoing Tully's theory of democratic constitutionalism. These deviations from constitutionalism predicated on a 'unitary' people, Section C will claim, animated the No campaign to reject the Voice proposal in the terms of modern constitutional commitments: the unitary state, supreme Parliament and formal equality.

A *'Polity Composed of Polities': Plural Federal People*

Australia's people, at Federation, were not considered an aggregate whole, but a 'Federal Commonwealth'[189] — a polity composed of polities. '[F]ederalism', says Aroney, 'was the non-negotiable pre-supposition, not responsible government', of the National Australasian Convention Debates.[190] Arcioni and Aroney have highlighted how federalism continues to obstruct the framing of Australia's sovereign people as uncomplicatedly singular.[191] The conception of the Australian state as, in the terms of James Bryce, a 'community made up of communities',[192] required a unique 'set of analytical criteria' to comprehend popular sovereignty.[193]

Different constructions of the sovereign people yield different modes of constitutional government and different approaches to constitutional law. A plurality of 'the people' undermines an exclusive authority of majoritarian government, enabling other, counter-majoritarian institutions to claim to speak for parts of the sovereign people. The institutions of Australian government operationalise this union of polities. 'The composition of the Senate', Arcioni notes, remains 'an

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189 Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 1 ('*Constitution of a Federal Commonwealth*').

190 Ibid 6.

191 But see generally Tully's discussion of American federalism and 'diverse' federalism: Tully (n 4) 92–5, ch 5.

192 James Bryce, *The American Commonwealth* (Macmillan, 2nd ed, 1889) vol 1, 14. See Aroney, *Constitution of a Federal Commonwealth* (n 189) 34–5. See further Peter C Oliver, 'Parliamentary Sovereignty, Federalism and the Commonwealth' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart Publishing, 2018) 49, 58. See also Stephen Gageler, 'James Bryce and the Australian Constitution' (2015) 43(2) *Federal Law Review* 177, 185; Partlett (n 140) 838.

193 Nicholas Aroney, 'Constituent Power and the Constituent States: Towards a Theory of the Amendment of Federal Constitutions' (2017) 17 *Jus Politicum* 5, 5.

obvious indication of the peoples of the states being distinct communities',[194] and 'thereby identifies the constituent power of "the people"'.[195] The majoritarian House of Representatives represents 'the people of the Commonwealth', while the Senate represents 'the people of the States'.[196] A federal High Court, the 'keystone of the federal arch',[197] is necessary to maintain the federal compact.[198] The power of judicial review, 'a significant departure from the English constitutional tradition of parliamentary sovereignty', grants the court a counter-majoritarian power to enforce the federal terms.[199]

Further, contrary to Moore's 'great underlying principle',[200] the sovereignty of the divisible 'people' does not manifest equal political power. The *Constitution* explicitly discriminates between the peoples of the states and territories in terms of political capacity, and the High Court recognises this.[201] The 'equal representation of the several Original States' in the Senate grants unequal voting power to residents of different states.[202] Section 128 requires a 'double majority' of 'a majority of the States [by] a majority of electors' to pass constitutional amendments, inflating the power of less populous states. Section 128 further requires that any formal amendment affecting the constitutional power of a state not pass unless the majority of electors in that state approve the amendment, essentially granting a veto power to residents of that state. *McKellar* confirmed that ss 7 and 24 ensured representation in Parliament only for the people of states, not territories.[203] Although s 122 allows Parliament to grant Territorians representation, they enjoy no constitutional entitlement.

McKinlay[204] and *McGinty v Western Australia*[205] saw the Court rebuff a constitutionally entrenched equality of voting power.[206] In *McGinty*, Gummow J emphasised that the 'ultimate sovereignty' reposed in s 128 was not distributed equally, but anticipated unequal preference to the electors of a state when altering constitutional provisions affecting that state.[207] 'Broad statements as to the reposition of "sovereignty" in "the people" of Australia,' said his Honour, 'if they

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194 Elisa Arcioni, 'The Peoples of the States under the Australian Constitution' (2022) 45(3) *Melbourne University Law Review* 861, 867 ('Peoples of the States').

195 Ibid 882.

196 *Australian Constitution* ss 7, 24; Arcioni, 'Peoples of the States' (n 194) 867.

197 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Alfred Deakin, Attorney-General).

198 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 267–8 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 73 [56] (Gummow, Hayne and Crennan JJ).

199 James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis, 3rd ed, 2020) 376 [7.27].

200 Tham (n 179) 163–5.

201 See further Arcioni, 'Peoples of the States' (n 194) 884–6; *Street v Queensland Bar Association* (1989) 168 CLR 461.

202 *Australian Constitution* s 7.

203 *A-G (NSW) ex rel McKellar v Commonwealth* (1977) 139 CLR 527, 532–3 (Barwick J), 542 (Gibbs J), 561–3 (Stephen J, Mason J agreeing at 562–3), 565–6 (Jacobs J), 568–9 (Murphy J), 582 (Aickin J) ('*McKellar*').

204 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 ('*McKinlay*').

205 *McGinty* (n 151).

206 Stellios, *The High Court and the Constitution* (n 139) 596–7 (discussing *McKinlay*).

207 *McGinty* (n 151) 274–5.

are to be given legal rather than popular or political meaning, must be understood in light of the federal considerations contained in s 128'.[208] McHugh J expressed the point more baldly:

> Only the people can now change the *Constitution*. They are the sovereign. But, because their rights to amend the *Constitution* are not equal, the Australian people do not have equal shares in that sovereignty. …
>
> When the share of individuals in the sovereignty of the nation, in the right to amend the *Constitution* and in Senate voting is expressly made unequal and when new States and Territories may have unequal representation in the Parliament, it is obvious that equality of individual voting power is not and has not been a fundamental feature of the *Constitution*.[209]

The tension between a unitary or a plural conception of 'the people' is therefore already entrenched in structures of the *Constitution* itself. The incremental diminishment of the view of the *Constitution* as 'an agreement between sovereign powers'[210] reflects a shift not just in judicial attitudes, but in Australian constitutional culture, towards a unified understanding of the national people. The growing dominance of federal Parliament represented not merely a growing 'preference for British over American institutions and concepts',[211] but more fundamentally 'the *Constitution* [being] read in a new light … reflected from events that had … led to a growing realization that Australians were now one people and Australia one country'.[212]

B *Pluralist Constitutional Methods under the Voice*

The legitimacy crisis occasioned by Indigenous claims to sovereignty urgently re-animates this tension. By formally recognising Indigenous plurality, the Voice seemed poised to activate novel approaches to the *Constitution*. Two contemporary constitutional theories, deliberative constitutionalism and democratic constitutionalism, which emerged from the commentary and case law preceding the Voice referendum, illustrate the institutional and jurisprudential potency of the plural conception of 'the people' embedded in the Voice.

1 *Deliberative Constitutionalism*

Ahead of the referendum, the pluralist possibility of the Voice caused it to be canvassed as a vector for deliberative constitutionalism. Deliberative democracy is 'a reaction against traditional democratic models that principally sought to tally the fixed preferences of majorities or interest groups'.[213] It seeks to reinvigorate democratic legitimacy by incorporating meaningful deliberation between citizens in decision-making.[214] Deliberative constitutionalism extends this project to

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208 Ibid 275.
209 Ibid 237–8.
210 Stellios, *The High Court and the Constitution* (n 139) 1.
211 Ibid 594.
212 *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J) ('*Payroll Tax Case*').
213 Ron Levy and Hoi Kong, 'Introduction: Fusion and Creation' in Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 1, 1.
214 Ibid.

constitutional law, seeking to restore democratic legitimacy by construing a constitution as 'principally a vehicle for deliberation'[215] 'within and among the constituent political units of a [society]'.[216] Deliberative constitutionalism frames a constitution as a process by which 'a polity continually … work[s] through social controversies and refine[s] its own constitutional commitments via procedures of robust deliberative democracy'.[217]

A system of parallel, representative institutions 'giving political and legal authority to disparate voices within the federal state' naturally provides expression for democratic deliberation.[218] Gabrielle Appleby, Ron Levy and Helen Whalan argued in 2023 that the Voice could operate as an institution of deliberative democracy 'capable of creating a dialogue between peoples' and facilitating a plurality of constituent power groups 'working through, and perhaps, settling competing legitimacy claims, via a deliberative and democratic process'.[219] This model, they assert, avoids the 'limits [of] the appropriateness of [majoritarian] democracy in an unequally divided polity'[220] and allows 'multiple sovereignties [to] be accommodated',[221] achieving 'a conversation about both constitutive … and ongoing matters … in which the sovereignty of each side may be respected and pragmatic solutions for allowing each to be expressed in practice are pursued'.[222] This, say the authors, was the method envisioned by the *Uluru Statement*.[223]

Deliberative constitutionalism is posited as an avenue to involve diverse peoples in ongoing constitution-making,[224] particularly of informal constitutional change, affecting the 'fragments of ordinary law — statutes, judgments and unwritten conventions'[225] which amount to, if not enforceable law, 'constitutional morality'.[226] It is said to 'avoid foreclosing essential debates about the nature and

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215 Hoi L Kong and Ron Levy, 'Deliberative Constitutionalism' in Andre Bächtiger, John S Dryzek, Jane Mansbridge and Mark E Warren (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018) 625, 634.

216 Ibid 635.

217 Ibid 632.

218 Robyn Hollander and Haig Patapan, 'Deliberative Federalism' in Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 101, 102. See also Kong and Levy (n 215) 635.

219 Appleby, Levy and Whalan (n 12) 764. But see especially Asmi Wood, 'Critique of "Voice versus Rights"' [2023] *UNSW Law Journal Forum* 5:1–17, in particular Wood's criticism of this projection onto the Voice as presuming the function of the Voice while debate was still 'in train' (at 3), overreaching the 'meaning in the *Constitution Alteration Act*' (at 6) and, centrally, assuming a non-Indigenous perspective in approaches to questions of Indigenous sovereignty and self-determination (at 13). Wood acknowledges the Voice's 'recognition of Aboriginal and Torres Strait Islander peoples [as] explicitly giv[ing] form to the Indigenous body-politic referred to by the majority in *Love v Commonwealth*' (at 3–4). See also 15–16. However, he retorts that '[c]onstitutional legitimacy is *not really an issue for most Indigenous people*' (at 7, emphasis in original). '[N]on-Indigenous peoples should avoid addressing these deficiencies [in colonial legitimacy] through the Voice or other Indigenous attempts for some form of redress' and instead allow Indigenous voices on issues of Indigenous sovereignty and self-determination to set their own agenda (at 9).

220 Appleby, Levy and Whalan (n 12) 780.

221 Ibid 777.

222 Ibid 785.

223 Ibid 763.

224 Kong and Levy (n 215) 627.

225 Lim (n 142) 15.

226 Ibid 21 (citations omitted).

scope of political community',[227] allowing continual reinvention of the groups and identities recognised constitutionally and 'complex conceptions of political community and affiliation'.[228] It further deviates from traditional constitutional approaches by authorising the counter-majoritarian, constitutional court to defend arrangements reached by deliberative constitutional methods.[229] It attempts to reverse key commitments of modern constitutionalism, promising to reintegrate the plurality of voices and authorities in law and governance.

2 *Democratic Constitutionalism*

Tully's answer to the motivating question of *Strange Multiplicity* — whether constitutionalism can recognise cultural diversity — was the promotion of a different way of thinking about constitutions: reconceiving a constitution as 'a "form of accommodation" of cultural diversity'.[230] This theory of a 'democratic constitutionalism' is defined in opposition to the abstracted formula of modern constitutional popular sovereignty. Modern constitutionalism, Tully saw, quarantines the multiformity of 'the people' from the law at the same time as it draws legitimacy from them.[231] As a 'positivist enterprise', it imposes upon 'the people' the mould of a unitary entity, 'fragment[ing] and stifl[ing] social discourse [and] confin[ing] social and political possibilities'.[232] Tully's democratic constitutionalism instead frames the constitution as an 'activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time'.[233]

Under this theory, the actual forms of association within a sovereign people are a source of constitutional law. Michael Simpson summarises:

> If a constitution is not to be conceived of as something abstracted that stands above an unformed constituent group of people, then perhaps it can be conceived in broader terms as the wide-ranging fields of interaction, understood as rules and customs, that emerge, are established, are contended with, and change through the very practices of everyday interactive rule-following itself.[234]

Democratic constitutional theory invites judicial decision-makers to interrogate the actual values, associations and recognitions within a constitutional community — revealing the 'hidden constitutions' of a polity, disguised by 'the rule of modern constitutionalism and the narrow range of uses of its central terms'[235] — and to formulate the law in some degree of conformity, limited by the formal conventions of the *Constitution* and the common law, thereby 'mak[ing] explicit the implicit rules embodied in practice in a culture or community'.[236]

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227 Kong and Levy (n 215) 636.
228 Ibid.
229 Ibid 626.
230 Tully (n 4) 30.
231 Ibid 183.
232 ButleRitchie (n 78) 31.
233 Tully (n 4) 30.
234 Michael Simpson, '"Other Worlds Are Actual": Tully on the Imperial Roles of Modern Constitutional Democracy' (2008) 46(3) *Osgoode Hall Law Journal* 509, 521.
235 Tully (n 4) 99.
236 Ibid 107.

Ahead of the Voice referendum, the High Court's approach to Indigenous plurality increasingly displayed a form of common law constitutionalism paralleling the commitments of democratic constitutionalism.[237] The internalisation of popular sovereignty, Justice French has noted, appeared to authorise judges resorting to '"contemporary community values" to develop common law'.[238] If 'the people' were the authority underpinning the *Constitution* then it might be said that 'community values' should inform constitutional law. Popular sovereignty sees, thereby, '[s]tandards and values … being ascribed to the community and in turn … being reflected back into the law itself'.[239]

Brendan Lim saw Chief Justice Mason as expressing a judicial philosophy favouring a 'reflexive relationship between the concept of popular sovereignty and the phenomenon of judicial lawmaking'.[240] Mason perceived that an 'evolving concept of the democratic process [in Australia] is moving beyond an exclusive emphasis on parliamentary supremacy and majority will',[241] and openly acknowledged that judges make law.[242] Brennan J likewise saw that contemporary values 'justify judicial development of the law'.[243] '[T]he genius of the common law system', states Brennan J, 'consists in the ability of the courts to mould the law to correspond with the contemporary values of society.'[244] This impulse animated his Honour's judgment in *Mabo No 2* where, in overruling the doctrine of terra nullius, he invoked 'contemporary values' and 'contemporary notions of justice and human rights'.[245] '[I]t is imperative in today's world', his Honour said, 'that the common law should neither be nor be seen to be frozen in an age of racial discrimination'.[246]

This method, and its conflict with a method predicated on a 'unified' people, arguably surfaced plainly in *Love v Commonwealth*,[247] 'a battle for the identity of "the people"'.[248] In *Love*, a bare majority of the High Court, comprising Bell, Nettle and Gordon JJ, and Edelman J, writing separately, agreed that Aboriginal Australians could not be 'aliens' under s 51(xix) of the *Constitution*. Arcioni has argued that the majority judgments in *Love* demonstrate a view of 'the people' as 'plural and diverse', while the dissent advanced 'a unified conception dominated by formal equality and democratic participation'.[249] For the minority, observes Arcioni,

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237 See further ibid 113–16.

238 Robert French, 'The Constitution and the People' [2001] FedJSchol 7 <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2001/7.html>. See also Robert French, 'Law Making in Representative Democracy: The Durability of Enduring Values' (2017) 19(1) *Flinders Law Journal* 19.

239 PD Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed), *Essays on Law and Government: Volume 1 — Principles and Values* (Law Book Co, 1995) 1, 6.

240 Lim (n 142) 172.

241 Ibid 169, quoting Anthony Mason, 'Future Directions in Australian Law' (1987) 13(3) *Monash University Law Review* 149, 162.

242 Lim (n 142) 170, quoting Sir Anthony Mason, *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason*, ed Geoffrey Lindell (Federation Press, 2007) 398, 405. See also John Braithwaite, 'Community Values and Australian Jurisprudence' (1995) 17(3) *Sydney Law Review* 351.

243 *Dietrich v The Queen* (1992) 177 CLR 292, 319.

244 Ibid 319.

245 *Mabo No 2* (n 15) 30.

246 Ibid 41–2.

247 *Love v Commonwealth* (2020) 270 CLR 152 ('*Love*').

248 Arcioni, 'Competing Visions' (n 11) 76.

249 Ibid.

a distinct, Aboriginal constitutional status contravened formal equality between subjects of Australia.[250] Kiefel CJ and Keane J, two exponents of the 'political sovereignty' and 'equality' of the sovereign people, maintained that the Australian people were and are formally undifferentiated, saying '[f]rom the time of British settlement the legal status of Aboriginal persons in Australia — as subjects of the Crown — has not been different from other Australians'[251] and there is no 'special class within the people of the Commonwealth'.[252] The minority suggested that recognition threatened the sovereignty of the Australian state, as prohibited by *Mabo No 2*.[253] Their Honours also advanced the supremacy of Parliament by, as Davenport describes, aligning definition of 'the people' with the 'broad legislative discretion to control community membership [by] citizenship'.[254]

The majority, by contrast, conceived the constitutional people as 'plural', 'capable of accommodating a distinct identity of First Nations people'.[255] This distinct place *within* 'the people', said the majority, was 'directly contrary to accepting any notion of [external] Indigenous sovereignty persisting after the assertion of sovereignty by the British Crown'.[256] A 'fundamental reason' for this recognition was the acceptance in Australian law and society of the place of Aboriginal peoples within the Australian community.[257] The meaning of 'alien', said Bell J, being responsive to 'changes in the national and international context',[258] was for the Court, not merely Parliament, to declare.[259]

Edelman J most explicitly explained that Australian history has not 'assimilated Aboriginal people within a unitary, homogenous political community that is defined almost entirely by legislative norms of citizenship'.[260] Edelman J challenged the notion of formal equality and homogeneity endorsed by the minority as inattentive to 'the one thing that is essential to real community: difference'.[261] 'Political community', says Edelman J, 'is not a concept that is wholly a creature of legislation'.[262] 'To the extent that such an approach might be said to be based upon a concern for *equality* within the political community, it would involve a misunderstanding of both equality and community.'[263] Demands for homogeneity in the capacities of the constitutional people '[misunderstand] the concept of equality

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250 Ibid 95–6. See also Morris (n 27) 418.
251 *Love* (n 247) 172 [9] (Kiefel CJ).
252 Ibid 221 [178] (Keane J). See further at 221–3 [176]–[182] (Keane J).
253 See ibid 172–3 [9]–[10], 176177 [25] (Kiefel CJ), 196–8 [91]–[94], 200–01 [102]–[103] (Gageler J), 226–228 [197], [199]–[205] (Keane J).
254 Mischa Davenport, '*Love v Commonwealth*: The Section 51(xix) Aliens Power and a Constitutional Concept of Community Membership' (2021) 43(4) *Sydney Law Review* 589, 590. See also *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, 574 [43]–[44] (Kiefel CJ, Keane and Gleeson JJ).
255 Arcioni, 'Competing Visions' (n 11) 76. See also Morris (n 27) 426; Wood (n 219) 4.
256 *Love* (n 247) 278–9 [356] (Gordon J).
257 Ibid 183 (Bell J), 272 [335], 278 [355], 279–80 [360] (Gordon J), 252–4 [269]–[272] (Nettle J), 289 [396] (Edelman J).
258 Ibid 189 [69].
259 Ibid 187 [64].
260 Ibid 315 [453].
261 Ibid 289 [396].
262 Ibid 321 [466].
263 Ibid 320–1 [467] (emphasis added).

before the law. To treat differences as though they were alike is not equality. It is a denial of community.'[264]

Though judicial resort to 'community values' need not necessarily express pluralism, the jurisprudence surrounding Indigenous Australian constitutional status, particularly in *Love*, has given expression to pluralist values and impulses by reference to plurality within the Australian community. As Arcioni articulates, the conflicting formulations of the 'identity' of 'the people' in *Love* illustrate judicial commitments to particular constitutional values.[265] Yet further, these conflicting judgments demonstrate how alternative constructions of the sovereign people implicate genuinely and significantly different approaches to a constitutional practice, ostensibly founded on popular sovereignty. For the minority Justices in *Love*, the role of 'the people' in Australian constitutional law remains formalistic and their authority remains abstracted. The constructively unified people are sustained behind institutions: defined by an equality which legitimates their engagement with authoritative, parliamentary democratic processes. For the majority Justices, however, the forms of association they perceive within the sovereign people are an authoritative source of constitutional law. More than a mere figure, 'the people' are, through the mouths of the judicial elite, present and operative in constitutional law.

C *Are We One? Or Are We Many? The Rejection of the Voice*

In 2017, Prime Minister Turnbull refused the call from the *Uluru Statement* for a referendum on an Aboriginal and Torres Strait Islander Voice to Parliament, saying:

> Our democracy is built on the foundation of all Australian citizens having equal civic rights — all being able to vote for, stand for and serve in either of the two chambers of our national Parliament ...
>
> A constitutionally enshrined additional representative assembly which only Indigenous Australians could vote for or serve in is inconsistent with this fundamental principle.
>
> It would inevitably become seen as a third chamber of Parliament.[266]

In promising to recognise the plurality of Aboriginal and Torres Strait Islander peoples, the Voice seemed poised to express, endorse and legitimise novel approaches to constitutional government and law. It appeared poised to provide textual and institutional support for deviations from the modern constitutional orthodoxy predicated on a 'unitary' people. The Voice referendum thus put to the Australian people the same question which split the Court in *Love*: Are the people 'unified' or plural for the purposes of constitutional law? Beyond the legal and political elite, Australian constitutional culture was surveyed. The Yes campaign saw in plurality a

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[264] Ibid 315 [453].

[265] Arcioni, 'Competing Visions' (n 11) 95–6.

[266] Malcolm Turnbull, 'Response to Referendum Council's Report on Constitutional Recognition' (Media Release 41263, Department of Prime Minister and Cabinet, 26 October 2017) ('Response to Referendum Council') <https://pmtranscripts.pmc.gov.au/release/transcript-41263>. But see Malcolm Turnbull, 'I Will Be Voting Yes to Establish an Indigenous Voice to Parliament', *Malcolm Turnbull* (Web Page, 16 August 2022) <https://www.malcolmturnbull.com.au/media/i-will-be-voting-yes-to-establish-an-indigenous-voice-to-parliament> ('I Will Be Voting Yes').

greater 'unity',[267] a 'fuller expression of Australia's nationhood'[268] and an adequate recognition of the distinctiveness of Aboriginal and Torres Strait Islander Australians.[269] The No campaign raised as objections — in terms of the commitments of the modern constitutional, 'unified' view of 'the people' — the integrity of the Australian state, the authority of Parliament, and the equality of the people.[270]

1 *Fracturing the Unitary State*

Suggestions of Aboriginal sovereignty resurfaced anxieties about the integrity of the Australian state. The modern constitutional formulation of a necessary connection between a people and their unitary state emerged in both the 'progressive' and 'conservative' No campaigns. According to the progressive No campaign, which advocated for more significant Indigenous sovereign recognition, the passage of the Voice amendment threatened to dissolve Aboriginal sovereignty by ceding it to the Australian state.[271] A conception of Aboriginal sovereignty as necessarily unitary prohibited the co-existence of that sovereignty with the Australian constitutional order. For the conservative No campaign, threats to the sovereignty of the Australian state arose in suggestions that a treaty between Aboriginal peoples and the Australian Government would follow if the Voice proposal succeeded at referendum. As the *No Pamphlet* states: 'By definition, a treaty is an agreement between governments, not between one group of citizens and its government.'[272] This reflects a loyalty to the unitary state model not entirely congruous with current international practice, since 'New Zealand (Aotearoa), Canada, Norway, Sweden, Finland, Japan, Greenland and the US have all negotiated treaties with Indigenous peoples'.[273] Circulating misinformation also suggested that the success of the referendum would see land ceded to Aboriginal and Torres Strait Islander Australians as a result of the referendum,[274] or that an ill-conceived 'rent' would have to be paid.[275] These suggestions, encouraged by the *No Pamphlet*'s suggestion that 'reparations and compensation and other radical changes' may follow the Voice,[276] underscored anxieties about a fracturing of the stable authority of the Australian state.

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267 *Yes Pamphlet* (n 62) 10, 12.
268 *Uluru Statement* (n 40).
269 *Yes Pamphlet* (n 62).
270 Australian Electoral Commission, *Your Official Referendum Booklet* (2023) 9, 11, 13, 15, 17, 19 ('*No Pamphlet*'); Lorena Allam, Josh Butler, Nick Evershed and Andy Ball, 'The No Pamphlet: Campaign's Voice to Parliament Referendum Essay — Annotated and Factchecked', *The Guardian* (online, 20 July 2023) <https://www.theguardian.com/australia-news/ng-interactive/2023/jul/20/the-vote-no-pamphlet-referendum-voice-to-parliament-voting-essay-aec-published-read-in-full-annotated-fact-checked> ('*No Pamphlet Factchecked*').
271 Paul Karp, 'Why a Voice to Parliament Won't Affect First Nations Sovereignty as Lidia Thorpe Fears', *The Guardian* (online, 26 January 2023) <https://www.theguardian.com/australia-news/2023/jan/26/will-indigenous-voice-to-parliament-impact-first-nations-sovereignty-explainer>.
272 *No Pamphlet* (n 270).
273 *No Pamphlet Factchecked* (n 270).
274 Kirstie Wellauer, Carly Williams and Bridget Brennan, 'Why the Voice Failed', *ABC* (online, 16 October 2023) <https://www.abc.net.au/news/2023-10-16/why-the-voice-failed/102978962>.
275 RMIT ABC Fact Check, 'Secret Agendas, Context-Free Claims and Mistaken Identities: These Are the Key Themes in Voice to Parliament Misinformation', *ABC* (online, 29 September 2023) <https://www.abc.net.au/news/2023-09-29/fact-check-voice-to-parliament-misinformation/102913680>.
276 *No Pamphlet* (n 270) 11.

2 *Plurality of Authority*

The No campaign similarly expressed concern that the Voice would dilute or obstruct the authority of Parliament. The *No Pamphlet* foregrounded the claim that the proposed amendment was 'divisive and permanent', and warned that '[t]he High Court would ultimately determine [the Voice's] powers, not the Parliament' and so it 'risks legal challenges, delays and dysfunctional government'.[277] The potential of the High Court, as interpreter of the *Constitution*, to exert authority through the Voice provisions contrary to the law-making supremacy of Parliament was a core anxiety conveyed by the No campaign.[278] The fear that representations to the Voice would enable legal challenges to government actions or that 'activist judges' might usurp the power of the Voice to 'interfere with the work of government' remained a 'genuine fear amongst some Coalition MPs and constitutional conservatives' and circulated public discourse.[279]

So too did the spectre of the Voice itself acting as an authority obstructing the law-making supremacy of Parliament. This characterisation, captured in Turnbull's infamous label, a 'third chamber of parliament',[280] persisted in the public discourse, despite inconsistency with the provisions themselves.[281] The suggestion that the Voice represented 'a parallel system of representative government based on race'[282] also remained a persistent claim in No campaign media throughout the debate. These arguments appeared influential with voters. For 32% of respondents to a poll conducted shortly after the referendum, the top three reasons for voting No included that the Voice proposal would give Aboriginal people 'too much power'.[283]

3 *Inequality of Peoples*

Perhaps the central claim of the No campaign was that the Voice 'divides us'.[284] The *No Pamphlet* stated that '[t]his goes against a key principle of our democratic system, that all Australians are equal before the law', and '[t]his Voice will not unite us; it will divide us by race'.[285] The Pamphlet claimed the proposal would 'create different classes of citizenship' and '[enshrine] a Voice in the *Constitution* for only one group of Australians':[286]

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277 Ibid 11.

278 Sonam Thomas, 'The Voice and the High Court Challenge: Analysis of a Misrepresented Legal Debate', *RMIT University* (online, 13 June 2023) <https://www.rmit.edu.au/news/crosscheck/the-voice-and-the-high-court-challenge>.

279 Ibid.

280 Turnbull, 'Response to Referendum Council' (n 266); Wahlquist (n 43). But see Turnbull, 'I Will Be Voting Yes' (n 266).

281 Thomas (n 278); RMIT ABC Fact Check (n 275).

282 Morgan Begg and Daniel Wild, 'Indigenous Voice Counterpoint: A Violation of Racial Equality' *The Sydney Morning Herald* (online, 6 June 2019) <https://www.smh.com.au/national/indigenous-voice-counterpoint-a-violation-of-racial-equality-20190603-p51u3u.html>.

283 Rafqa Touma, 'People Who Watched Sky News More Likely to Have Voted No in Referendum, Survey Finds', *The Guardian* (online, 16 October 2023) <https://www.theguardian.com/australia-news/2023/oct/16/people-who-watch-sky-news-more-likely-to-vote-no-survey-of-voting-behaviour-finds>.

284 *No Pamphlet* (n 270) 13.

285 Ibid 13.

286 Ibid 11.

> Our Constitution belongs to all Australians. Our Parliament is there to represent all Australians. ... Our national anthem was recently changed to reflect the fact that we are 'one and free'. By contrast, this Voice would permanently divide Australians, in law and spirit.[287]

The No campaign depicted the Voice as a deviation from a principle of equality within the *Constitution*. The primary organisation of the No campaign, Australians For Unity, presented as its primary message: 'The Voice will divide Australians by race and completely change our democracy.'[288] 'All Australians are equal', stated a typical opinion piece by the Institute of Public Affairs: 'The legal status of Australians should not be decided according to their skin colour or race. ... Our nation's founding document should not divide us'.[289] It further stated: 'The universality of the Australian constitution [should not] be compromised' and 'the concerns and needs of Indigenous Australians are fundamentally [not] different to that of non-Indigenous Australians'.[290] Indeed, beyond constructive equality among 'the people', 32% of voters polled stated that Indigenous and non-Indigenous Australians faced the same levels of discrimination.[291] Drawing explicitly on modern constitutional thinkers, the non-aligned Rule of Law Education Centre accused the proposal of being 'the antithesis of the principle[s] espoused by American revolutionaries … who considered it self-evident that we are all created equal. Revolutionary France … embraced this idea'.[292] These suggestions of inequality reverberated strongly among No voters. According to polling shortly after the referendum, 82% of respondent No voters listed that the Voice would 'divide Australia' in their top three reasons for voting as they did.[293] For 41% of respondents it was the primary reason.[294]

V Conclusion

This article has aimed to show that two conceptions of Australia's sovereign people persist in Australian constitutional culture generating distinct, competing modes of constitutional practice, and that the tension between these conceptions was animated in the arguments surrounding, and outcome of, the Voice referendum. Drawing on the scholarship of Tully who articulates the tendency of contemporary Western constitutional culture towards a uniformity which supports abstraction and suppresses cultural diversity, this article has sought to demonstrate the significance of the competing pictures of the sovereign people in Australian constitutional culture — visions which wrestled in the Voice debate and will do so again as Australia continues to negotiate questions of cultural and political diversity.

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287 Ibid 13.

288 Australians for Unity, *Home Page* (Website, 25 July 2023) <https://webarchive.nla.gov.au/awa/20230725035824/https://australiansforunity.com.au>.

289 Begg and Wild (n 282).

290 Ibid.

291 Touma (n 283).

292 'The Voice Referendum; The Argument for Voting No', *Rule of Law Education Centre* (Web Page, 2023) <https://www.ruleoflaw.org.au/voice-the-case-for-voting-no/>.

293 Touma (n 283).

294 Ibid.

The reasons for the defeat of the Voice referendum are, of course, complex and irreducible. It is commonly observed that misinformation and disinformation ran rampant, while critics have said that the messaging of the Yes campaign struggled to cut through.[295] No referendum in Australian history has passed without bipartisan support. Yet, the commitments to a 'unified' people exhibited by the No campaign reveal the influence of a deeper ambiguity concerning the nature of popular sovereignty as a Grundnorm of the *Australian Constitution*. The spectre of deviation from orthodox constitutional modes, predicated on a constructive 'unity' of 'the people', inflamed anxieties inherited from a modern constitutional tradition which, incorporated into the rhetoric of the No campaign, informed a rejection of the proposal in terms of inherited values of the unitary state, parliamentary supremacy and equality.

The lens of these competing conceptions of 'the people' highlights the significance of Australian constitutional culture and its historical inheritances to the development of Australian constitutional law. By providing for intervention by the Australian people in decisions about the shape and values of the *Constitution*, referendums under s 128 invite analysis of the culturally and historically specific normative imaginary. Even the debates and practices of judges and politicians reflect the life of ideas operating in wider society, especially where those elites claim to speak for that community. As Australian constitutional scholarship takes more seriously the normative foundation of popular sovereignty, it is necessary to interrogate the often-unspoken assumptions and constructions that, underlying that concept, direct and shape constitutional practice.

In this vein, while the defeat of the referendum represents a regrettable failure to institutionalise culturally diverse popular sovereignty, it does not represent the triumph of a 'unified' view. Indigenous sovereign difference survives the referendum. Australian federalism remains in tension with ideals of national formal unity. Both 'unified' and plural views, and the approaches to constitutional practice they engender, have roots in constitutional text and history. Rather, the referendum re-enacts the paradox at the centre of constitutional theory founded on popular sovereignty — what Hobbes called the 'double signification' of 'the people' — simultaneously a collective and a multitude.[296] Popular sovereignty in its relationship to constitutional theory continues to contend with this paradox. But, as the jurisprudence of Aboriginal rights and federalism illustrate, the negotiation of these two, apparently contradictory aspects of 'the people' can produce new law responsive to changing societal demands. It remains a potent source of law that, constitutionally and culturally, we are *one* but we are *many*.

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[295] See, eg, Wellauer, Williams and Brennan (n 274).

[296] Thomas Hobbes, *The Elements of Law: Natural and Politic*, ed Ferdinand Tönnies (Routledge, 2nd ed, 2018) 124. See further Hobbes (n 93) 110–14.