THE PEOPLES OF THE STATES UNDER THE *AUSTRALIAN CONSTITUTION*

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The political and legal reactions by governments to the challenges of COVID-19 have brought into sharp relief the way in which Australian federalism operates. State borders and state affiliations have become the bases for restrictions and privileges in a way that harks back to the significance of colonial borders prior to the enactment of the Constitution. *It is thus timely to explore the constitutional category and status of the 'people of a State'. In this article the constitutional definition of the peoples of the states is addressed to demonstrate they are territorially bounded and mutually exclusive but fungible communities. The peoples of the states are shown to be the privileged constitutional 'people' because of their protected role as electors under the* Constitution. *Lastly, the dual federal–national nature of the constitutional people is discussed.*

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I Introduction

Since March 2020, each Australian state has, at various times, enacted regulatory orders which have restricted travel into its jurisdiction in an effort to

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reduce the impact of the COVID-19 pandemic on its population.[1] Despite the rhetoric of 'we are all in this together',[2] legal restrictions were imposed with state residence as a criterion.[3] It therefore matters to which state one belongs,

[1] The precise orders changed frequently in response to outbreaks in various parts of the country. For a useful summary of government announcements between March and June 2020, see Rebecca Storen and Nikki Corrigan, 'COVID-19: A Chronology of State and Territory Government Announcements (Up until 30 June 2020)' (Research Paper, Parliamentary Library, Parliament of Australia, 22 October 2020) 7–101. There were also travel restrictions at the national level, limiting Australians' ability to both leave and enter Australia, which were the subject of criticism at the national and international levels: see the United Nations Human Rights Committee's interim measure in relation to Communication No 3915/2021, requesting that Australia 'facilitate and ensure the author's prompt return to Australia, while his case is pending before the Committee': Letter from Office of the High Commissioner for Human Rights, 15 April 2021, 1, shared on Twitter by @LionelNichols (Lionel Nichols) (Twitter, 16 April 2021, 5:26am AEST) <https://twitter.com/LionelNichols/status/1382777285120552962/photo/1>, archived at <https://perma.cc/X4NC-V5PQ>. Controversy also arose regarding the temporary suspension of travel from India to Australia, with attached penalties of up to 300 penalty units, five years' imprisonment or both: see *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements — High Risk Country Travel Pause) Determination 2021* (Cth) s 6, as at 30 April 2021; *Biosecurity Act 2015* (Cth) s 479(3). The two self-governing territories — the Northern Territory and the Australian Capital Territory — also imposed travel restrictions along similar lines to the states: see, eg, Storen and Corrigan (n 1) 6, 24–8; *Public Health (COVID-19 Areas of Concern) Notice 2021 (No 23)* (ACT) sch 3.

[2] For example, on 11 March 2020, the United Nations ('UN') declared COVID-19 a pandemic: Tedros Adhanom Ghebreyesus, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 — 11 March 2020' (Speech, World Health Organization, 11 March 2020) <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>, archived at <https://perma.cc/ZAB9-PW9X>. The next day, the then Australian Prime Minister stated: 'we'll get through this together': Scott Morrison, 'Address to the Nation' (Speech, Australian Parliament House, 12 March 2020) <https://webarchive.nla.gov.au/awa/20200319023814/https://www.pm.gov.au/media/address-nation>. The phrase 'we are all in this together' became ubiquitous (but has also been used as a point of critique) in commentary regarding the pandemic: see, eg, United Nations, *COVID-19 and Human Rights: We Are All in This Together* (Policy Brief, April 2020) 7, 10, 13, 15, 18, 20 <https://unsdg.un.org/sites/default/files/2020-04/COVID-19-and-Human-Rights.pdf>, archived at <https://perma.cc/LRV9-YG4Y>; Francesca Sobande, '"We're All in This Together": Commodified Notions of Connection, Care and Community in Brand Responses to COVID-19' (2020) 23(6) *European Journal of Cultural Studies* 1033, 1034.

[3] There have been some limited outlier examples whereby a state imposed travel restrictions applying to all persons, including restricting their own residents from returning home — such as the Victorian travel restriction preventing any person, whether or not a Victorian resident, from entering Victoria if arriving from an area nominated a 'red zone' from midnight 20 December 2020: Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 19 December 2020' (Media Release, 19 December 2020) <https://www.dhhs.vic.gov.au/coronavirus-update-Victoria-19-December-2020>, archived at <https://perma.cc/AC9P-SXCS>.

and where one lives within Australia. Our sub-national identities have become more important than at other times since Federation. We are identified as 'Victorians', 'Western Australians', etc, in addition to 'Australians', in a way which we usually associate with sporting codes rather than with how we can physically interact with fellow Australians.

In light of the renewed legal significance of where one lives within Australia, this article interrogates who the peoples of the Australian states under the *Constitution* are.[4] The Commonwealth of Australia was created by the federal union of the six Australian colonies and their peoples. Those colonies became states and the peoples of the colonies became the peoples of the states. Section 7 of the *Constitution* refers to the people of the states as those who directly choose Senators, and it is the same people who are referred to in s 24 as those who directly choose Members of the House of Representatives. The peoples in the states also have a privileged role in referenda under s 128 of the *Constitution*.

There is growing scholarly interest in membership of the Australian constitutional people as a whole — following cases before the High Court of Australia that have addressed who constitutes a 'belonger', as compared to who constitutes an 'alien' who can be deported.[5] However, the sub-national status of being a member of a state people has not received the same attention. This article sets out a fundamental doctrinal analysis of that status. I address the identity of the category 'people of the states' and explain how those peoples are at the core of the Australian constitutional people.

In Part II, I tackle the identity of the peoples of the states. Through an analysis of constitutional text and case law, we can see that the state peoples are territorially bounded, distinct and mutually exclusive communities. This is in parallel with the identity of the people of the colonies, who were the constitutional ancestors of the people of the states. The people of the states are defined in relation to state boundaries. State boundaries are significant in understanding how the system of representative government operates under the *Constitution*, with states and the peoples of the states represented as distinct entities in Parliament and in referendum result calculations. The way in which the people of a state are identified through residence reinforces the importance of state boundaries and, together with the default guarantee of free movement across

[4] While territory affiliation is significant in relation to the COVID-19 regulations, the territories are more peripheral in constitutional terms and are not the primary focus of this article: see generally Elisa Arcioni, 'Identity at the Edge of the Constitutional Community' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 31.

[5] See, eg, *Love v Commonwealth* (2020) 270 CLR 152 ('*Love*'); *Chetcuti v Commonwealth* (2020) 385 ALR 1 ('*Chetcuti (First Instance)*'), affd (2021) 392 ALR 371.

state borders (albeit a freedom with limits),[6] supports the ability of individuals to exercise some autonomy in determining their state affiliation.

While state identity is significant, it is also complicated by the dual nature of 'the people' under the *Constitution*. The *Constitution* established a federal Commonwealth. Thus, two consequential questions arise in relation to the peoples of the states. First, how do the peoples of the states fit within the Commonwealth? Secondly, how can tensions be resolved when national and federal concerns collide? In relation to the status of the peoples of the states within the Commonwealth, in Part III, I argue that they are the core of 'the people'. This argument relies on a recognition that the identity of 'the people' under the *Constitution* is predominantly a demotic or political one.[7] Unlike some constitutional systems where the identity of 'the people' is based upon ethnicity or culture, the Australian constitutional identity is based upon the roles of 'the people' within democratic systems of government. We do not have constitutional commitments to a particular racial profile, despite our history of administrative and legal commitments to a 'white Australia'.[8] Instead, we have commitments to a protected franchise and freedom of communication to support 'the people' in their exercise of political participation. Once one accepts the political or demotic character of 'the people' under the *Constitution*, then, by considering the privileged roles of the peoples of the states in relation to representative government, it becomes clear that they are at the core of 'the people'. We can see them as the privileged people because, textually, they are recognised as the constitutional electors.

In Part IV, I turn to explore how the tensions between the national and federal identities of the people are likely resolved. A survey of High Court case law reveals that there are many indications of the unity of the Australian people and polity, and recognition of the new nation created by the *Constitution* federating the pre-existing colonies. At the same time, the High Court has adopted doctrines which are protective of the ongoing existence and functioning of the states as distinct polities, and has recognised exceptions to constitutional rules which on their face look like limitations on the power of states to privilege their residents over out-of-state residents.

[6] See *Palmer v Western Australia* (2021) 388 ALR 180, 188 [29] (Kiefel CJ and Keane J), 201 [92], 202 [97]–[98] (Gageler J), 222 [180] (Gordon J), 233 [219] (Edelman J) ('*Palmer*').

[7] See Elisa Arcioni, 'The Core of the Australian Constitutional People: "The People" as "The Electors"' (2016) 39(1) *University of New South Wales Law Journal* 421, 421, 422–7 ('The Core of the Australian Constitutional People').

[8] See generally Elisa Arcioni, 'Tracing the Ethno-Cultural or Racial Identity of the Australian Constitutional People' (2015) 15(2) *Oxford University Commonwealth Law Journal* 173 ('Tracing the Ethno-Cultural or Racial Identity').

The most recent example of the latter is the case of *Palmer v Western Australia* ('*Palmer*').[9] Clive Palmer challenged the validity of Western Australia's border closure in response to the spread of COVID-19.[10] Palmer, a resident of Queensland, was prevented by the border closure from travelling to Western Australia, where he had business interests. He argued that there was therefore a contravention of s 92 of the *Constitution*. Section 92 states: 'On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States … shall be absolutely free.' The High Court unanimously rejected Palmer's argument, accepting Western Australia's argument that the laws in question had the 'legitimate purpose of protecting the Western Australian population against the health risks of COVID-19'.[11] This case epitomises the tensions that exist when there is a national principle of free movement, as well as legitimate claims for state-specific regulation.

In Part V, I conclude and highlight the importance of recognising both national and federal elements in the identity of 'the people' under the *Constitution*.

II Defining the Peoples of the States

In this Part, I address the identity of the peoples of the states and argue that they are distinct, territorially defined communities. This seemingly obvious conclusion is grounded in the text of the *Constitution*,[12] the ways in which the peoples of the states are represented as communities within the structures of representative government in the *Constitution*, and the significance of residence within the text and related case law.

The states are understood as territorially defined, and 'the peoples' of the states are likewise defined by their connections to specific territories. Covering cl 6 to the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12 ('*Constitution Act*') defines the 'Original States' to include New South Wales, Queensland, Tasmania, Victoria, Western Australia and South Australia.

[9] *Palmer* (n 6).

[10] The border closure was effected by the *Quarantine (Closing the Border) Directions* (WA), made under ss 56 and 67 of the *Emergency Management Act 2005* (WA).

[11] *Palmer* (n 6) 185 [14] (Kiefel CJ and Keane J). See also at 218–19 [164]–[166] (Gageler J), 230–1 [205]–[210] (Gordon J), 251–5 [277]–[293] (Edelman J).

[12] I focus on the federal *Constitution*, not on the constitutions of the various states. For a discussion of the state constitutions, see generally Cheryl Saunders, 'The Constitutional Credentials of State Constitutions' (2011) 42(4) *Rutgers Law Journal* 853; RD Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 5th ed, 1991); Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004).

Those states together formed the Commonwealth.[13] The text of the *Constitution Act* maintains the earlier colonial boundaries as state boundaries, subject to change only with the approval of the peoples of the relevant states.[14] Covering cl 8 of the *Constitution Act* states:

> After the passing of this Act the *Colonial Boundaries Act, 1895*, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

The consequence of this clause was that the internal boundaries of the Commonwealth could no longer be changed by the United Kingdom. The boundaries could only be changed through the mechanisms set out in the *Constitution*.[15] The mechanisms for changing the boundaries of any state require the consent of 'the people' of the relevant state — either directly through a referendum or indirectly through the approval of their representative state Parliament.[16] Therefore, the text of the *Constitution* assumes the states are territorially

[13] The text of the *Constitution* also allows for new states to be admitted or established: at s 121. Parts of a state can be surrendered to the Commonwealth to form federal territories: at s 111. The 'Northern Territory of South Australia' was part of the State of South Australia until 1911, when it was surrendered to the Commonwealth as a territory: Commonwealth, *Commonwealth Gazette*, No 79, 24 December 1910; *Northern Territory Acceptance Act 1910* (Cth); *The Northern Territory Surrender Act 1907* (SA). The Australian Capital Territory was formed out of part of the State of New South Wales in 1909 in accordance with s 125 of the *Constitution*: *Seat of Government Surrender Act 1909* (NSW) ss 6–7.

[14] *Constitution* s 123. See also at s 128.

[15] See, eg, *Constitution* ss 111, 123–4, 128. For discussion of the interaction between these sections, see RD Lumb, 'Territorial Changes in the States and Territories of the Commonwealth' (1963) 37(6) *Australian Law Journal* 172. Prior to covering cl 8 of the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12 ('*Constitution Act*'), the external boundary of the Commonwealth could be altered by Order in Council or letters patent, as long as the Commonwealth consented: *Colonial Boundaries Act 1895* (Imp) 58 & 59 Vict, c 34 ('*Colonial Boundaries Act*'). The only significant Australian judicial consideration of the *Colonial Boundaries Act* (n 15) occurred in *Wacando v Commonwealth* (1981) 148 CLR 1. There, the High Court was concerned with an argument regarding the status of the islands in the Torres Strait, concluding that the Act remedied any deficiencies in Queensland's earlier purported annexation in 1879: at 16 (Gibbs CJ, Aickin J agreeing at 28, Wilson J agreeing at 30, Brennan J agreeing at 30), 27 (Mason J), 28 (Murphy J). See also *Mabo v Queensland* (1988) 166 CLR 186, 219–20 (Deane J), 236 (Dawson J); *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 30 (Brennan J), 113–14 (Deane and Gaudron JJ), 120 n 34 (Dawson J), 179–80 (Toohey J). The relevance of the *Colonial Boundaries Act* (n 15) to sea boundaries was considered in *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*'): at 466–7 (Mason J).

[16] Section 111 of the *Constitution* allows the state Parliament to 'surrender any part of the State to the Commonwealth'. This mechanism was used to create the internal territories. One example is that of the surrender of South Australian territory to create the Northern Territory: see above n 13. Section 123 provides that the federal Parliament may change the limits of a state,

bounded. Thus, the *peoples* of the states can be understood as territorially bounded communities, with some power to determine their own constitutional identity through changes in the relevant territory.

Unlike the states, the *peoples* of the states are not defined within the covering clauses of the *Constitution Act* or the *Constitution* itself.[17] Instead, what we see in the constitutional text is that state boundaries are significant in determining who the people of a state are. I address the importance of territory by considering how the states and people of a state are represented as distinct entities in Parliament and in referendum calculations. Then, I address the significance of residence.

A *Distinct State Peoples*

The identity of the peoples of the states as distinct constitutional communities can be seen in the way in which the peoples of the states are represented as communities within the structures of representative government in the *Constitution*. The composition of the Senate is an obvious indication of the peoples of the states being distinct communities. Section 7 states that the Senate is to be 'composed of senators for each State, directly chosen by the people of the State'. The default in that section with respect to *how* the people of a state are to choose their Senators is that the state is one electorate — that is, the entire state community acting together. Even if there are subdivisions, these each exist within the boundaries of one state.[18] Section 7 thus assumes and treats the people of

but only with the 'consent' of the Parliament of any state affected, together with a majority of the electors of any such state. Section 124 states that '[a] new State may be formed by separation of territory from a State … and a new State may be formed by the union of two or more States or parts of States'. However, such change requires the 'consent' of the relevant state Parliament. Section 128 allows for alteration of the 'limits' of a state, but only if a majority of electors of the affected state approve the proposed change.

[17] The *Constitution* indicates at least one criterion for exclusion from the peoples of the states — race: see at s 25. See also at s 127, repealed by *Constitution Alteration (Aboriginals) 1967* (Cth) s 3. For a detailed analysis of their operation, see generally Elisa Arcioni, 'Excluding Indigenous Australians from "The People": A Reconsideration of Sections 25 and 127 of the *Constitution*' (2012) 40(3) *Federal Law Review* 287.

[18] Provision was made for the Parliament to allow for subdivisions: *Constitution* s 7. Provision was also made for the Queensland Parliament to 'make laws dividing the State into divisions and determining the number of senators to be chosen for each division', but only 'until the Parliament of the Commonwealth otherwise provides'. In the absence of relevant Queensland legislation, the default position in s 7 would apply — Queensland would be treated as one electorate, like the other states. The federal Parliament did 'otherwise provide', so that each state is treated as one electorate: *Senate Elections (Queensland) Act 1982* (Cth), and its present-day equivalent in *Commonwealth Electoral Act 1918* (Cth) s 39.

each state as a collective within a state boundary, which acts together to choose its representatives in the Senate.

The Senate was intended to be the body representing the states,[19] and the High Court has supported that conception as still having relevance today.[20] In the case of *Williams v Commonwealth*,[21] a majority of the Justices referred to federalism as imposing a limit on the executive's power.[22] Chief Justice French criticised the Commonwealth's submission regarding a general power of the executive 'to deal with matters of Commonwealth legislative competence' as being 'in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power'.[23] He noted that the reality of party politics meant that '[t]he function of the Senate

[19] Albeit with guaranteed equal representation being only for the 'Original States'. Section 7 of the *Constitution* states:

> Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

Thus, each 'Original State' community is treated as an equal part of the Commonwealth. Any new state is subject to the will of the federal Parliament in relation to representation in the Parliament. If there were to be a new state, the representation of its people in the Parliament would be circumscribed by s 121. Section 121 states (emphasis added): 'The Parliament may admit … or establish new States, *and may … make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit*.' No guarantee of a particular level of representation is provided for new states. No new states have been created — although there is ongoing discussion regarding whether the Northern Territory will become a state — and none of the 'Original States' have left the Commonwealth, despite Western Australia's attempt to secede in 1934: Christopher W Besant, 'Two Nations, Two Destinies: A Reflection on the Significance of the Western Australian Secession Movement to Australia, Canada and the British Empire' (1990) 20(2) *University of Western Australia Law Review* 209, 212–15, 226–99. The dominant view is that no Original State *can* unilaterally leave the Commonwealth, because of the 'indissoluble' nature of Federation indicated in the Preamble to the *Constitution Act* (n 15): Gregory Craven, 'The Constitutionality of the Unilateral Secession of an Australian State' (1985) 15(2) *Federal Law Review* 123, 123–4 ('Unilateral Secession'). Note that covering cl 3 — which refers to the people of Western Australia agreeing to join the Commonwealth — does not include the word 'indissoluble': Craven, 'Unilateral Secession' (n 19) 135–7. For discussion of secession, see generally Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986); Helen Irving, 'Counterfactual Constitutionalism: The American Civil War and the Framing of Australia's Constitution' (Legal Studies Research Paper No 11/26, Sydney Law School, April 2011).

[20] *Williams v Commonwealth* (2012) 248 CLR 156, 203–6 [58]–[61] (French CJ) ('*Williams [No 1]*').

[21] *Williams [No 1]* (n 20).

[22] See generally David Hume, Andrew Lynch and George Williams, 'Heresy in the High Court? Federalism as a Constraint on Commonwealth Power' (2013) 41(1) *Federal Law Review* 71.

[23] *Williams [No 1]* (n 20) 205 [60].

as a chamber designed to protect the interests of the States may now be vestigial'.[24] Yet the change in political practice had not

> resulted in any constitutional inflation of the scope of executive power, which must still be understood by reference to the 'truly federal government' … which, along with responsible government, is central to the *Constitution*.[25]

Chief Justice French was indicating that the Senate, as representative of the states, still carries some constitutional weight. Despite the way in which the Senate operates in practice, that chamber is relevant constitutionally as the chamber that treats each state people as a distinct people.

By contrast with the Senate, the House of Representatives was intended to be the House representing the national population, indicated in the fact that s 24 requires that House to be 'composed of members directly chosen by the people of the Commonwealth'. Nicholas Aroney has argued that it is 'the people' — grouped and counted within state boundaries — that determine the composition of the House.[26] Therefore, he concludes, even the composition of the 'national' chamber of the Parliament supports an understanding of the peoples of the states as distinct communities.[27] Section 24 contemplates Members of the House of Representatives to be chosen only in the states.[28] Later, I consider how the High Court has interpreted 'the people of the Commonwealth' in that section to include *only* people in the states.[29] Here, I am concerned with how s 24 indicates the peoples of the states to be distinct peoples. The section does so through the requirement of numerical proportionality between people in a state and Members chosen in that state, and the provisions for electorates to be within one state. This analysis does not negate the fact that the House of Representatives operates as representative of the national people — the people of the Commonwealth. My focus here is to explain how the peoples of the states are understood as distinct political communities within the Commonwealth. As is noted later, the peoples of the states hold dual identities — both as people of their state and as members of the national people of the Commonwealth.[30]

[24] Ibid 205 [61].

[25] Ibid 205–6 [61].

[26] Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 224–37.

[27] Ibid 49. The Senate represents the states equally, irrespective of the composition of the House: at 191. Equal representation is a right of the peoples of the states as an extension of their right to self-government: at 197. See generally at ch 7, 221–7.

[28] See below Part III(B).

[29] See below Part IV(B).

[30] See below Part IV(C).

The second paragraph of s 24 states: 'The number of members chosen in the several States shall be in proportion to the respective numbers of their people'. This requirement assumes that each state is a distinct community. The section goes on to establish a calculation for determining the number of Members of the House of Representatives.[31] Section 24 grants Parliament the power to change the method of calculating the number of Members to be chosen in the House of Representatives. However, any legislation doing so must abide by the 'permanent and absolute provisions of the section'[32] — one of which is the requirement of proportionality between the numbers of people of each state and the number of Members chosen in each state.[33]

The requirement of proportionality can be understood as a measure to ensure the representation of sub-national communities within the overall constitutional community.[34] Aroney notes that, in relation to the drafting of this part of the *Constitution*,

> precisely who or what would be represented in the House was … a contested issue. … The House could represent the Australian people as a whole, the majority of the people as a whole, the people grouped in localities, or the people as individuals.[35]

The text of the second sentence of s 24 reflects the recognition of communities grouped according to state boundaries, within the overall constitutional community. Aroney has argued that, at Federation, the Commonwealth was understood as 'a community made up of communities'.[36] The new constituent entities were the peoples of the states, who were to receive representation as groups through the Parliament, in proportion to population.[37]

At Federation, there was — and there remains today — significant numerical disparity between the populations of the states.[38] The High Court has

[31] It is to this calculation that ss 25 and 127 were directed. Those sections excluded, or allowed for the exclusion of, groups defined as 'races' from the communities reflected in the text of s 24.

[32] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 453.

[33] Ibid 454.

[34] Aroney (n 26) 31.

[35] Ibid 224.

[36] Ibid 34–5. See also at 344–5, 368–9.

[37] This is a common feature of other federal systems: ibid 49.

[38] See Quick and Garran (n 32) 455, with respect to Tasmania and Western Australia. For the number of members in relation to the states' populations (excluding 'aborigines'): at 459.

rejected any constitutional requirement of numerical equality for electorates.[39] In two cases,[40] a majority of the Court rejected the requirement of equality in either population or electors in determining electoral divisions within each state, in relation to either the Commonwealth Parliament or state Parliaments.[41] However, members of the Court have acknowledged that any legislative choices regarding electoral law must be consistent with the command that Members of federal Parliament be chosen by 'the people' and that gross disproportionality may breach that command.[42] While strict numerical equality between electoral divisions is not required by s 24, the basic command remains: the number of Members of the House of Representatives chosen in each state 'shall' be proportionate to the respective number of people of each state.[43]

A further indication of the states as distinct communities is seen in the rules regarding the boundaries of electorates for the House of Representatives. The default is that the state is to be one electorate.[44] However, until the Commonwealth Parliament 'otherwise provide[d]',[45] the states could make laws for determining divisions within each state, although a division could not be formed 'out of parts of different States'.[46] Therefore, electoral boundaries must

[39] *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 33 (Barwick CJ), 38 (McTiernan and Jacobs JJ), 45 (Gibbs J), 57 (Stephen J), 61 (Mason J) ('*McKinlay*'); *McGinty v Western Australia* (1996) 186 CLR 140, 178 (Brennan CJ), 182–4 (Dawson J), 229–30 (McHugh J), 284 (Gummow J) ('*McGinty*').

[40] *McKinlay* (n 39); *McGinty* (n 39).

[41] This conclusion was foreshadowed by PA Paterson, 'Federal Electorates and Proportionate Distribution' (1968) 42(4) *Australian Law Journal* 127, 128; PH Lane, 'Recent Cases: Notes and Comments' (1968) 42(4) *Australian Law Journal* 139, 140. See generally Geoffrey J Lindell, 'Judicial Review and the Composition of the House of Representatives' (1974) 6(1) *Federal Law Review* 84, where Geoffrey Lindell canvasses many of the arguments addressed in the cases noted above at n 39. Note that in 1974, a requirement of equality of electoral divisions of both state and federal legislatures was defeated at referendum (proposal 3 of the 18 May 1974 referendum): 'Referendum Dates and Results', *Australian Electoral Commission* (Web Page, 24 October 2012) <https://www.aec.gov.au/elections/referendums/referendum_dates_and_results.htm>, archived at <https://perma.cc/F7BQ-J3YV>.

[42] *McKinlay* (n 39) 36–7 (McTiernan and Jacobs JJ), discussed in *McGinty* (n 39) 218–19 (Gaudron J). See also *McKinlay* (n 39) 57 (Stephen J), 61 (Mason J).

[43] Section 24 of the *Constitution* also guarantees that 'five members at least shall be chosen in each Original State'. This is another indication, together with guaranteed equal representation in the Senate in s 7, that each 'Original State' is to be represented as a community in the federal Parliament. Like the guaranteed representation in the Senate, the minimum representation of states in the House is *not* guaranteed to any new states: at s 121.

[44] Ibid s 29.

[45] As it did in 1902 with the *Commonwealth Electoral Act 1902* (Cth) ss 12–13.

[46] *Constitution* s 29. The following laws had been made pursuant to s 29 but their operation was short-lived due to the Commonwealth legislation noted above: *Federal Elections Act 1900*

be wholly within one state. This requirement, like its equivalent in relation to the Senate, supports the conclusion that each state people is a distinct community, state boundaries being significant in determining representation in the federal Parliament.

The constitutional requirement that each state must have equal representation in the Senate[47] is matched by the requirement that each state have an equal voice in relation to constitutional referenda under s 128. Section 128 requires that, in order for a proposed alteration to the *Constitution* to be successful, not only must a majority of electors throughout Australia approve such a change, but a majority of electors in a majority of states must also approve the proposed change. In the second calculation, each state is treated as numerically equal, despite the disproportionate population size of each state community. The underlying assumption of each state acting as one community is also seen in the proviso in s 128 that

> until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any state in which adult suffrage prevails.[48]

This process of calculation can only operate if each state and each state population is exclusive of the others.

In the text of the *Constitution*, the peoples of the states are understood as distinct communities. We see either the people of a state acting together as one group, or geographical communities within a state being represented in electorates. The boundaries of the states are essential to the system of representative government under the *Constitution*, and therefore the peoples of the states must be territorially bounded and mutually exclusive communities. The distinctive nature of state peoples can also be seen in the way in which the High Court identifies a legitimate purpose in relation to s 92 challenges. As noted above, the *Palmer* case was a challenge to a Western Australian law which restricted interstate intercourse.[49] The key area of argument before the High Court was whether the burden imposed on free intercourse was justified,[50] the Court

(NSW); *Federal House of Representatives Victorian Electorates Act 1900* (Vic); *Federal House of Representatives Western Australian Electorates Act 1900* (WA); *Parliament of the Commonwealth Elections Act and the Elections Acts 1885 to 1898 Amendment Act of 1900* (Qld).

47 And to a more limited extent, the minimum guaranteed representation of each 'Original State' in the House of Representatives: see above n 43.

48 This text is related to s 41 of the *Constitution*. For an explanation of that relationship, see Arcioni, 'The Core of the Australian Constitutional People' (n 7) 430–2.

49 See above n 10 and accompanying text.

50 *Palmer* (n 6) 198 [76] (Kiefel CJ and Keane J).

holding that it was.[51] The reasoning to reach that ultimate outcome reinforces the distinct nature of each state people. Chief Justice Kiefel and Keane J identified the legitimate purpose of the impugned law as 'the protection of the health of residents of Western Australia'.[52] They identified earlier cases where legitimate purposes included measures to prevent harm to the people of a state, by reference to 'state citizens' or 'the state public'.[53] Justice Gordon similarly referred to 'decisions of [the High] Court, as well as the Privy Council, holding that s 92 will likely not be infringed by a law which has the object of protecting the citizens of a State from disease or some other threat to health'.[54]

Justice Gageler's reasoning identified protection of a state's people (against the residents of other states) as a legitimate purpose of a law, noting that while 'there shall be no barrier of any kind … between one section of the Australian people and another',[55] 'democratically elected legislatures in a political subdivision of a federal system have a structural incentive to "protect and promote the interests of their own constituents"'.[56]

Thus, the Court in *Palmer* assumed that protecting a distinct state people is a legitimate purpose under s 92. Although the Australian people are one national people, they exist as a series of separate state peoples.

B *Territorially Bounded Communities: Place and Home*

The peoples of the states are distinct peoples — represented as such in Parliament and considered by the High Court to be distinct communities under the *Constitution*. The territorial connection of individuals to a particular state is also significant in understanding the constitutional category of the people of a state. This is seen particularly in the way in which residence is understood in the relevant case law.

As noted above, the *Constitution* does not explicitly define who the people of a state are.[57] Instead, we see 'the people' being defined by territory through

[51] Ibid 199 [77] (Kiefel CJ and Keane J), 218–19 [166] (Gageler J), 229–30 [202] (Gordon J), 251–5 [277]–[293] (Edelman J).

[52] Ibid 198 [74], 199 [77], [80].

[53] Ibid 198 [75], citing *R v Smithers; Ex parte Benson* (1912) 16 CLR 99, 110 (Barton J), *Ex parte Nelson* (1928) 42 CLR 209, 218 (Knox CJ, Gavan Duffy and Starke JJ), *North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW)* (1975) 134 CLR 559, 607–8, 616 (Mason J).

[54] *Palmer* (n 6) 231 [209].

[55] Ibid 204 [104], quoting *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 24 (Sir Henry Parkes). This quote is also referred to in the reasoning of Edelman J: *Palmer* (n 6) 242 [248].

[56] *Palmer* (n 6) 203 [101].

[57] See above n 17 and accompanying text.

the fact of residence. Covering cl 5 to the *Constitution Act* states that the Act applies to, inter alia, 'the people of every State'. The text of the *Constitution* proper includes references to the peoples of, or in, the states in ss 7, 24, 89(ii)(b), 105, and the repealed s 127, and residents of the states in ss 75(iv), 100 and 117. While ss 7 and 24 are key to understanding the political roles of the peoples of the states, the related case law says little regarding how those people are defined and identified.[58] Sections 89, 105 and 127 have received very scant attention from the High Court.[59]

By contrast, the High Court's interpretation of the sections which refer to residents of the states provide indications as to how a state people is understood under the *Constitution*. The associated case law regarding residence supports the notion that people can only be connected to one state at a time, and that therefore the peoples of the states are mutually exclusive groups, defined by territory. The reasoning in the cases which consider the meaning of 'residence' all converges on the notion of 'home' as determinative of residence. Some of those cases make explicit that a person has only one legal 'home'; thus the connection to a state through residence means that the peoples of the states are mutually exclusive groups, but groups that are fungible — meaning a person's state identity can be altered by their changing their legal 'home' or residence.

I begin my analysis of residence with s 117. Section 117 prohibits discrimination on the basis of state residence. In the first case concerning this section, *Davies v Western Australia* ('*Davies*'), the High Court addressed the meaning of residence by contrasting it with the legal notion of domicil, concluding that residence was connected to the location of a person's home.[60] *Davies* was a challenge to the application of succession duties.[61] Western Australian legislation imposed a higher tax rate for persons resident and domiciled outside Western Australia than for persons resident and domiciled within Western Australia.[62] Davies' beneficiary lived in Queensland.[63] The executors of the will paid the higher rate of tax in relation to inheritance and then sought a partial refund on the basis that the legislation was contrary to s 117.[64] The High Court concluded

[58] See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571–2 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoted in *Coleman v Power* (2004) 220 CLR 1, 44 [77] (McHugh J). See generally *McCloy v New South Wales* (2015) 257 CLR 178; *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*').

[59] But see *New South Wales v Commonwealth* (1908) 7 CLR 179 ('*Surplus Revenue Case*').

[60] (1904) 2 CLR 29, 39–42 (Griffith CJ), 46–7 (Barton J), 49–53 (O'Connor J) ('*Davies*').

[61] Ibid 36–7 (Griffith CJ), 44–5 (Barton J), 47–8 (O'Connor J).

[62] *Administration Act 1903* (WA) s 86.

[63] *Davies* (n 60) 37 (Griffith CJ), 44 (Barton J), 47 (O'Connor J).

[64] Ibid 36–7 (Griffith CJ), 44–5 (Barton J), 47–8 (O'Connor J).

the legislation did not contravene s 117, as the discrimination was not because of the state in which the beneficiary resided, but because of their domicil.[65]

Each of the Justices concluded that domicil in the legislation at hand was to be understood in its technical, 'legal' meaning.[66] Justice O'Connor was clearest in his explanation of the different meanings of domicil and their relationship with residence. He stated: 'Domicil … is an idea of the law. It is the relation which the law creates between an individual and a particular locality or country.'[67] He contrasted this with the 'popular meaning [of domicil] … to describe a man's "permanent residence" the place or country in which he has his "home"'.[68] That 'popular meaning' is relevantly indistinguishable from the notion of residence contained in s 117. Therefore, a person's home determines their place of residence.

In the case law concerning state residence in ss 75(iv) and 100, the High Court has relied on the same notion of 'home' and made explicit that persons only have one legal 'home'; thus, the peoples of a state are mutually exclusive of each other. Section 75(iv) of the *Constitution* extends the original jurisdiction of the High Court to matters 'between residents of different States, or between a State and residents of another State'.[69] A key early case regarding s 75(iv) is *The Australasian Temperance & General Mutual Life Assurance Society Ltd v Howe* ('*Australasian Temperance*'), decided in 1922 and never overruled.[70] It

[65] The reasoning in *Davies* (n 60) appears not to have been influential in later cases regarding the operation of s 117, due to the High Court having eschewed some of the formalist interpretation adopted therein that deprived s 117 of its rights-protective effect: Peter A Gerangelos et al (eds), *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Lawbook, 4th ed, 2017) 804–5 [10.390]–[10.400], 806 [10.430]; James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 616–20. For discussion of the early case law, including *Davies* (n 60), see generally FL Stow, 'Section 117 of the Constitution' (1906) 3(3) *Commonwealth Law Review* 97; Clifford L Pannam, 'Discrimination on the Basis of State Residence in Australia and the United States' (1967) 6(2) *Melbourne University Law Review* 105.

[66] *Davies* (n 60) 40, 43 (Griffith CJ), 46 (Barton J), 52 (O'Connor J).

[67] Ibid 50–1.

[68] Ibid 51. See also at 40 (Griffith CJ): 'The word "domicil" is a technical legal word with a definite legal meaning, although it may, no doubt, be used in a popular or more enlarged sense'. Chief Justice Griffith rejected the 'popular' meaning in favour of the 'technical' one: at 42–3.

[69] For a consideration of the limited application of this section, see James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis, 2nd ed, 2020) 421 [7.122], quoting Leslie Zines, 'Federal, Associated and Accrued Jurisdiction' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 265, 284–5, discussing *Service and Execution of Process Act 1992* (Cth).

[70] (1922) 31 CLR 290 ('*Australasian Temperance*'). Despite attempts to overturn this precedent, the High Court has consistently refused leave to reopen the primary case: *Cox v Journeaux*

concerned the foreclosure of a mortgage.[71] The plaintiff company wanted to commence proceedings under s 75(iv) against the defendant.[72] The High Court, by majority, concluded that 'resident' in s 75(iv) only included natural persons and so, as a company, the plaintiff could not use that section to commence its case.[73] In considering the meaning of 'resident', the Justices all focused on the connection necessary to make a person a member of a state community, with the correlative element that a person can be a member of only one state at any one time.[74]

The notion of 'home' was important to the reasoning of the High Court.[75] Chief Justice Knox and Gavan Duffy J stated that s 75(iv)

> assumes that a resident of one State cannot at the same time be a resident of another … At any given time a man must be living, and therefore residing, in some specific place …[76]

Justice Higgins emphasised the exclusive link between a person and one state.[77] The words of s 75(iv)

> obviously imply some close connection between the resident and the State, some exclusive link with some one State which cannot at the same time be had with any other State. The notion which is at the root of the words used in sec 75(iv) appears to be … the notion of home.[78]

The Court highlighted the relationship between the 'people of the state' and 'residents' and developed a notion of the peoples of the states as having a connection with, or membership of, one state and no other. All the Justices acknowledged that the case rested on the meaning of 'resident'.[79] In exploring

(1934) 52 CLR 282, 284 (Dixon J); *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22, 23–4 (Gibbs CJ, Mason J agreeing at 24, Wilson J agreeing at 24, Brennan J agreeing at 24, Deane J agreeing at 24, Dawson J agreeing at 24); *Rochford v Dayes* (1989) 84 ALR 405, 406–7 (Gaudron J).

71 *Australasian Temperance* (n 70) 300 (Isaacs J), 325–6 (Higgins J).

72 Ibid 294 (Knox CJ and Gavan Duffy J), 300 (Isaacs J), 326 (Higgins J).

73 Ibid 295, 299–300 (Knox CJ and Gavan Duffy J), 327, 337 (Higgins J).

74 Ibid 296 (Knox CJ and Gavan Duffy J), 307–8 (Isaacs J), 332 (Higgins J), 340 (Starke J).

75 Justice Isaacs, although in dissent on whether a 'resident' could include a company, otherwise reasoned similarly to the majority: ibid 307–8.

76 Ibid 296.

77 Justice Starke (in dissent) did the same: ibid 337. See also at 340, where he used the idea of a 'political attachment to some one State in the Commonwealth' in relation to companies.

78 Ibid 332. Justice Isaacs also emphasised the notion of home: at 324.

79 Ibid 294 (Knox CJ and Gavan Duffy J), 300 (Isaacs J), 326 (Higgins J). See at 339 (Starke J).

the meaning of resident in s 75(iv), reference was also made to the term 'resident' in s 100.[80]

Section 100 prohibits the Commonwealth from abridging the rights of state residents to the 'reasonable use of the waters of rivers for conservation or irrigation'.[81] In *Australasian Temperance*, Knox CJ and Gavan Duffy J looked to s 100, and stated that

> its purpose is to protect the rights of the State and the people of the State, and not to benefit foreigners who may choose to carry on operations in a State through the instrumentality of an incorporated company.[82]

While it was unnecessary in that case to decide the interpretation of s 100, the Justices nevertheless emphasised what it meant to have a relevant connection to a state by being a 'resident'.[83]

C *Fungibility of State Identity*

The case law regarding the meaning of residence in a state supports the conclusion that the peoples of the states are mutually exclusive and distinct groups, defined by territory. To the extent that residence may determine membership of a state, one consequence is that an individual can determine his or her constitutional identity in the sense of being a person 'of a state'. A person could

[80] Ibid 299 (Knox CJ and Gavan Duffy J), 320–1 (Isaacs J), 334–5 (Higgins J).

[81] For discussion regarding this section, see generally Adam Webster and John M Williams, 'Can the High Court Save the Murray River?' (2012) 29(4) *Environmental and Planning Law Journal* 281, 291–4; John M Williams and Adam Webster, 'Section 100 and State Water Rights' (2010) 21(4) *Public Law Review* 267.

[82] *Australasian Temperance* (n 70) 299. Justice Higgins distinguished the two sections by holding that 'the words "resident of a State" point to a more intimate connection with the State than "residents therein"': at 335.

[83] Even Isaacs J, in dissent, referred to the notion of residence in s 100 as identification with one state to the exclusion of all others: see *Australasian Temperance* (n 70) 324. The later cases that have touched on s 100 have not developed the meaning of residence. The purpose of s 100 has been identified by the High Court as related to the protection of the use of rivers for interstate trade and commerce: *Morgan v Commonwealth* (1947) 74 CLR 421, 454–5 (Latham CJ, Dixon, McTiernan and Williams JJ); *Commonwealth v Tasmania* (1983) 158 CLR 1, 154 (Mason J), 182 (Murphy J), 248–9 (Brennan J) ('*Tasmanian Dam Case*'); *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242, 263–4 [50]–[53] (Gummow and Crennan JJ) ('*Arnold*'). None of that discussion touches on the meaning of resident of a state. In the most recent case in which s 100 was considered, the Court held that the rights to ground water at issue were not rights to 'waters of rivers' and therefore s 100 was not engaged: *Arnold* (n 83) 258 [29] (French CJ), 264 [55] (Gummow and Crennan JJ), 269 [75] (Hayne, Kiefel and Bell JJ). See also David Lewis and Asaf Fisher, 'Water Entitlement Reductions Valid: Acquisition of Property and Abridgment of Rights to Water' [2010] (20) *Litigation Notes* 1.

unilaterally change their identity by changing their place of residence or 'home', making membership of a state community fungible.

The ability of persons to choose their residence or 'home' and therefore affect their state identity under the *Constitution* is supported by the freedom of movement protected by the 'intercourse' limb of s 92 of the *Constitution*. Section 92 provides that '[o]n the imposition of uniform duties of customs, trade, commerce, and intercourse among the States … shall be absolutely free'. There has been limited judicial discussion or commentary regarding the intercourse limb.[84] A key early case is that of *Gratwick v Johnson* ('*Gratwick*').[85] During wartime, Dulcie Johnson travelled to Western Australia without a permit.[86] She was charged with contravening national security regulations which restricted interstate travel without a permit required under the wartime *National Security (Land Transport) Regulations 1944* (Cth).[87] Johnson challenged the requirement of a permit, arguing that it contravened s 92.[88] The High Court agreed. All the Justices in the High Court concluded that the law in question was a direct infringement of the 'guarantee'[89] of freedom of interstate movement, as the law operated to restrict travel simply because of its interstate nature.[90]

The Court gave the intercourse limb of s 92 a wide application. Chief Justice Latham stated: 'Section 92 says that any person can travel between the States if he pleases.'[91] Justice Starke stated: 'The people of Australia are thus free to pass to and fro among the States without burden, hindrance or restriction.'[92] Justice Dixon, quoting a Privy Council decision, stated that '"the true criterion" of the operation of the section [is] "freedom as at the frontier", "passing into or out of the State"'.[93]

[84] James Stellios, 'The Intercourse Limb of Section 92 and the High Court's Decision in APLA Ltd v Legal Services Commissioner (NSW)' (2006) 17(1) *Public Law Review* 10, 11 ('The Intercourse Limb'). The latest case is that of *Palmer* (n 6), addressed below.

[85] (1945) 70 CLR 1 ('*Gratwick*').

[86] Ibid 8 (Latham CJ), 15 (Rich J), 15 (Starke J).

[87] 'National Security (Land Transport) Regulations Order No 1: Restriction of Interstate Passenger Transport' in Commonwealth, *Commonwealth Gazette*, No 175, 23 June 1942, 1489, made under s 7 of the *National Security (Land Transport) Regulations 1944* (Cth), in turn made under s 5 of the *National Security Act 1939* (Cth).

[88] Ibid 8 (Latham CJ), 15–16 (Rich J), 16 (Starke J).

[89] *Gratwick* (n 85) 22 (McTiernan J).

[90] Ibid 14–15 (Latham CJ), 16 (Rich J), 17 (Starke J), 19 (Dixon J), 21–2 (McTiernan J).

[91] Ibid 12.

[92] Ibid 17.

[93] Ibid 20, quoting *James v Commonwealth* (1936) 55 CLR 1, 58 (Lord Wright MR for the Judicial Committee).

Since *Gratwick*, the Court has only made brief mention of the intercourse limb. In 1988, in *Cole v Whitfield* ('*Cole*') — the case which clarified the operation of the 'trade and commerce' limb of s 92 — the High Court echoed the words used by Starke J in *Gratwick* and stated that the intercourse limb 'extends to a guarantee of personal freedom "to pass to and fro among the States without burden, hindrance or restriction"'.[94] In several cases since *Cole*, the Court has been faced with challenges to legislation which restricted intercourse between the states but where the restriction was not imposed simply because of the interstate nature of the intercourse in question;[95] that is, the restrictions in question were less direct than that in *Gratwick*. James Stellios, summarising the post-*Cole* cases, observed that 'much remains unclear about the intercourse limb, in particular its underlying purpose'.[96]

Some clarity has been provided, however, in the recent case of *Palmer*. As noted above, the High Court in that case rejected Palmer's challenge to the validity of Western Australia's COVID-19 border closure.[97] In doing so, each judgment considered the two 'limbs' of s 92 and sought to bring them together under one overarching test to determine the validity of a law.[98] The Court agreed that any burden on interstate trade, commerce or intercourse will be assessed as valid if it has a legitimate non-discriminatory purpose which goes no further than is reasonably necessary to achieve that object.[99]

The Court recognised the freedom of intercourse protected by s 92 as including freedom of movement between the states.[100] This was accepted by the parties and by the Court, as was the proposition that the border closure effected

[94] (1988) 165 CLR 360, 393 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) ('*Cole*'), quoting *Gratwick* (n 85) 17 (Starke J).

[95] See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 60 (Brennan J), 83–4 (Deane and Toohey JJ); *AMS v AIF* (1999) 199 CLR 160, 179 [45] (Gleeson CJ, McHugh and Gummow JJ), 213 [157], 214 [159] (Kirby J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 353 [38] (Gleeson CJ and Heydon J), 394 [179] (Gummow J), 463 [427] (Hayne J), 482 [462]–[464] (Callinan J).

[96] Stellios, 'The Intercourse Limb' (n 84) 10.

[97] See above nn 10–11 and accompanying text.

[98] *Palmer* (n 6) 191–2 [45]–[46] (Kiefel CJ and Keane J), 202 [97]–[98], 207 [115] (Gageler J), 222–3 [181] (Gordon J), 233 [218] (Edelman J).

[99] Ibid 193 [50], 196 [62] (Kiefel CJ and Keane J), 202 [97] (Gageler J), 222 [180] (Gordon J), 246–7 [261]–[262] (Edelman J). However, fierce disagreement continues between members of the High Court regarding how to engage in that testing exercise. Chief Justice Kiefel, Keane J and Edelman J adopted a structured proportionality test: at 196 [62] (Kiefel CJ and Keane J), 232 [217], 246 [261] (Edelman J). Justice Gageler and Gordon J maintained their rejection of such an approach: at 202 [94] (Gageler J), 228 [198] (Gordon J).

[100] Ibid 190 [40], 192 [47]–[48] (Kiefel CJ and Keane J), 202 [98] (Gageler J), 220 [178] (Gordon J), 232 [215] (Edelman J).

under the impugned legislation placed a burden on such freedom.[101] These concessions reinforce that the *Constitution* protects — to some extent — the freedom of individuals to move throughout the Federation and therefore choose their place of residence. This freedom reinforces the fungibility of state identity, allowing individuals to determine for themselves their state of residence and therefore of which state they are a constitutional member. At the same time, the reasoning in the s 92 cases also demonstrates that sometimes that freedom can be blocked by a law, if that law itself is concerned with the protection of a distinct state people — reinforcing that each state people is distinct from the other state communities.

The peoples of the states can therefore be understood as the separate units that come together to form the people of the Commonwealth. By considering all the sections of the *Constitution* which refer to people in the states and how the federal and representative structures operate under the *Constitution*, we can see that the 'people of a state' must be territorially bounded and mutually exclusive. The territorial nature of the people of a state can also be seen in the way in which the numbers of the people of a state are determined for the purpose of constitutional calculations — through the census.[102] A series of constitutional sections require a calculation to be made of the number of people in each state.[103] Those calculations only make sense if each state is exclusive of all others, and if every person can only be counted as a person of one state. The importance of territorial connection is reinforced by the references to residence in the text of the *Constitution*.[104] Further, as considered above, the individuals making up each state community are fungible — membership of a state community is flexible in being determined by connection to a state which an individual can alter through choice of residence or 'home'.

II The Privileged State People

In this Part, I return to the text of the *Constitution* which refers to 'the people', acting as electors, in order to explain how the peoples of the states are at the core of the Australian constitutional people. Within the existing literature regarding constitutional identity, a constitutional 'people' is often defined on the basis of either an ethno-cultural identity, which is reliant on a unifying ethnic, cultural or racial characteristic, or a demotic identity, which focuses on the

[101] See, eg, ibid 190–1 [40], 197 [72] (Kiefel CJ and Keane J).

[102] See, eg, *Constitution* s 51(xi).

[103] See, eg, ibid ss 24, 89(ii)(b), 105. Note the effect of ss 25 and 127 of the *Constitution*.

[104] See *Constitution* ss 75(iv), 100, 117.

people acting in a political capacity within the structures of government.[105] The Australian constitutional identity — as seen in the constitutional text and case law — is predominantly a demotic one.[106] The High Court has addressed the concept of 'the people' within the *Constitution* by focusing upon protecting the people's roles within representative government as electors. The federal franchise has been protected by requiring the Parliament to justify any incursions on a universal adult citizen franchise.[107] The exercise of political roles is supported by the implied freedom of political communication, which acts to limit the Parliament's power in burdening such communication.[108] At the core of the identity of the Australian constitutional people is the way in which the people are 'electors'.

I explain in this Part that key textual references to 'the people' as electors in the *Constitution* have been interpreted by the High Court to include *only* people in the states and that the people in the states have a privileged position as compared to people outside the states. Even where people outside the states are given the federal vote or vote in referenda, their political participation is not as protected as it is for electors in the states. Therefore, the privileged state people are at the core of the Australian constitutional people.

[105] See, eg, Michel Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 756. Note that these conceptions are not the only foundations for identity that arise in the literature but are addressed here as the most prominent. For alternatives, see Elaine R Thomas, 'Who Belongs? Competing Conceptions of Political Membership' (2002) 5(3) *European Journal of Social Theory* 323; Seyla Benhabib, Ian Shapiro and Danilo Petranović, 'Editors' Introduction' in Seyla Benhabib, Ian Shapiro and Danilo Petranović (eds), *Identities, Affiliations, and Allegiances* (Cambridge University Press, 2007) 1.

[106] As developed in Arcioni, 'The Core of the Australian Constitutional People' (n 7) 422–7. That is not to say that ethno-cultural issues are irrelevant — in particular, our legal history demonstrates the significance of race, and the ongoing debate regarding recognising First Nations peoples in the *Constitution* is a distinct reminder of the role of race in constitutional identity. However, to date, ethno-cultural commitments have not been constitutionalised in the same way as they have in countries which can be characterised as having a dominantly ethno-cultural constitutional identity: see generally Arcioni, 'Tracing the Ethno-Cultural or Racial Identity' (n 8).

[107] See, eg, *Roach* (n 58) 173–5 [6]–[8] (Gleeson CJ), 198–9 [83], 199–200 [85]–[86] (Gummow, Kirby and Crennan JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 19–21 [23]–[25] (French CJ), 58–9 [160]–[161] (Gummow and Bell JJ), 118–19 [375]–[376] (Crennan J), 132 [429] (Kiefel J).

[108] See the unanimous judgment in *Lange* (n 58), following a series of earlier implied freedom cases and confirmed in later cases: at 560–1 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

A *The Peoples of the States as Electors*

The key constitutional sections that establish the system of representative government in Australia are ss 7 and 24. As noted above, s 7 of the *Constitution* contains the first explicit reference to the peoples of the states in the *Constitution* proper.[109] That section begins: 'The Senate shall be composed of senators for each State, directly chosen by the people of the State'. Section 15 makes clear that that choice is exercised by the electors. Section 24 then refers to the people of the states in determining the number of Members of the House of Representatives to be chosen in each state. It is only people in the states who are included amongst 'the people' in ss 7 and 24.[110]

The people in the states, acting as and through electors, also have the classic constitutive power of making changes to the constitutional text. This constitutive role is seen in s 128 regarding referenda to alter the text of the *Constitution*. No change can be made to the constitutional text without approval of the 'electors qualified to vote for the election of members of the House of Representatives'.[111] The electors referred to in s 128 are the same electors that exercise the constitutive function referred to above in relation to choosing Members of federal Parliament. While electors in the territories can vote in referenda, as I discuss below, their involvement is less protected than for electors in the states.[112]

The constitutional text, by placing political power in the hands of the peoples of the states through electors in the states, thereby identifies the constitutive power of 'the people'. As Aroney has argued,[113] the peoples of the states are central to the 'representative institutions, configurations of powers, and amending formulas adopted under the *Constitution*'.[114]

B *The Peoples of the States at the Core of the Commonwealth*

The cases which protect the federal franchise and which established the freedom of political communication were preceded by a trio of cases which determined the status of people in the territories with respect to representative government. These cases illustrate the privileged position of the peoples of the

[109] See above Part II(A).

[110] Territorians can vote for federal Parliament but that vote is derived from legislation made under s 122, not ss 7 and 24: see *Western Australia v Commonwealth* (1975) 134 CLR 201 ('*First Territory Senators' Case*'); *Queensland v Commonwealth* (1977) 139 CLR 585 ('*Second Territory Senators' Case*'), discussed below in Part III(B).

[111] *Constitution* s 128.

[112] See below Part III(B).

[113] See, eg, Aroney (n 26) 197, 360.

[114] Ibid 6.

states as compared to people in the territories and demonstrate that the state peoples are at the core of the Australian constitutional people.

In 1975, in *Western Australia v Commonwealth* ('*First Territory Senators' Case*'),[115] the High Court heard a challenge to legislation which provided for two Senators to be chosen by electors in each of the Australian Capital Territory and the Northern Territory, with all the powers and privileges of Senators chosen in the states.[116] The Court was faced with what seemed to be irreconcilable provisions of the *Constitution*. Section 7 states that '[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State', and this by itself seems to mean that the Senate must be composed of *only* state Senators.[117] Section 122 empowers the federal Parliament to make laws allowing 'the representation of [Australian territories] in either House of the Parliament to the extent and on the terms which it thinks fit', which on its face suggests that territorians can have representatives in both the House of Representatives and the Senate. A majority of four Justices decided that the legislation allowing Senators for the territories was valid as within s 122 of the *Constitution*.[118]

Despite the majority's finding in favour of the validity of territory representation, the Court did not question the federal elements of the Parliament or the significance of the peoples of the states and their representation in the Senate. Justice Mason (with whom McTiernan J agreed)[119] acknowledged that 'the conception of a senator as the representative of a State pervades the provisions of Pt II of Ch I [of the *Constitution*]'.[120] Justice Jacobs also accepted that '[i]n the main the framers of the *Constitution* looked to the uniting of the States of the Australian mainland and Tasmania',[121] and that the 'intention was that the original States, large and small, would have equal representation [in the Senate]'.[122] Justice Murphy noted that '[t]he general scheme in Ch [I] of the *Constitution* is a Senate of States with equal numbers of senators'.[123]

In 1977, the Court delivered judgment in two further cases that clarified the respective positions of the peoples of the states and territories. The legislation in question in the first of the two decisions, *Attorney-General (NSW) ex rel*

115 *First Territory Senators' Case* (n 110).

116 *Senate (Representation of Territories) Act 1973* (Cth) ss 4–5(1).

117 See, eg, *First Territory Senators' Case* (n 110) 244 (Gibbs J).

118 Ibid 271–2 (Mason J, McTiernan J agreeing at 233–4), 274–5 (Jacobs J), 280–1 (Murphy J).

119 Ibid 233–4.

120 Ibid 269.

121 Ibid 273.

122 Ibid 274.

123 Ibid 281.

McKellar v Commonwealth ('*McKellar*'), defined 'the people of the Commonwealth' for the purpose of s 24 as excluding people in the territories.[124] The Court had to determine whether that legislation was valid. It decided it was.[125] In doing so, the Court concluded that s 24 of the *Constitution* only included the peoples of the states within 'the people of the Commonwealth'.[126]

In reaching this conclusion, all the members of the Court referred to the decision in the *First Territory Senators' Case*, and clarified that only the peoples of the states receive representation through ss 7 and 24 of the *Constitution*.[127] Chief Justice Barwick maintained his disagreement with the decision in the *First Territory Senators' Case*.[128] Given Barwick CJ's strict view of the Federation as only including the states,[129] it was not surprising that he found in favour of the exclusion of territorians. Justice Gibbs, assuming that the decision in the *First Territory Senators' Case* should be followed (despite his dissent in that case), stated:

> It is clear from the judgments of the majority in that case that the power to appoint senators for the Territories is derived solely from s 122 of the *Constitution*. It was not doubted that the provisions of Pt II of Ch I of the *Constitution*, including s 7, relate only to senators for the States.[130]

Justice Gibbs reasoned: 's 24 is concerned only with members of the House of Representatives chosen in the States' so that each mention of 'people of the Commonwealth' in that section excluded territorians.[131] Justice Stephen agreed that, as he understood them, the majority judgments in the *First Territory Senators' Case* 'treat[ed] the provisions of s 122 of the *Constitution* as a proviso

[124] (1977) 139 CLR 527 ('*McKellar*'). There were numerous provisions challenged in this case. I focus on the challenge to s 1A of the *Representation Act 1905* (Cth), as amended by s 3 of the *Representation Act 1973* (Cth). Section 1A provided: 'In this Act, "the people of the Commonwealth" does not include the people of any Territory'. That section affected the determination of who constituted 'the people of the Commonwealth' for the purpose of the calculation to be conducted according to s 24 of the *Constitution* regarding the number of Members of the House of Representatives in each state: *Representation Act 1905* (Cth) s 10.

[125] *McKellar* (n 124) 533 (Barwick CJ), 544 (Gibbs J), 554 (Stephen J, Mason J agreeing at 562), 567 (Jacobs J), 569 (Murphy J), 580 (Aickin J).

[126] Ibid 532 (Barwick CJ), 543 (Gibbs J), 553 (Stephen J, Mason J agreeing at 563), 566 (Jacobs J), 568–9 (Murphy J), 579–80 (Aickin J).

[127] *First Territory Senators' Case* (n 110), discussed in *McKellar* (n 124) 532 (Barwick CJ), 542 (Gibbs J), 561–2 (Stephen J), 563 (Mason J), 565–6 (Jacobs J), 572–6 (Aickin J).

[128] *McKellar* (n 124) 532–3, 536. Chief Justice Barwick was in dissent in the *First Territory Senators' Case* (n 110): at 214.

[129] *McKellar* (n 124) 532–3.

[130] Ibid 542.

[131] Ibid.

or exception to ss 7 and 24', and therefore that in the case before him, *McKellar*, 'the people of the Commonwealth' in s 24 meant only the peoples in the states.[132]

Justice Mason agreed with the judgment of Stephen J in *McKellar*, including the statement regarding s 122 being understood as a proviso.[133] The consequence was that territorians were excluded from 'the people of the Commonwealth' in s 24.[134] Justice Jacobs reached the same conclusion for the same reason,[135] as did Murphy J.[136] Justice Aickin, the only member of the Court in *McKellar* who had not been on the Bench in the *First Territory Senators' Case*, agreed with the validity of the legislation which excluded territorians from being counted amongst 'the people of the Commonwealth'.[137]

The entire Court agreed that Members of Parliament directly chosen by 'the people' in ss 7 and 24 are chosen by the peoples of the states only. Territorians may be granted representation but only through legislation made under s 122. Therefore, any reference to 'people of the Commonwealth' in s 24 includes *only* the peoples of the states. This understanding of the *First Territory Senators' Case* was reaffirmed in the second of the relevant cases decided in 1977: *Queensland v Commonwealth* ('*Second Territory Senators' Case*').[138]

In that case, the Court heard another challenge to legislation providing for federal Members of Parliament to be chosen by electors in the territories, this time in the House of Representatives.[139] All the parties and the Justices agreed that for the application to succeed, the earlier *First Territory Senators' Case* would have to be reconsidered.[140] While four of the Justices in the *Second Territory Senators' Case* would have found in favour of overruling the earlier case,[141] two of them felt that they were bound by it, leaving only two to provide

[132] Ibid 561–2.

[133] Ibid 562–3.

[134] Ibid.

[135] Ibid 565–6.

[136] Ibid 568–9.

[137] See his answer to question (i) of the questions reserved: *McKellar* (n 124) 582. But note that he took a slightly different approach to the validity of some of the other provisions, due to a difference in his understanding of 'composed' in s 7 of the *Constitution*: *McKellar* (n 124) 576–7, 582.

[138] *Second Territory Senators' Case* (n 110).

[139] See, eg, ibid 591 (Barwick CJ), 594–5 (Gibbs J).

[140] Ibid 591 (Barwick CJ), 598 (Gibbs J), 602 (Stephen J), 607 (Mason J), 607–8 (Jacobs J), 610 (Murphy J), 613–14 (Aickin J).

[141] Ibid 594 (Barwick CJ), 597 (Gibbs J), 603–4 (Stephen J), 631 (Aickin J).

judgments proposing dissenting orders.[142] The remaining three Justices reaffirmed what they had said in the earlier case, leading to the conclusion that the legislation in this case was valid in providing for representation of territorians under s 122.[143]

Significantly, just as in *McKellar*, the Justices who agreed in the final orders of the Court in the *Second Territory Senators' Case* affirmed that territorians receive representation through legislation made under s 122 and not as 'people of the Commonwealth' in s 24.[144] Justice Gibbs reiterated that the earlier case meant that 's 122 operates as a proviso or exception to s 24 as well as to s 7',[145] and Stephen J held that s 122 provides authority for the Parliament to provide 'representation' of territorians in the House of Representatives.[146] Justice Mason, Jacobs J and Murphy J all held that the Parliament's power in s 122 to provide for 'representation' of territorians in the Senate was, in the words of Mason J, 'coextensive with its power to provide for their representation in the House of Representatives'.[147]

The reasoning of the majority in this string of cases confirms the centrality of the peoples of the states, as compared to the peripheral position of the peoples of the territories, who are dependent on federal legislation for representation. The key sections in the text of the *Constitution* referring to 'the people' are to 'the people' acting as electors.[148] Those protected political roles are guaranteed only for electors in the states; that is, 'the people' in those sections includes only the peoples of the states. The peoples of the states are therefore at the core of the Australian constitutional 'people'. That core identity exists at the same time as the peoples of the states hold dual identities — both as people of their state and as members of the national people of the Commonwealth.

[142] Justice Gibbs and Stephen J felt bound by the earlier decision: ibid 600 (Gibbs J), 603–4 (Stephen J). Chief Justice Barwick maintained his earlier dissenting position: at 594. Justice Aickin, who was not on the Court in the earlier case, also argued against the majority position: at 631.

[143] See ibid 607 (Mason J), 610 (Jacobs J), 610, 612 (Murphy J).

[144] Ibid 601 (Gibbs J), 604 (Stephen J), 607 (Mason J), 610 (Jacobs J), 612 (Murphy J).

[145] Ibid 601.

[146] Ibid 602. The earlier case decided that s 122 of the *Constitution* authorised Senators for the territories: 'To follow [the *First Territory Senators' Case*] necessarily requires that the action brought [in the *Second Territory Senators' Case*, which raised the question of representation in the House of Representatives] should be dismissed': *Second Territory Senators' Case* (n 110) 605.

[147] Ibid 607. See also 609–10 (Jacobs J), 611–12 (Murphy J).

[148] See, eg, *Constitution* ss 7, 15, 24–5.

III Resolving Federal–National Tensions: The Demotic State People

The combination of state communities within the Commonwealth means that 'the people' must be understood as both members of their state community and their new national community in order to fully account for the 'partly federal, partly national' character of 'modern federations',[149] of which Australia is one.[150] All federations necessarily include memberships of both the national and regional, or provincial, polities. This can be explained as the dual nature of a federal 'people':

> '[T]he people' are taken as a single entity, in one sense, but a plurality of entities in another. The people are represented as a whole (the nation) and as parts (the distinct regions comprising the nation). The people, then, are taken as both united and as diverse. This duality, for the life of the federation, is implicitly inexpungible.[151]

Federalism, per se, does not prescribe the relationship between the different memberships.[152] Instead, scholars have argued that the pre-federal history and the historical manner of federating affect the post-federal nature of membership at the national and sub-national levels.[153] In this Part, I argue that the case law of the High Court reflects the federal and national identities of 'the people' in the states and emphasises the demotic or political identity of a state people as the central factor in determining when a state identity will trump a national one, in circumstances beyond that of any existential threat that applies to the state people as a whole, which we can see in the most recent decision regarding s 92 — that of *Palmer* described above.[154]

[149] See Aroney (n 26) 28. See also at 31.

[150] Ibid 22.

[151] Preston King, 'Federation and Representation' in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Harvester Wheatsheaf, 1993) 94, 96; Quick and Garran (n 32) 332, 334.

[152] See Vicki C Jackson, 'Citizenship and Federalism' in T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace, 2001) 127, 133, providing an outline of the possible options.

[153] Peter H Schuck, 'Citizenship in Federal Systems' (2000) 48(2) *American Journal of Comparative Law* 195, 198. See also the general argument that Aroney makes in relation to Australia as well as other federal nations: Aroney (n 26) 6, 19, 59–61. This mirrors the work of Michel Rosenfeld, where he argues that the history of constitution-making affects the constitutional identity within the state: see generally Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, 2010). See especially at chs 4–6.

[154] See above nn 50–56 and accompanying text.

The only section of the *Constitution* which explicitly identifies the object of protection as *people* in the states is s 117. Section 117 states:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

I addressed the first High Court case regarding s 117 above, in order to explore the meaning of residence.[155] The later jurisprudence regarding s 117 shows that even where people in states are given protection under this section because of their connection to a state (in this instance through residence), the Court has identified the underlying rationale as one of national unity.[156] This reflects the identity of the peoples in the states as the national people of the Commonwealth.[157] However, the Court has also protected some aspects of a distinct state identity. In determining how the state-based identity is to be understood, the demotic or political heart of the peoples of the states comes to the fore. It is that identity which is central to the way in which the Court is likely to resolve tensions between the dual federal–national nature of 'the people'.

[155] See above Part II(B), discussing *Davies* (n 60).

[156] A similar rationale is identified in relation to ss 51(ii) and 99: *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 561–2 [3] (French CJ) (citations omitted) ('*Fortescue Metals*'):

> The limitations on Commonwealth legislative power imposed by ss 51(ii) and 99 of the *Constitution* protect the formal equality in the Federation of the States inter se and their people, and the economic union which came into existence upon the creation of the Commonwealth.

This rationale is referred to again later as a 'federal purpose — the economic unity of the Commonwealth and the formal equality in the Federation of the States inter se and their people': at 585 [49] (French CJ). These are described by French CJ as 'high purposes'.

[157] There are interesting parallels, as well as differences, with the way in which European Union citizenship 'is complementary to national citizenship and does not replace it': see Anja Lansbergen and Jo Shaw, 'National Membership Models in a Multilevel Europe' (2010) 8(1) *International Journal of Constitutional Law* 50, 50.

A *The Peoples in the States as People of the Commonwealth*

In 1989, the High Court heard *Street v Queensland Bar Association* ('*Street*'),[158] which was to become the leading s 117 case.[159] Since *Street*, the High Court has considered s 117 in only two cases,[160] which have either explicitly confirmed the elements of s 117 that I consider below, or made no statement inconsistent with them.[161] *Street* was brought before the Court because Alexander Street, a barrister in New South Wales, had sought admission to practice as a barrister of the Supreme Court of Queensland but was refused admission because he had failed to comply with the *Rules Relating to the Admission of Barristers of the Supreme Court of Queensland 1975* (Qld) ('*Rules*'),[162] as he was resident in New South Wales rather than Queensland and had failed to cease practice in New South Wales.[163] He argued that the *Rules* were in contravention of s 117.[164] The Court agreed.[165]

In reaching their ultimate conclusion, the members of the Court in *Street*, writing in separate judgments, emphasised the national purpose of s 117.[166]

158 (1989) 168 CLR 461 ('*Street*'). This matter was heard together with an application by Timothy Robertson regarding the same issue: at 465. Section 92 was raised: see, eg, at 470 (JJ Doyle QC) (during argument), 479 (Mason CJ). All the Justices except Dawson J confined their reasons to the application of s 117, finding it unnecessary to address the application of s 92: *Street* (n 158) 494 (Mason CJ), 521 (Brennan J), 534 (Deane J), 551 (Toohey J), 564–5 (Gaudron J), 576 (McHugh J). Cf at 536–40 (Dawson J).

159 For discussion of *Street* (n 158), including criticisms of the limitations of the reasoning therein, see Genevieve Ebbeck, 'The Future for Section 117 as a Constitutional Guarantee' (1993) 4(2) *Public Law Review* 89; Genevieve Ebbeck, 'Section 117: The Obscure Provision' (1991) 13(1) *Adelaide Law Review* 23, 32–4.

160 Daniel Reynolds, 'Defining the Limits of Section 117 of the *Constitution*: The Need for a Theory of the Role of States' (2021) 44(2) *University of New South Wales Law Journal* 786, 786.

161 *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 ('*Sweedman*'); *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463, 478–9 (Deane and Gaudron JJ), 485 (Dawson and Toohey JJ), 493–4 (McHugh J) ('*Goryl*'). For discussion of the limited effect of the reasoning in *Sweedman* (n 161), see Amelia Simpson, '*Sweedman v Transport Accident Commission*: State Residence Discrimination and the High Court's Retreat into Characterisation' (2006) 34(2) *Federal Law Review* 363, 369–74.

162 *Street* (n 158) 477 (Mason CJ), 534 (Dawson J), 564 (Gaudron J), 575–6 (McHugh J).

163 Ibid 477 (Mason CJ).

164 Ibid 465–6 (DMJ Bennett QC) (during argument).

165 The Court remitted the matter to the Supreme Court of Queensland for the making of orders consistent with the judgment in the High Court: ibid 494 (Mason CJ, Toohey J agreeing at 564), 521 (Brennan J), 533 (Deane J), 550 (Dawson J), 575 (Gaudron J), 590 (McHugh J).

166 The only exception is Gaudron J, who noted in the course of analysis that the purpose of s 117 is 'federal', but emphasised the individual focus of s 117 and analysis of discrimination rather than the underlying national purpose of the section: *Street* (n 158) 570. For analysis of the entire Court's approach to discrimination, see Amelia Simpson, 'The High Court's Conception

They agreed that s 117 existed to ensure equality of treatment amongst the peoples of the states in order to achieve national unity within the Federation. 'The people' are understood as a national people. Chief Justice Mason stated:

> The very object of federation was to bring into existence one nation and one people. This section is one of the comparatively few provisions in the *Constitution* which was designed to enhance national unity and a real sense of national identity by eliminating disability or discrimination on account of residence in another State … [to] bring into existence a national unity and a national sense of identity transcending colonial and State loyalties.[167]

Justice Brennan agreed that s 117 was a 'constitutional [pillar] of the legal and social unity of the Australian people'.[168] Justice Deane used similar language, describing s 117 as constituting 'a structural provision directed to the promotion of national economic and social cohesion and the establishment of a national citizenship'.[169] Justice Dawson identified the purpose of s 117 as 'a federal one, … designed to ensure that persons from one State are treated in another as citizens of the one nation, not as foreigners'.[170] Justice Toohey identified the principle that 'Australia was to be a commonwealth in which the law was to apply equally to all its citizens'.[171] Justice Gaudron identified a 'federal' purpose to s 117,[172] and McHugh J identified the object of s 117 as being

> to make federation fully effective by ensuring that subjects of the Queen who were residents of Australia and in comparable circumstances received equality of treatment …[173]

of Discrimination: Origins, Applications, and Implications' (2007) 29(2) *Sydney Law Review* 263 ('The High Court's Conception of Discrimination'). For discussion of the 'federal–structural' understanding of s 117, see generally Amelia Simpson, 'The (Limited) Significance of the Individual in Section 117 State Residence Discrimination' (2008) 32(2) *Melbourne University Law Review* 639 ('The (Limited) Significance of the Individual in Section 117'). For discussion of the federal principle and creation of a common citizenship, together with detailed discussion of the history and debates regarding s 117, see Pannam (n 65).

167 *Street* (n 158) 485.

168 Ibid 512. See also at 513.

169 Ibid 522.

170 Ibid 541. See also at 548: 'there is but one nation and … the citizens of that nation carry their citizenship with them from State to State'.

171 Ibid 554.

172 Ibid 570.

173 Ibid 583.

The rationale for s 117 being national unity was also noted in the later case of *Goryl v Greyhound Australia Pty Ltd* ('*Goryl*').[174] The reasoning of the Court therefore recognises the people in the states as being people of the Commonwealth, a national people.

B *Peoples of the States of the Commonwealth*

While 'the people' are a national people, the Justices in *Street* also recognised that 'the people' exist as a series of distinct state peoples. That is, the reasoning in *Street* supports the recognition of the dual identities of the people in the states as being *both* collectively the people of the Commonwealth *and* as the distinct peoples of the states of the Commonwealth. These identities can be seen most clearly in the reasoning the Justices adopted when identifying exceptions to the prohibition on discrimination in s 117. The exceptions are not yet settled in the case law.[175] However, on the basis of the current judicial discussion of exceptions, the rationale for any exceptions is based on the requirement of a measure of autonomy for each state community.[176] This confirms the independent status of the peoples of the states as distinct communities with some control over their respective polities, within an overall national Commonwealth. The identity of the people of the states in their state capacity thus has jurisprudential significance.

All the Justices in *Street* recognised that, despite the generous wording of s 117, it was not an absolute prohibition on differential treatment on the basis of state residence. The Justices identified a range of examples which may fall outside the operation of s 117. Chief Justice Mason stated:

> To allow the section an unlimited scope would give it a reach extending beyond the object which it was designed to serve by trenching upon the autonomy of the States to a far-reaching degree. Accordingly, there may be cases where the need to preserve that autonomy leads to a recognition that a particular disability or discrimination is not prohibited.[177]

[174] *Goryl* (n 161) 486 (Dawson and Toohey JJ), 493 (McHugh J).

[175] Michael Mathieson, 'Section 117 of the Constitution: The Unfinished Rehabilitation' (1999) 27(3) *Federal Law Review* 393, 404.

[176] However, note that Gaudron J gave a greater emphasis to theories of discrimination and its development over time: see Simpson, 'The High Court's Conception of Discrimination' (n 166) 267–8; Simpson, 'The (Limited) Significance of the Individual in Section 117' (n 166) 646–7.

[177] *Street* (n 158) 491–2. See also at 493.

Justice Brennan focused on '[t]he necessity to preserve the [state] institutions of government and their ability to function [as] an unspoken premise of all constitutional interpretation'.[178] Justice Deane noted that

> [t]he words of s 117 must, of course, be construed in their context in a constitution which is founded upon the existence of the various States as distinct entities under the federation.[179]

Justice Dawson, in a similar vein, stated that

> it should be borne in mind that [the purpose of s 117] does not deny the separate responsibilities of the States which, together with the Commonwealth, make up the Australian federation.[180]

Justice Toohey identified the limits of s 117 to be found in

> the implications to be drawn from the *Constitution*, in particular the capacity of the States to regulate their own affairs within a federal system … protecting the legitimate interests of the 'State community'.[181]

Justice Gaudron went further in focusing on 'the people' by noting that:

> Within our federal framework it is the status of being a 'subject of the Queen' … and residence within a State which together signify membership of the body politic constituting that State. That membership carries with it rights to participate in the political processes of the State.[182]

Justice McHugh was the clearest in his enunciation of the essentially dual membership of the people in the states:

> [T]he existence of a federal system of government, composed of a union of independent States each continuing to govern its own people, necessarily requires the conclusion that some subject-matters are the concern only of the people of each State. And since the residents of a State and its people are basically interchangeable concepts, it follows that laws dealing with these particular subject-matters may exclude interstate residents from participation …[183]

Thus, the reasoning in *Street* reflects the partly federal, partly national nature of the peoples of the states. People in the states are recognised by the Court as

[178] Ibid 513.
[179] Ibid 528.
[180] Ibid 548.
[181] Ibid 560.
[182] Ibid 572.
[183] Ibid 583–4.

being part of a national federal community, but also as distinct state communities, membership of which can be given legal effect through restricting access to some rights or privileges on the basis of state residence. State and national identities coexist and the interaction between them is to be worked out on a case-by-case basis by the Court. As I consider below, it is the political capacities of the state peoples which will influence how that interaction will be worked out.

C *Political State Peoples*

In identifying possible exceptions to the s 117 prohibition on discrimination, Justices have gone beyond simply identifying the dual identities of peoples in the states and have emphasised the state people acting in a *political* capacity.[184] The reasoning regarding the exceptions to s 117 demonstrates that the High Court has recognised the peoples of the states as distinct communities. The peoples' identity as such is manifest by acting as and through electors within their states, and by being represented as people of a state; that is, the people of a state act as electors of their state in order for their state community to be represented, whether in their state Parliament or in the Senate.

Some Justices have emphasised the way in which the people of a state is a distinct community that receives representation as such — particularly in the federal Parliament, as discussed above.[185] Justice Brennan, while recognising that 'equality of treatment within each State … is a basic doctrine of the *Constitution*', identified an exception of 'necessity' regarding s 117.[186] He stated that 'a subject of the Queen, resident in one State, must be denied a vote for the senators for another State voting as one electorate', because of the text of s 7 of the *Constitution*.[187] Justice Toohey similarly explained that

> the *Constitution* itself contemplates an electoral system in which senators for one State will be chosen by the people of that State and, impliedly at least, that members of the House of Representatives in each State will be chosen by the people of that State. It is inconceivable that a State Parliament may not exclude

[184] As noted by Michael Mathieson, the one area of judicial consensus regarding exceptions to s 117 is 'the exclusion of non-residents from the franchise in Senate and State elections': Mathieson (n 175) 404. Other possible exceptions include the provision of welfare benefits only to residents: *Street* (n 158) 492 (Mason CJ), 528 (Deane J), 572 (Gaudron J); and the suggestion that licences for hotels may legitimately require local residence: at 492 (Mason CJ), 511 (Brennan J).

[185] See above Part II(A).

[186] *Street* (n 158) 512.

[187] Ibid.

> from the qualifications of its electors those who reside outside the State, without offending s 117.[188]

Justice Deane also used a similar idea to justify the exception to s 117 both with respect to the Senate and with respect to the state Parliaments.[189] For Deane J, those exceptions were dependent on '[t]he incapacity of the non-resident to vote flow[ing] from … the nature of the franchise in a political system based, to a significant extent, on residential divisions and representation'.[190] Justice Dawson justified the exception of voting in state elections, finding that

> the very nature of the subject matter which is being regulated in a case such as that requires organization upon the basis of State residence because the purpose for which votes are cast is to elect persons to represent the residents of a State in the State legislature.[191]

As seen above, Gaudron J referred to membership of the state body politic that 'carries with it rights to participate in the political processes of the State'.[192] Justice McHugh also focused on representation within a state, stating that '[m]atters which are the concern only of a State and its people and are not within the scope of s 117 would seem to include the franchise, [and] the qualifications and conditions for holding public office in the State'.[193] Justice McHugh affirmed that view in the later case of *Goryl*,[194] as did Dawson and Toohey JJ (with Mason CJ agreeing), where they stated:

> The most obvious example of differential treatment which lies outside s 117 is the exclusion of non-residents from voting in a State election. Clearly, that is something which would not be prohibited by s 117 even if it did amount to the imposition of a disability upon non-residents or discrimination against them. But it might also be said that there is no disability or discrimination because the very nature of a State election, which is to elect representatives for the residents of the State, dictates that residence be a qualification of voters. Non-residents have no part to play in the election of representatives for residents.[195]

188 Ibid 559 (citations omitted).

189 Ibid 528–9.

190 Ibid 528.

191 Ibid 548.

192 Ibid 572.

193 Ibid 584.

194 *Goryl* (n 161) 493.

195 Ibid 485–6 (Dawson and Toohey JJ, Mason CJ agreeing at 471).

All of the Justices referred to above relied on the idea that the people of a state are represented by and through their state electors. The autonomy of the peoples of the states, carved out of the exceptions to s 117, is therefore connected to the peoples acting in a political capacity within their state. The exceptions suggested in the reasoning above primarily emphasise 'the people' acting as electors, either in electing federal Senators who are intended to represent the state people or in choosing representatives in the state Parliament. It is the political roles of 'the people' that are privileged above the constitutional prohibition of discrimination in s 117.

The High Court has hinted that in some contexts there may be limited utility in seeking to define people as connected to a state. In 2008, in the case of *Betfair Pty Ltd v Western Australia* ('*Betfair*'), the Court was asked to determine whether parts of the *Betting Control Act 1954* (WA) contravened the command in s 92 of the *Constitution* that interstate trade, commerce and intercourse shall be 'absolutely free'.[196] In doing so, the Court considered earlier cases regarding s 92.[197] It considered that, in one of those cases, the Court had emphasised the impact of s 92 on

> 'the people of' the State and … 'its' well-being, rather than [on] those persons who from time to time are placed on the supply side or the demand side of commerce and who are present in a given State at any particular time.[198]

The Court in *Betfair* questioned such an approach, stating that such references to the people of a state

> appear to discount the significance of movement of persons across Australia, and of instantaneous commercial communication, and to look back to a time of physically distinct communities located within colonial borders and separated by the tyranny of distance.[199]

While on its face this comment in *Betfair* may seem to undermine the significance of state identity, it should be seen as only relevant to some financial or

[196] (2008) 234 CLR 418, 450 [9], 469 [67] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) ('*Betfair*'). The case focused on trade and commerce or commercial intercourse, not freedom of movement of persons: see, eg, at 448–9 [2]–[3], 454–5 [21]–[24] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). The 'intercourse limb' of s 92 was addressed earlier: see above nn 84–101 and accompanying text. Other sections regarding the trade and commerce among the states include ss 51(ii) and 99.

[197] See especially *Cole* (n 94); *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 ('*Castlemaine Tooheys*').

[198] *Castlemaine Tooheys* (n 197) 472–3 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), cited in *Betfair* (n 196) 453 [18] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[199] *Betfair* (n 196) 453 [18] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

economic matters. The Court has accepted that there is one financial system across the country and that the economies within each state are not independent of one another.[200] The need for a free trade zone across the Commonwealth was a critical issue for Federation.[201] However, the High Court has *not* extended this reasoning of national unity to the political sphere in each state, consistent with the Federation-era emphasis on maintaining separate bodies politic in each state.

A consideration of the case law relating to s 117 supports the proposition that the people of the states are territorially bounded communities, mutually exclusive of each other. Section 117 requires both that a person be a subject of the Queen *and* a resident of a state before a person can gain the protection from discrimination under that section. In the High Court's reasoning in *Street*, the states were understood as independent entities, with separate populations.[202] Uniformity was to be achieved by prohibiting discrimination on the basis of out-of-state residence, but at the same time residence in a state could be the foundation for some rights and privileges.[203] The reasoning of the High Court reflects the partly federal, partly national identity of 'the people' in the states, as both people of the national Commonwealth and peoples of the states of the Commonwealth. Significantly, the area of consensus regarding exceptions to the discrimination prohibited in s 117 focuses on the people of the states acting as and through electors: that is, 'the people' understood as the *demotic* state people. The reasoning in *Street* and *Goryl*, outlined above,[204] specifically insulates the political autonomy of each state and its electors from the national unity

[200] See the reasoning in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, where the majority concluded that the Commonwealth executive had the power to respond to the global financial crisis, given the unified nature of the Australian fiscal system and the inability of the states to respond: at 63 [133] (French CJ), 89 [233] (Gummow, Crennan and Bell JJ).

[201] JA La Nauze, 'A Little Bit of Lawyers' Language: The History of "Absolutely Free" 1890–1900' in AW Martin (ed), *Essays in Australian Federation* (Melbourne University Press, 1969) 57, 70.

[202] See above Part III(B).

[203] See also the general statement by Anne Twomey:

> Eligibility to obtain rights and benefits within a State that are associated with citizenship, such as the right to vote and the right to receive State financial assistance, are based upon the dual requirements of Australian citizenship and residence within a State. The same is the case with the burdens associated with citizenship, such as the responsibility to attend for jury duty.

Wolters Kluwer, *IEL Constitutional Law* (online at 8 June 2022) Sub-National Constitutional Law, 'Australia' [287]. Compare the importance of residence for the purpose of the federal franchise, with diaspora provisions in operation with respect to other national voting schemes: Jean-Michel Lafleur, *Transnational Politics and the State: The External Voting Rights of Diasporas* (Routledge, 2013). See, eg, at 1, 10–11.

[204] See above nn 158–74 and accompanying text.

at the heart of s 117. That is, the demotic or political identity of 'the people' in the states is protected against a uniform national identity.

IV Conclusion

State identity has come to the fore in the legal and political response to the COVID-19 pandemic in Australia. In this article, I have addressed the constitutional category of the 'people of the states' to capture the salient legal features which determine the identity of those peoples, and their roles and status within the federal Commonwealth. The peoples of the states are the constitutional descendants of the historically constitutive peoples of the colonies.[205] The peoples of the states are — like the peoples of the colonies — distinct, territorially bounded communities. The territorial nature of the people of the states is found in the constitutional text and related case law. Given the guarantee of freedom of movement across state borders, people in the states are able to change their place of residence or 'home', and therefore their state identity. Thus, the individuals who make up the peoples of the states are fungible. This ability of an individual to unilaterally influence one's own constitutional status is an intriguing consequence of the case law and adds to the disparate ways in which the High Court understands a variety of constitutional categories.

There are various statuses under the *Constitution* that are associated with the concept of 'the people'. In this article, I have addressed the category of the 'people of a state', as well as the interaction between that category and the 'people of the Commonwealth'. There are other categories which implicate membership and exclusion under the *Constitution*. The main category of membership is 'subject of the Queen' seen in ss 34(ii) and 117. The category of exclusion is that of 'alien' in s 51(xix), which is the basis for the *Migration Act 1958* (Cth) and therefore determines who can be deported. Prior to the 1980s, the 'immigrant' category in s 51(xxvii) was the basis for migration regulation.[206] Across those categories there are a range of approaches adopted by the High Court which either allow a person to exercise a measure of self-identification, or where the status is ascribed by law and by the acts of the state. For example,

[205] But noting the complication that some of those people are now territorians due to the creation of the Australian Capital Territory and the Northern Territory: see above nn 13–14 and accompanying text.

[206] For an explanation of these categories and their interaction with membership and exclusion under the *Constitution*, and with citizenship law, see Rayner Thwaites, *Report on Citizenship Law: Australia* (Country Report 2017/11, May 2017) <https://cadmus.eui.eu/bitstream/handle/1814/46449/RSCAS_GLOBALCIT_CR_2017_11.pdf?sequence=1&isAllowed=y>, archived at <https://perma.cc/MW5Y-YB8J>; Elisa Arcioni, 'Constituting Citizenship: The Evolution of Australian Citizenship Law' (2020) 84 *Studies in Law, Politics and Society* 1.

immigrant status is affected by the extent to which an individual is a substantive part of the Australian community, such that the way in which a person lives their life — where, with what interactions with others, etc — can affect whether or not they are a constitutional 'immigrant'.[207] In contrast, the High Court has made clear that with respect to the alien category, a person's subjective feelings of belonging and the way they are thought of by others have no impact on their status as an alien or otherwise.[208] There is a complicating element recently developed by the High Court whereby aboriginality — defined according to a three-part test which explicitly includes self-identification and community recognition — takes a person outside the alien category.[209] The way in which the High Court's reasoning considered in this article allows an individual some autonomy in relation to their membership of a people of a particular state adds to this complicated tapestry of the interaction between an individual and their constitutional status.

At the heart of the constitutional identity of the peoples of the states are the political roles of those peoples. This is another point of commonality between the peoples of the states and the peoples of the colonies. The people of the colonies were the *historically* constitutive people, through their involvement as electors in approving the *Constitution*.[210] The peoples of the states have *ongoing* constitutive power under the *Constitution*. The peoples of the states have guaranteed representation in federal Parliament and have protected voting rights as federal electors both for Members of Parliament and in constitutional referenda.

The key difference between the peoples of the states and those of the colonies is that the states exist within a federal Commonwealth. Therefore, the peoples of the states have dual Australian identities — as distinct peoples of each state as well as collectively as the people of the Commonwealth. The peoples of

[207] See the case law which addresses the absorption doctrine, including *Potter v Minahan* (1908) 7 CLR 277 and *Donohoe v Wong Sau* (1925) 36 CLR 404.

[208] A recent such statement was that of Nettle J, noting

> established jurisprudence that, generally speaking, alienage has nothing to do with a person's experience or perception of being connected to the Australian territory, community or polity, or with an actual or perceived absence of connection to another country.

Chetcuti (First Instance) (n 5) 10 [39] (footnotes omitted). See also Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 172 [26]: 'The concept of absorption into the Australian community, vague as it may be … does not mean that a person has lost the status of an alien'.

[209] See the reasoning of the majority in *Love* (n 5): at 190 [74] (Bell J), 253–4 [271]–[272] (Nettle J), 262 [296] (Gordon J), 314 [451], 316 [454] (Edelman J). See also Michelle Foster and Kirsty Gover, 'Determining Membership: Aboriginality and Alienage in the Australian High Court' (2020) 31(2) *Public Law Review* 105.

[210] Aroney (n 26) 338.

the states are therefore less separate than the peoples of the colonies were, as a result of those colonial peoples having agreed to unite in a federal Commonwealth. This dual identity is captured by O'Connor J's comment in *Attorney-General (NSW) ex rel Tooth & Co Ltd v Brewery Employés Union of New South Wales*:

> The *Constitution* recognizes that in respect of the exercise of State powers each State is under the Crown an independent and autonomous community. Similarly the States must recognize that in respect of the exercise of Commonwealth powers all State boundaries disappear and there is but one community, the people of the Commonwealth.[211]

While the colonial peoples were united in their membership of the British Empire, and each equally subject to limitations on self-government such as arising from the *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63, the peoples of the states have a unified identity as people of the national Commonwealth. That identity was created by the *Constitution* and has survived the disintegration of the Empire and Australia's independence from the United Kingdom.[212]

The peoples of the states are at the core of that national Commonwealth people and hence central to the identity of 'the people' of the *Constitution*. The key references to 'the people' in the text of the *Constitution* are to the peoples of the states acting as electors. The protected and guaranteed nature of the constitutive powers of the peoples of the states — a key indicator of the demotic or political character of 'the people' — is not extended to federal electors outside the states. This illustrates the centrality of the peoples of the states to the Australian constitutional 'people'.

The peoples of the states also have dual identities — as distinct peoples within their respective states and — collectively — as the national people of the Commonwealth. In this article, I have focused on the state identity of those peoples, leaving a detailed analysis of the national component of that identity and the detailed interactions between them for future explication. The dual identities require ongoing negotiation, as federal and national concerns can be in tension and are subject to High Court determination regarding when one overrides the other. In what circumstances might federal–national tensions arise that touch upon the dual identities of the people? From past examples,

211 (1908) 6 CLR 469, 552 ('*Union Label Case*').

212 While Britain retained a reservation and disallowance power in ss 59–60 of the *Constitution*, and allowed for appeals to the Judicial Committee of the Privy Council in s 74, those provisions are now dead letters, and from, at the latest, 1986, Australia has been legally independent of the United Kingdom in relation to all governmental powers, as discussed in *Sue v Hill* (1999) 199 CLR 462, 490–7 [60]–[82] (Gleeson CJ, Gummow and Hayne JJ).

including recent COVID-19-related controversies, the most obvious occasions will be when a state seeks to protect its state boundary, people and distinct policies, to the exclusion of people from outside the state, and, possibly, in contrast to other states (or territories) or the Commonwealth. That is, when a state border, state affiliation or state residence becomes a legal criterion for the operation of a law, against the interests of individuals from outside the state. In those circumstances, there may be a challenge to the validity of the state law. The main lines of challenge would likely focus on discrimination, inequality, and expectations of national unity.

From as early as 1908, members of the High Court have noted the unity of the Australian people.[213] Recognition of the national identity of 'the people' has continued throughout the history of the Court.[214] We can see the centralisation of power — both in terms of legislative competence and financial dominance. The High Court has rejected the reserved powers doctrine (which protected state legislative power), to understand Commonwealth legislative powers in a broad manner, with inevitable consequences on state legislative freedom.[215] At the same time, the Court has adopted doctrines which are protective of the ongoing existence and functioning of the states as distinct self-governing polities with control over their own political structures.[216] As addressed above, the Court has recognised exceptions to constitutional rules which on their face look like limitations on the power of states to privilege their residents over out-of-state residents.[217]

The unity of the Australian people can be understood as a default position, matched with the trade and finance provisions of the constitutional text seeking to create one market and the establishment of a national Parliament to rule over the whole country. However, this underlying national unity is neither fixed nor without exception and does not exist untethered from constitutional provisions. As a matter of constitutional reasoning, the High Court will only

[213] *Union Label Case* (n 211) 552 (O'Connor J).

[214] See, eg, *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J).

[215] See *Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 154 (Isaacs J for Knox CJ, Isaacs, Rich and Starke JJ). An example of the breadth of Commonwealth legislative power can be seen in *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*'): see, eg, at 73–4 [54] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[216] This is particularly the case in relation to the limits on Commonwealth legislative power: see, eg, *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 60 (Latham CJ), 66 (Rich J), 75 (Starke J), 81–3 (Dixon J); *Austin v Commonwealth* (2003) 215 CLR 185, 249 [124] (Gaudron, Gummow and Hayne JJ). This limitation was more recently addressed in *Fortescue Metals* (n 156) 609 [130] (Hayne, Bell and Keane JJ) and *Spence v Queensland* (2019) 268 CLR 355, 420–1 [105]–[108] (Kiefel CJ, Bell, Gageler and Keane JJ).

[217] See above nn 184–95 and accompanying text.

recognise a limitation on power that is seen on the face of the constitutional text, or which exists as a necessary implication from the text and structure of the *Constitution*. Any challenge to a state law seeking to protect its people will therefore first have to be sourced in a limitation securely based in the *Constitution*. For example, a concept of national unity arising from Federation will not be given a life of its own in order to strike down state legislation — as we see from the clear statements of the Court in *Gerner v Victoria*.[218] In that case, Julian Gerner unsuccessfully challenged the Victorian emergency powers being exercised under legislation in response to the COVID-19 pandemic.[219] Gerner argued that the legislation infringed an implied freedom of movement, purportedly drawn from the *Constitution*, because

> federation produced 'one people, one nation, where there had been several peoples and several colonies'. Freedom to move wherever one wishes for whatever reason was said to follow, it being the essence of being a community or society or nation that the people can know each other.[220]

The Court rejected this argument, finding that it had no foundation in the text and structure of the *Constitution*, and therefore it would be contrary to established judicial method to imply such a restriction on power.[221] Instead, absent clear foundation in a more direct limitation on power, the state would retain its own intrastate legal autonomy. This is consistent with the rejection by the High Court of any general implication of equality[222] and is supported by the doctrine developed in relation to maintaining the ongoing existence of distinct state polities.

How then could a challenge to state-based distinctions be supported under the *Constitution*? The answer comes most likely from the sections referred to in this article — ss 92 and 117. Those sections both establish a default position against interstate discrimination: s 92 preventing discrimination against interstate trade, commerce and intercourse, s 117 preventing discrimination on the basis of state residence. In relation to both sections, the High Court has recognised legitimate exceptions. We can see that those legitimate exceptions revolve around the distinctive constitutional identity of the state peoples. Returning to the key elements noted above, we see the definition of state identity in the fact that the people of each state constitute a territorially defined community. The

[218] (2020) 270 CLR 412.

[219] Ibid 418–19 [1]–[4], 429 [35] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

[220] Ibid 397 [11] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

[221] Ibid 422–3 [14]–[17], 428–9 [30]–[34] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

[222] *Leeth v Commonwealth* (1992) 174 CLR 455, 467 (Mason CJ, Dawson and McHugh JJ).

territorially distinct nature of the peoples of the states means that the state government or Parliament can use state borders, or residence within the state, as a legitimate means to impose restrictions which operate differentially on people from within and outside the state. Differential treatment is permissible to the extent that it is as a result of legitimate attempts to protect the state people — whether that be from a threat such as the COVID-19 virus or other threats which affect the safety, health and wellbeing of a state community. Differential treatment is also permissible if on the basis of identifying the political or demotic roles of a state people and denying those roles to out-of-state individuals. We can see the political roles of people in a state forming the core exception to s 117. Thus, when questions of electoral law are at play, states will be particularly able to discriminate against out-of-state individuals who cannot call upon a protected position as a political agent within a state.

The dual federal and national identities of the state peoples can lead to tensions. The existing case law suggests that the key concepts to resolve any tension between those identities include the guaranteed ongoing existence of the states as entities — with their own distinct peoples, and with weight given to the political roles of the state peoples within their state. As we continue to experience the impacts of COVID-19, and the diverse political reactions by state governments in their efforts to protect their own peoples, these elements may yet come to the fore in further disputes between individuals, states and the Commonwealth. It would be a brave litigant who would seek to rely on the unity of the Australian people without taking into account the strong federalist concerns that continue in our constitutional law.