REMEMBERING AUSTRALIAN CONSTITUENT POWER

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The constituent power of the Australian people has long been neglected. This article will turn to the transnational history of the Australian founding period to provide a clearer understanding of Australian constituent power. This history shows that the Australian framers adopted a version of constituent power borrowed from the American tradition of constituent power and which gives the people legal sovereignty to alter constitutional law outside of Parliament but in a way regulated by law. Remembering this constituent power tradition holds both conceptual and practical lessons for the way we understand Australia's constitutional order and the way that the Australian people exercise their constituent power to alter their constitutional order. In particular, it shows the importance of separating Australian constitution-making from ordinary, parliamentary politics. It therefore suggests that a fully-elected convention for drafting proposed constitutional amendments could revitalise the people's role in constitutional change. Furthermore, it also demonstrates the broader importance of theorising a constituent power tradition that allows the people to make constitutional law outside of Parliament but in a cooperative process regulated by ordinary law and institutions.

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I Introduction

Constituent power is the source of power to create the constitutional order. In democracies, this power is indisputably vested in 'the people'.[1] For many years, constituent power has been associated with continental European thinkers such as Sieyès and Schmitt.[2] They argue that the only true way for the people to exercise their constituent power is to give the people legal sovereignty to remake their constitutional orders in a revolutionary process that breaks with the

[1] Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press, 2020) 30–5 ('*Constituent Power and the Law*').

[2] George Duke and Carlo Dellora, 'Constituent Power and the Commonwealth Constitution: A Preliminary Investigation' (2022) 44(2) *Sydney Law Review* 199, 202: 'Histories of constituent power generally grant centre stage to Sieyès and Schmitt.'

existing legal order.[3] This continental European tradition has had a powerful impact on the practice of recent constitutional change in Latin America.[4]

But this is not the only tradition of constituent power. In the British tradition of parliamentary sovereignty, the people's constituent power is exercised by Parliament.[5] In this tradition, the people only exercise *political* sovereignty to act through parliamentary representation. In the United States, the people have the legal sovereignty to exercise their constituent power outside of ordinary legislative politics but in a process that cooperates with — rather than supersedes — ordinary law.[6] In this American tradition, therefore, the people exercise their legal sovereignty through a *cooperative* constitution-making process.

This American 'constituent power through law' tradition is critical to understanding the role of the people in Australia's constitutional order. In 1891, Australian constitution-making appeared to have failed.[7] But this process was given new life when Australian colonial legislatures passed enabling Acts creating a specially-elected constitutional convention that would propose a draft to the people in a series of colonial referendums.[8] This process then led to a constitution that gave the Australian people — and not Parliament — the constituent power of 'altering' the *Constitution*.[9]

This constitutional order therefore gave the Australian people a form of *legal* sovereignty similar to that in the American tradition: the constituent power to make constitutional law outside of Parliament but in cooperation with ordinary

[3] Joel I Colón-Ríos et al, 'Constituent Power and Its Institutions' (2021) 20(4) *Contemporary Political Theory* 926, 928–9, 932–3; Joel Colón-Ríos, 'The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform' (2010) 48(2) *Osgoode Hall Law Journal* 199, 240 ('The Legitimacy of the Juridical').

[4] Raffael N Fasel, 'Constraining Constituent Conventions: Emmanuel Joseph Sieyès and the Limits of *Pouvoir Constituant*' (2022) 20(3) *International Journal of Constitutional Law* 1103, 1109–11.

[5] Martin Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 27, 28; Alan Greene, 'Parliamentary Sovereignty and the Locus of Constituent Power in the United Kingdom' (2020) 18(4) *International Journal of Constitutional Law* 1166, 1183–6.

[6] William Partlett, 'The American Tradition of Constituent Power' (2017) 15(4) *International Journal of Constitutional Law* 955, 981–3 ('The American Tradition of Constituent Power').

[7] John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press, 2000) 105–24 ('*The Sentimental Nation*').

[8] *Australasian Federation Enabling Act 1895* (NSW) s 32 ('*NSW Enabling Act*'); *Australasian Federation Enabling Act 1895* (SA) s 33 ('*SA Enabling Act*'); *Australasian Federation Enabling Act 1896* (Tas) s 33 ('*Tas Enabling Act*'); *Australasian Federation Enabling Act 1896* (Vic) s 33 ('*Vic Enabling Act*'); *Australasian Federation Enabling Act 1896* (WA) s 28 ('*WA Enabling Act*').

[9] *Australian Constitution* s 128.

law and institutions.[10] This cooperative form of legal sovereignty challenges the conventional wisdom that the Australian people exercise a weak version of popular sovereignty understood 'in the late 19th-century British constitutional sense' and which is therefore derived from parliamentary sovereignty.[11] It therefore helps to understand how to improve the process of constitutional amendment. In particular, it shows the importance of separating Australian constitution-making from ordinary, parliamentary politics. It therefore suggests that partisan processes of amendment centred around the political party that controls Parliament are a mistake.[12] Instead, it suggests that a specialised convention convened by Parliament that is elected by the people to draft constitutional changes could help to revitalise the Australian people's constituent power to alter their constitutional text.[13]

Australian constituent power has been neglected because of the flawed assumption that 'constituent power' requires revolutionary popular change.[14] This assumption demonstrates the importance of theorising the constituent power through law tradition and its cooperative form of constitutional politics. This tradition offers a normatively attractive theory of constitutional lawmaking in functioning democracies by disentangling constitutional politics from ordinary politics while also avoiding the dangers of revolutionary process unregulated by existing institutions.[15] Furthermore, this tradition is necessary for any conception of constituent power to operate in a federal democracy. It

[10] See Benjamin B Saunders and Simon P Kennedy, 'Popular Sovereignty, "the People" and the Australian Constitution: A Historical Reassessment' (2019) 30(1) *Public Law Review* 36, 56–7; Duke and Dellora (n 2) 221–2. Duke and Dellora argue that constituent power has an 'uneasy fit with the Australian constitutional tradition': at 202.

[11] Saunders and Kennedy (n 10) 57, describing the role of popular sovereignty in the Australian founding but placing that exercise of power within the British tradition of parliamentary sovereignty. See Duke and Dellora (n 2) 202.

[12] See Lael K Weis, 'Constituting "the People": The Paradoxical Place of the Formal Amendment Procedure in Australian Constitutionalism' in Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, 2017) 253, 262–4.

[13] This specialised institution could also cooperate with other deliberative institutions for consulting the people such as citizens' assemblies: see Ron Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change' (2010) 34(3) *Melbourne University Law Review* 805, 813.

[14] See Duke and Dellora (n 2) 202, arguing that constituent power requires a revolutionary expression of popular power.

[15] See William Partlett and Zim Nwokora, 'The Foundations of Democratic Dualism: Why Constitutional and Ordinary Politics Are Different' (2019) 26(2) *Constellations* 177, 177, describing the nature of dualist democracy.

therefore adds to recent work suggesting the ways constituent power can and should be exercised through law.[16]

To make this argument, this article will be divided into five further parts. Part II will describe the different traditions of democratic constituent power in democracies around the world. Part III will describe the historical evolution of the American tradition of 'constituent power through law'. Part IV will remember how this American tradition shaped the Australian constitutional order. Part V will explain why remembering this transnational influence helps to better understand the nature of Australia's constitutional system where the people hold legal sovereignty to make their constitutional order. This better understanding suggests that a fully-elected drafting convention could revitalise the exercise of Australian constituent power. Part VI will describe how the Australian example shows the broader possibilities and problems of exercising constituent power through law.

II Different Traditions of Constituent Power

Constituent power describes the source of authority for creating a new constitutional order. In democracies, the people indisputably have the supreme constituent power.[17] But the way in which the people exercise this constituent power obscures 'many complexities'.[18] A key overlooked complexity is the way in which the people's fundamental constituent power is practised in different historical contexts. Theorists have long argued that the exercise of constituent power requires a revolutionary process involving a unitary pre-constitutional people which breaks with the existing constitutional order.[19] This theory of constituent power is not universal, however, but is instead drawn from the continental European tradition.[20] Competing traditions of constituent power exist in other democratic traditions. In systems of British-style parliamentary sovereignty, the people's constituent power is absorbed into Parliament.[21] In the United States (and, as we will see, Australia), the people have the constituent power to act outside the legislature, but they must cooperate with law and

[16] Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge University Press, 2017) 103–5; Colón-Ríos, *Constituent Power and the Law* (n 1) 295.

[17] Colón-Ríos, *Constituent Power and the Law* (n 1) 30–5.

[18] Mark Tushnet, 'Constitution-Making: An Introduction' (2013) 91(7) *Texas Law Review* 1983, 1985–9.

[19] See Partlett, 'The American Tradition of Constituent Power' (n 6) 955–6.

[20] See ibid 959–63.

[21] Loughlin (n 5) 28; Greene (n 5) 1183–6.

the existing constitutional system.[22] These different traditions are outlined in Table 1.

Table 1: Different Traditions of Constituent Power

	Institutional Exercise of Constituent Power	Legal Regulation of Constituent Power	Position of the People
Continental European Tradition	In specially-elected assemblies and referendums.	Specialised institutions with unlimited legal power.	Legal sovereignty through a revolutionary process.
British Parliamentary Sovereignty Tradition	In Parliament.	Parliamentary lawmaking.	Political sovereignty through parliamentary representation.
American (and Australian) Tradition	In specially-elected assemblies and referendums.	Specialised institutions regulated by ordinary law and institutions.	Legal sovereignty through a cooperative process.

A *Continental European Tradition: The People's Revolutionary Legal Sovereignty*

The dominant theoretical understanding of constituent power — grounded on continental European constitutional thinkers like Sieyès and Schmitt, and recently influential in Latin America — holds that the people exercise their constituent power to make constitutional law through a revolutionary process involving extraordinary institutions unlimited by law (or ordinary institutions like the legislature).[23] This approach to constituent power envisions a *dualist* constitutional order in which the people operate in two capacities.[24] First, during times of ordinary politics, the people operate through ordinary

[22] Partlett, 'The American Tradition of Constituent Power' (n 6) 955–8.

[23] Arato (n 16) 80–1, 88–90. See also Lars Vinx, 'The Incoherence of Strong Popular Sovereignty' (2013) 11(1) *International Journal of Constitutional Law* 101, 102: 'The people as constituent power is taken to exist prior to and apart from all law, including constitutional law, and is taken to have the right to give itself whatever constitution it pleases.'

[24] Emmanuel Joseph Sieyès, *What Is the Third Estate?*, ed SE Finer, tr M Blondel (Pall Mall Press, 1963) 154–5 (emphasis omitted), describing how the people — or the 'nation' as he calls them — act in two capacities in a democracy.

representative politics and constituted institutions (like parliament) to make ordinary law.[25] Second, during times of constitutional politics, the people exercise their *legal sovereignty* to act through extra-parliamentary institutions such as constitutional conventions and referendums in a revolutionary process unconstrained by law or existing institutions.[26] If law does constrain or regulate these institutions, the logic goes, then their true 'original' constituent power has not been exercised.[27] Instead, some form of derived or delegated constituent power is exercised.[28]

In practice, this revolutionary tradition of constituent power centres around sovereign constituent assemblies.[29] These assemblies are the only institutions that are associated with true constituent power and, as sovereign bodies, cannot be limited by law.[30] Andrew Arato summarises this approach as follows:

> [S]overeign constitution making involves the making of the constitution by a constitutionally unbound, sovereign constituent power, institutionalized in an organ of government, that at the time of this making unites in itself all of the formal powers of the state, a process that is legitimated by reference to supposedly unified, pre-existing popular sovereignty.[31]

As the representatives of the people, these sovereign assemblies are unconstrained by law. They are therefore seen as 'a gathering of the nation'[32] that allows the people to 're-activat[e] [their] constituent power and becom[e] the author[s] of a radically transformed constitutional regime'.[33] This specialised institution is about 'recognizing a power superior to the constitution and giving citizens, acting outside the ordinary institutions of government, the institutional means to exercise it'.[34] The unlimited nature of the power of this body is

[25] Partlett and Nwokora (n 15) 177.

[26] Ibid 180.

[27] See Yaniv Roznai, 'Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea' (2013) 61(3) *American Journal of Comparative Law* 657, 665.

[28] See ibid.

[29] See Colón-Ríos et al (n 3) 926–7.

[30] Joel Colon-Rios and Allan C Hutchinson, 'Democracy and Revolution: An Enduring Relationship?' (2012) 89(3) *Denver University Law Review* 593, 599; Christian G Fritz, *American Sovereigns: The People and America's Constitutional Tradition before the Civil War* (Cambridge University Press, 2008) 291, arguing that the idea of the rule of law is 'inconsistent with the notion that a sovereign people could not be bound even by a fundamental law of their own making'.

[31] Arato (n 16) 31 (emphasis omitted).

[32] Yash Ghai, 'The Role of Constituent Assemblies in Constitution Making' (Issue Paper, International Institute for Democracy and Electoral Assistance, 2006) 10.

[33] Colón-Ríos, 'The Legitimacy of the Juridical' (n 3) 240.

[34] Ibid.

critical proof that this body is the true representative of the original or direct constituent power of the people.

This approach to constituent power has been closely associated with the revolutionary tradition and is seen as necessary to overcome the status quo problem.[35] This problem stems from a status quo elite which dominates the ordinary institutions of the state (eg the legislature) and can use law to block any exercise of constitutional change.[36] This undemocratic use of law and the constituted institutions ultimately has led many constitutional theorists to argue that only a revolutionary process that creates an institution with unlimited power adequately reflects the true sovereign constituent power of the people.[37]

B *Parliamentary Sovereignty: The People's Political Sovereignty*

In other democratic contexts with systems of parliamentary sovereignty, the people's constituent power is exercised exclusively by the legislature (parliament).[38] This kind of constitutional system has been described as a 'monist' one, with one undisputed supreme legal body (the legislature or parliament) that has the authority to make both ordinary and constitutional law.[39] The people can only act through parliamentary representation. Any extra-legislative attempt to remake the constitutional order is purely a *political* force that pressures the legislature to take legal action.[40]

A key theorist in this tradition is AV Dicey, who made a critical distinction between the legal and political sovereignty of the people. Dicey argued that parliament had full legal sovereignty, with

> the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[41]

[35] William Partlett, 'Expanding Revision Clauses in Democratic Constitutions' in Gabriel L Negretto (ed), *Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives* (Cambridge University Press, 2020) 53, 53 ('Expanding Revision Clauses').

[36] Ibid 56–7.

[37] See ibid 57.

[38] Loughlin (n 5) 28; Greene (n 5) 1183–6.

[39] See Stephen Tierney, *The Federal Contract: A Constitutional Theory of Federalism* (Oxford University Press, 2022) 84; Greene (n 5) 1169–70.

[40] See Greene (n 5) 1192–7.

[41] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 39–40.

This includes the parliamentary power to make constitutional law. By contrast, the people only exercise *political sovereignty*.[42] This means that any extra-parliamentary forms of popular representation (eg referendums or constitutional conventions) have no legal effect and are only advisory.[43]

C *American Tradition of Constituent Power: The People's Cooperative Legal Sovereignty*

In the United States constituent power tradition, the people have the legal sovereignty to make constitutional law outside the legislature through extraordinary institutions like constitutional conventions or referendums.[44] This tradition therefore envisions a dualist constitutional order. But there is a critical difference between this American tradition of constituent power and the continental approach described above: the extraordinary institutions that are used in constitutional politics to channel the power of the people are limited by ordinary law. Thus, in the American tradition, the legal sovereignty of the people is expressed through a *cooperative* process in which extra-parliamentary institutions such as constitutional conventions and referendums are regulated by ordinary law and institutions.[45]

From the founding period onward, Americans were committed to a form of democratic dualism where the people's constituent power is placed outside of the legislature and in specialised forms of representation (constitutional conventions and referendums).[46] But while the Americans saw the people's constituent power to be unlimited, they did not see the people's exercise of this legal sovereignty as requiring a revolutionary process.[47] Instead, the people's constituent power was to be exercised in a way that cooperated with existing institutions and was limited by law.[48] Critically, the specialised constitutional drafting body (called a convention) was not a sovereign institution with unlimited legal power. Instead, it was limited by law and existing institutions.[49]

The Americans justified this cooperative process with the logic of agency law and popular representation.[50] This logic begins with the premise that the

[42] See Colón-Ríos, 'The Legitimacy of the Juridical' (n 3) 233.

[43] But see Greene (n 5) 1192–7.

[44] Partlett, 'The American Tradition of Constituent Power' (n 6) 956.

[45] See Partlett and Nwokora (n 15) 187.

[46] Ibid 180.

[47] Partlett, 'The American Tradition of Constituent Power' (n 6) 957.

[48] Ibid 964–6.

[49] Ibid.

[50] Ibid 964.

people themselves can never act without representation. Given this fact, the people (the 'principal' in agency terms) must use law to ensure that they can control their representatives (the 'agent') and therefore retain their sovereign status. To delegate their full unlimited constituent power to a body of representatives (the 'agent') would make those representatives sovereign and *not* the people as a whole or the people at large.[51]

Thus, agency principles require that the people only be able to delegate part of their sovereign power to a convention — in this case, the power to *propose* a constitution. The people then reserve the remainder of their sovereign power to ratify or reject the constitutional draft proposed by the constitutional convention in a duly constituted (and legally organised) referendum process. This in turn allows the people to better screen their constitution-making agents by ensuring that they will represent the people as a whole and not a partisan faction. The following part will describe the historical development of this American constituent power through law tradition.

III The Origins of the Constituent Power through Law Tradition

The constituent power through law tradition is forgotten and under-theorised. This part will begin the process of remembering this tradition of constituent power through law by tracing its origins in Anglo-American constitutional practice. This historical development helps better understand the justifications of a constituent power tradition in which the people act outside of parliament through extra-parliamentary institutions but in a cooperative process regulated by law.

A *Origins*

The American tradition of constituent power has its origins in extra-parliamentary claims of constituent power made in Britain in the 17th century. During this period, the Levellers claimed that the people had *legal* sovereignty to remake their constitutional order outside of Parliament.[52] They were interested in 'the ways in which the people might express their ultimate authority outside of [Parliament]'.[53] They focused much of their rhetorical attention on the 1660 and

[51] Ibid 957.

[52] DJ Galligan, 'The Levellers, the People, and the Constitution' in DJ Galligan (ed), *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (Oxford University Press, 2014) 122, 125–6.

[53] Loughlin (n 5) 36.

1688 'convention parliaments', which were not lawfully formed by the King but were convened to render fundamental changes to British constitutional arrangements.[54]

Claims that these convention parliaments embodied the people were later muted in British constitutional theory, as the theory of parliamentary sovereignty held that the people could only legally act through Parliament.[55] This obfuscation was driven in part by the idea that there never should be a legal exercise of constituent power outside Parliament.[56] As time went on, therefore, the 'convention' parliaments were viewed as 'temporary device[s] to deal with unusual circumstances'.[57] They were therefore 'lesser or inferior' bodies because the Stuart parliamentarians were careful not to 'elevate a convention over a parliament'.[58]

Despite constituent power being absorbed into Parliament, the practice of extra-parliamentary attempts did not fully disappear in Britain. In the 18th and 19th centuries, the concept of an 'anti-Parliament' arose: a gathering of people in an irregular assembly (sometimes elected) that sought to put political pressure on the existing Parliament to do something.[59] These assemblies were often called 'conventions' but were never seriously viewed as having legal power to displace Parliament; instead, they exercised political sovereignty and were therefore 'a further means of arousing public opinion, and of intimidating parliament into making reforms'.[60] A good example was '[t]he chartist "General Convention of the Industrious Classes"' which met in London in February 1839.[61] This convention met in order to determine ways to get the six key principles of the *People's Charter* implemented.[62] A critical strategy was to use this convention to place *political* pressure on Parliament to expand the franchise.[63]

[54] Ibid 40–2.

[55] Ibid 42–3.

[56] Duke and Dellora (n 2) 200.

[57] Hirst, *The Sentimental Nation* (n 7) 125.

[58] Ibid 125–6.

[59] TM Parssinen, 'Association, Convention and Anti-Parliament in British Radical Politics: 1771–1848' (1973) 88 (July) *English Historical Review* 504, 504–5.

[60] Ibid 515.

[61] Ibid 521.

[62] Preston William Slosson, *The Decline of the Chartist Movement* (AMS Press, 1968) 12–13.

[63] Thomas Milton Kemnitz, 'The Chartist Convention of 1839' (1978) 10(2) *Albion* 152, 169.

B *American Practice*

The Americans further developed this British practice of extra-parliamentary constituent power in the 18th and 19th centuries. Founding-era Americans rejected parliamentary sovereignty and its concept that the people only held political sovereignty to act through parliamentary representation.[64] Instead, they argued that the people had legal sovereignty to act outside Parliament and alter their constitutional order.[65] To do this, they drew on the earlier British practice of 'convention' parliaments by arguing that specially-elected constitutional 'conventions' must be convened to draft new constitutions.[66] These special and irregular institutions would allow the people to exercise their inherent legal sovereignty to draft the *United States Constitution* and therefore elevate it above ordinary law.

The Americans explicitly rejected the possibility, however, that these conventions would be revolutionary institutions that would be uncontrollable by ordinary law and institutions.[67] They instead adopted a theory of representation that argued that the sovereign legal power of the people could never be delegated to a single body of representatives (even a special one like a convention).[68] Such delegation, they argued, would usurp the constituent power of the people. As a contemporaneous source stated, 'it would be an absurd surrender of liberty to delegate full powers to any set of men whatever'.[69] The Massachusetts General Court proclaimed that '[s]omewhere, a Supreme, Sovereign, absolute, and uncontroulable Power' must exist, '[b]ut this Power resides, always in the body of the People, and it never was, or can be delegated, to one Man, or a few'.[70]

Gordon Wood explains that founding-era Americans were developing a special concept of representation in which the '[t]he power of the people outside of the government was always absolute and untrammeled' but the power of their delegates 'could never be'.[71] JGA Pocock argues that the founding-era Americans never delegated full power to one body but instead 'asserted that there was a plurality of modes of exercising power and that every one of these

64 See Partlett, 'The American Tradition of Constituent Power' (n 6) 963.

65 Ibid.

66 See ibid 956.

67 Ibid 957.

68 Ibid 963.

69 Gordon S Wood, *The Creation of the American Republic: 1776–1787* (University of North Carolina Press, 1998) 388.

70 Ibid 362, quoting Oscar Handlin and Mary Handlin (eds), *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Belknap Press, 1966) 65.

71 Wood (n 69) 389.

… constituted a separate mode in which the people chose to be represented'.[72] The Philadelphia Convention that drafted the new *United States Constitution* was similarly limited in power. James Wilson described how the Convention was 'at liberty to propose any thing' but 'authorized to conclude nothing'.[73] Charles Pinckney argued that the Convention was 'authorized to go any length, in *recommending*, which they found necessary to remedy the evils which produced this Convention'.[74]

This position was reaffirmed in the post-Civil War period (after the secession conventions in the American South relied on revolutionary claims of unlimited power to secede from the United States). In the leading treatise on American constitutional conventions, John Jameson argued that the people could only delegate the exercise of their sovereign power 'within prescribed limits, or for a determinate time or purpose'.[75] This fact meant that a *constitutional* convention includes delegates who act 'under a commission, for a purpose ascertained and limited by law or by custom'.[76] An American convention, he concluded, is therefore always a creature of law and charged with 'definite' functions of 'never supplant[ing]' the existing organisation and 'never govern[ing]'.[77]

Jameson's work drew on Daniel Webster's earlier arguments from the *Luther v Borden* case that legal authorisation for a convention was needed to ensure that the convention is acting on behalf of the people.[78] Webster explained that the American practice clearly required some 'authentic mode' of determining that the body was a true agent of the whole people.[79] This connection between the voice of the people and its authentic agent, he argued, is 'not so easily discovered'.[80] Any authentic process of popular representation (even limited) must

[72] JGA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 2016) 521.

[73] Max Farrand (ed), *The Records of the Federal Convention of 1787* (Yale University Press, 1911) vol 1, 253 (emphasis omitted).

[74] Jonathan Elliot (ed), *Debates on the Adoption of the Federal Constitution* (JB Lippincott, 1891) vol 5, 197 (emphasis added).

[75] John Alexander Jameson, *A Treatise on the Principles of American Constitutional Law and Legislation: The Constitutional Convention* (EB Myers, 2nd ed, 1869) 21.

[76] Ibid 10.

[77] Ibid.

[78] Ibid 225, 229–30, citing *Luther v Borden*, 48 US (7 How) 1, 31–2 (Webster) (during argument) (1849) ('*Luther*').

[79] *Luther* (n 78) 31.

[80] Ibid 32.

be determined through law and the results are to be 'certified to the central power by some certain rule … in some clear and definite form'.[81]

The Americans justified limitations on the powers of these extra-parliamentary institutions in the logic of agency law.[82] If we see the people as the 'principal' and their institutions as the 'agent', the people should not delegate their full power to an agent. It then makes sense for the people to limit the power of their specialised agents to ensure a better process of screening.[83] This process provides 'a kind of mechanism … through which new power is constantly generated, without, however, being able to overgrow and expand to the detriment of other centres or sources of power'.[84] This in turn is more likely to generate what George Washington called an 'explicit and authentic' expression of the people's constituent power.[85]

This American approach to constituent power has largely been forgotten because the legal sovereignty of the people has long been assumed to require a revolutionary process.[86] At the federal level in the United States, a fear of popular constitution-making has meant that the Supreme Court of the United States has become the institution that amends the *United States Constitution* in response to changing public opinion through interpretation.[87] But, at the state level in the United States, the people continue to play a direct role in making and remaking their constitutions.[88] In fact, the American states have developed this tradition into a 'common law' of constituent power which recognises the power of the people to act through specialised constitution-making institutions that are regulated by law to alter their constitutional orders.[89] The next part will show how this forgotten tradition of constituent power through law shaped the Australian constitutional order.

[81] Jameson (n 75) 228.

[82] See generally Susan D Carle, 'Why the US Founders' Conceptions of Human Agency Matter Today: The Example of Senate Malapportionment' (2022) 9(3) *Texas A&M Law Review* 533.

[83] In so doing, they solve the problem of agency costs that arises from an unlimited agent of popular power: see generally Larry J Merville and Dale K Osborne, 'Constitutional Democracy and the Theory of Agency' (1990) 1(3) *Constitutional Political Economy* 21.

[84] Hannah Arendt, *On Revolution* (Penguin Books, 1963) 151–2.

[85] Kermit L Hall, 'David E Kyvig, *Explicit and Authentic Acts: Amending the US Constitution, 1776–1995*' (1997) 41(4) *American Journal of Legal History* 487, 487, quoting G Washington, Address to the People of the United States, *Claypoole's American Daily Advertiser* (Philadelphia, 19 September 1796) 2–3.

[86] See Partlett, 'The American Tradition of Constituent Power' (n 6) 956.

[87] See Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux, 2009) 5, 14.

[88] Partlett, 'The American Tradition of Constituent Power' (n 6) 981, discussing the common law of constituent power in the United States.

[89] Ibid 981–2.

IV Remembering Constituent Power in the Australian Founding

Constituent power is rarely discussed in the Australian context. Even when Australian courts and scholars acknowledge the role of the Australian people, they have resisted the term 'constituent power' and argue that the Australian people exercise a 'weaker notion' of *political* sovereignty which is consistent with Diceyan parliamentary sovereignty.[90] This part will challenge this conventional account by remembering the role of the people in the Australian founding period and the constitutional text that period produced.

A *The Conventional Story: The Australian People's Political Sovereignty*

Constituent power has been neglected in the Australian context. This is understandable because of the conventional understanding of constituent power as requiring revolutionary popular change.[91] Australia's constitutional order is clearly not revolutionary. On the contrary, it was founded by the Imperial Parliament and achieved its independence incrementally.[92] To declare that the Australian people had a *revolutionary* form of legal sovereignty would certainly be a dangerous departure from Australia's constitutional tradition.[93]

Given this, the role of the people in Australia's incrementalist, non-revolutionary tradition has long been assumed to be similar to the position of the people in the British tradition of parliamentary sovereignty.[94] In fact, it is still commonplace to refer to the Australian constitutional order as developing out of Diceyan parliamentary sovereignty.[95] In an influential book describing the Australian constitutional order, Leslie Zines argues that the Australian 'tradition of parliamentary supremacy' comes from Australia's 'British traditional heritage'.[96] A group of leading academics makes a similar point, stating that

[90] See, eg, Duke and Dellora (n 2) 202, 220, arguing that constituent power is an uneasy fit in Australian constitutional law.

[91] See ibid 202.

[92] *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9. See Scott Bennett, 'Australia's Constitutional Milestones' (Chronology No 1, Parliamentary Library, Parliament of Australia, 12 October 1999) 5–6 <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/prspub/TLG06%22>, archived at <https://perma.cc/2A2G-XUDD> ('Australia's Constitutional Milestones').

[93] See Duke and Dellora (n 2) 207.

[94] Ryan Goss, 'What Do Australians Talk about when They Talk about "Parliamentary Sovereignty"?' [2022] (January) *Public Law* 55, 62–5, describing how Australians frequently describe their constitutional order as coming from parliamentary sovereignty or supremacy.

[95] Ibid 62–5, 70–4.

[96] Leslie Zines, *The High Court and the Constitution* (Butterworths, 3rd ed, 1992) 339.

'parliamentary sovereignty' is one of 'at least five fundamental principles which underlie the Australian constitutional system', though it has 'a qualified meaning in Australia and must be understood together with the principle of judicial review'.[97]

The ongoing influence of parliamentary sovereignty has led scholars to conclude that the Australian people exercise what Dicey termed political sovereignty. Benjamin Saunders and Simon Kennedy acknowledge the historical importance of the people in the Australian founding period but argue that the Australian founders understood the popular sovereignty of the Australian people 'in the late 19th century British constitutional sense'.[98] They therefore conclude that the Australians accepted the 'standard orthodoxy' of the legal sovereignty of Parliament alongside the political sovereignty of the Australian people.[99] George Duke and Carlo Dellora argue that even the High Court's post-1992 statements about the people are compatible with this 'weaker' conception of popular sovereignty.[100] This leads them to the conclusion that there is 'little sense' in understanding Australia in terms of the 'constituent power of the people that intermittently awakes from its slumber in extraordinary political moments'.[101] The persistent influence of parliamentary sovereignty in understanding s 128 of the *Australian Constitution* and Australian constituent power has even led some to argue that constituent power is vested in Parliament.[102] Not all scholars have been so cautious. Elisa Arcioni has recently stressed the

> commitment to popular involvement in the constitution-making process, which leads to 'the people' being regarded as a source of authority for the constitution.[103]

[97] Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 32.

[98] Saunders and Kennedy (n 10) 57.

[99] Ibid 54.

[100] Duke and Dellora (n 2) 221–2, describing the people as a 'political sovereign'.

[101] Ibid.

[102] Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16(2) *Sydney Law Review* 213, 217, arguing that, even after the *Australia Act 1986* (Cth) and *Australia Act 1986* (UK) (together, '*Australia Acts*'),

> [s]ection 128 establishes a procedural condition precedent to the exercise of the constituent power vested in the Commonwealth Crown-in-Parliament, not an alternative locus of sovereign authority.

Fraser also later hints that the Commonwealth Parliament could alone amend the *Constitution*: Fraser (n 102) 217–18.

[103] 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, 424.

Her work, however, leaves open the precise legal role of the people in the Australian constitutional system.

The High Court has not taken a clear position on the actual nature of Australian constituent power. Initially, it too was heavily influenced by the categories of parliamentary sovereignty in understanding the role of the Australian people.[104] This stemmed from the historical fact at the time that the *Australian Constitution* was a 'statute of the British Parliament' and 'not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority'.[105] Since Australia formally became independent from the United Kingdom ('UK') in the 1980s and the High Court admitted that the *Constitution* draws its authority from the Australian people,[106] the Court has not explained the precise role of the people in Australia's constitutional order.[107] In a recent landmark case, a plurality of justices described 'the people of the Commonwealth as the sovereign political authority'.[108] But the Court did not explain the precise nature of this sovereignty. Justice Keane has explicitly referenced the 'political sovereignty' of the people of the Commonwealth.[109] Others have taken a different position, with McHugh J writing that '[s]ince the passing of the *Australia Act* (UK) in 1986 … the political and legal sovereignty of Australia now resides in the people of Australia'.[110]

B *The Historical Story: The Australian People's Legal Sovereignty*

Constitutional history and text show, however, that the Australian people hold more than just political sovereignty in their constitutional order. In fact, the American tradition of constituent power helps to better understand the process and writing of the *Australian Constitution*. A turn to specially-elected conventions and referendums helped to revitalise the process of drafting the *Constitution* in the 1890s by better engaging the people. It also helped create s 128 of the *Constitution*, which placed constituent power in the hands of the Australian people. Understood in its historical context, s 128 gives the Australian people

104 See Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32(1) *Federal Law Review* 57, 58–62.

105 Owen Dixon, 'The Law and the Constitution' (1935) 51 (October) *Law Quarterly Review* 590, 597.

106 See GJ Lindell, 'Why Is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29, 49.

107 Duke and Dellora (n 2) 224–6.

108 *Clubb v Edwards* (2019) 267 CLR 171, 191 [29] (Kiefel CJ, Bell and Keane JJ).

109 *Tajjour v New South Wales* (2014) 254 CLR 508, 604 [236].

110 *McGinty v Western Australia* (1996) 186 CLR 140, 230.

a form of legal sovereignty to alter their constitutional order (in cooperation with Parliament).

The drafting of the *Australian Constitution* began with the 1890 Australasian Federation Convention that was appointed by the colonial legislatures and that drafted a constitution.[111] This parliamentary-dominated process produced a draft constitution that included a democratically elected lower house and an appointed senate.[112] But this draft was rejected by the colonial legislatures and declared dead.[113] At this stage, the constitutional project of Australian federation looked to be over.[114]

In response, bottom-up pressure from federation leagues and other groups began to push for federation.[115] At the Corowa Conference of 1893, John Quick proposed a new process to draft a constitution.[116] He suggested a fully-elected, specialised convention to draft an Australian constitution followed by a series of referendums. His motion called for

> the Legislature of each Australasian colony [to] pass an Act providing for the election of representatives to attend a statutory Convention or Congress to consider and adopt a Bill to establish a Federal Constitution for Australia, and upon the adoption of such Bill or measure it [to] be submitted by some process of referendum to the verdict of each colony.[117]

The proponents of the plan argued that constitution-making would now be a process where '[t]he people would be in charge and not the politicians'.[118]

The Premier of New South Wales, George Reid, immediately saw the potential for this new kind of popular representation, describing it as creating a 'pulse … beating between the electors and the members of the convention'.[119] He went on to argue that '[s]urely … if ever there was a competent tribunal to

111 Helen Irving, 'Introduction' in Helen Irving (ed), *The Centenary Companion to Australian Federation* (Cambridge University Press, 1999) 1, 8–9.

112 Ibid 9.

113 Ibid 10.

114 Hirst, *The Sentimental Nation* (n 7) 105.

115 Brendan G O'Keefe, 'The Origins and Growth of the Popular Federation Movement in the Murray River Border Area: 1892–93' (2000) (5) *New Federalist* 11, 21, arguing that there can be 'no doubt' that the federation movement in the Murray River border area 'originated with and was sustained by local people'.

116 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 153.

117 Ibid.

118 Hirst, *The Sentimental Nation* (n 7) 123.

119 Ibid 128, citing 'Australian Federation: Deputation to the Premier', *The Sydney Morning Herald* (Sydney, 13 November 1894) 3.

frame a constitution for a nation, it should be a convention chosen by the future nation itself'.[120] A Minister in Reid's government described an elected convention in American terms, arguing that 'the people who created the parliaments have the right to withdraw so much of their powers as relate to federation and place them elsewhere'.[121]

Inspiration for this process likely came from James Bryce's influential book, *The American Commonwealth*, which was highly admired by many of the Australian drafters involved in the federation movement.[122] This book had been published in 1888, just as the federation movement was getting underway, and received glowing reviews from *The Argus* and *The Sydney Morning Herald*.[123] This book was 'quoted or referred to more than any other single work' during the drafting period of the 1890s and 'was regarded with the same awe, mingled with reverence, as the Bible would have been in an assembly of churchmen'.[124]

Bryce's book contains an entire appendix chapter on the role of constitutional drafting conventions in the American tradition of constituent power through law.[125] Bryce describes how a specialised constitution-making convention is not a sovereign convention because its powers 'invariably are … limited by the statute under which the people elect it'.[126] Limited by law, it operates 'merely [as] an advisory body, which prepares a draft of a new constitution and submits it to the people for their acceptance or rejection'.[127] He goes on to say that these conventions are 'not necessarily elected on party lines or in obedience to party considerations'.[128] Instead, these institutions are proposing bodies that do not legislate and 'need not fear to ask the people to enact what may offend certain persons or classes, for the odium, if any, of harassing these classes will rest with the people'.[129]

120 Hirst, *The Sentimental Nation* (n 7) 136, quoting New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 1895, 1919 (George Reid).

121 Hirst, *The Sentimental Nation* (n 7) 136–7, citing New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 November 1895, 2376 (Joseph Cook).

122 Stephen Gageler, 'James Bryce and the *Australian Constitution*' (2015) 43(2) *Federal Law Review* 177, 182; Harry Evans, 'Bryce's Bible: Why Did It Impress the Australian Founders?' (2001) (8) *New Federalist* 89, 89, describing Bryce's book as the 'bible' of Australian Federation.

123 Gageler (n 122) 182.

124 JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 273. See also at 19.

125 James Bryce, *The American Commonwealth* (Liberty Fund, 1995) vol 1, 606–9.

126 Ibid vol 1, 606.

127 Ibid.

128 Ibid vol 1, 607.

129 Ibid vol 1, 608.

The process Bryce described was closely followed when the Australian colonial parliaments passed enabling Acts in the 1890s to create a specialised drafting convention.[130] These Acts determined both voting rules for the convention as well as the powers and procedures of its operation.[131] Each colony (except for Western Australia) passed an Act for electing 10 delegates to the convention, and each colony was to comprise one electoral district.[132] In New South Wales, a key provision also made it clear that '[u]nless … otherwise prescribed', elections shall be held in accordance with New South Wales electoral law.[133] The specialised convention was also limited in power as its draft constitution needed to be authorised by the electors in each colony (in all but Western Australia this was legislated as a referendum) and then by the Imperial Parliament.[134] Finally, each enabling Act gave the colonial parliaments a chance to consider and comment on the draft before it was put to the electors in each colony.[135]

This process was criticised at the time for breaking with Diceyan parliamentary sovereignty. Some worried that the use of a specialised, extra-parliamentary convention was a dangerous circumvention of parliamentary control.[136] They argued that an elected, national constitutional convention followed by a series of ratification referendums was 'illegal'[137] and 'pure democracy'.[138] Even Henry Parkes — a key supporter of federation — argued that it was 'preposterous to talk of a mob of people making a constitution for the state'.[139] But these

[130] *NSW Enabling Act* (n 8) s 32; *SA Enabling Act* (n 8) s 33; *Tas Enabling Act* (n 8) s 33; *Vic Enabling Act* (n 8) s 33; *WA Enabling Act* (n 8) s 28.

[131] *NSW Enabling Act* (n 8) ss 6, 13; *SA Enabling Act* (n 8) ss 6, 12; *Tas Enabling Act* (n 8) ss 6, 14; *Vic Enabling Act* (n 8) ss 6, 13; *WA Enabling Act* (n 8) ss 6, 11.

[132] See above n 131. The *WA Enabling Act* (n 8) was the only one to not give the vote to the electorate. It instead stated that the Members of the Parliament of Western Australia would choose the delegates: s 6. Anyone qualified to vote could be nominated as a delegate: s 14.

[133] *NSW Enabling Act* (n 8) s 40.

[134] Ibid pts II–III; *SA Enabling Act* (n 8) pts II–III; *Tas Enabling Act* (n 8) pts II–III; *Vic Enabling Act* (n 8) pts II–III. By contrast, Western Australia originally stated that Parliament would authorise the proposed draft before seeking authorisation from the Imperial Parliament: *WA Enabling Act* (n 8) pt II.

[135] *NSW Enabling Act* (n 8) ss 26–7; *SA Enabling Act* (n 8) ss 26–7; *Tas Enabling Act* (n 8) ss 26–7; *Vic Enabling Act* (n 8) ss 26–7; *WA Enabling Act* (n 8) s 23.

[136] Hirst, *The Sentimental Nation* (n 7) 129; John Hirst, 'A Novel Convention: Adelaide 1897' (1998) (1) *New Federalist* 5, 8, describing how John Downer and William McMillan strongly criticised the specially-elected convention for being an 'attack on the British Constitution'.

[137] Hirst, *The Sentimental Nation* (n 7) 136.

[138] Ibid 142.

[139] Ibid 129.

objections were ultimately overruled. In the end, an elected group of special representatives assembled to draft a new constitution in Adelaide in 1897.

This specialised convention met three times in total (in Adelaide, Sydney, and Melbourne) and transformed the pre-existing constitutional draft. At the first meeting in Adelaide, the delegates agreed that the purpose of Australian federation now was 'to enlarge the powers of self-government of the people of Australia'.[140] The draft that was ultimately adopted included a number of democratic changes that acknowledged the central role of the Australian people. The Preamble described 'the people' — and no longer 'the Australasian colonies' as in a prior draft — as creating the *Constitution*.[141] It required not just the lower house but also the upper house of Parliament to be 'directly chosen by the people',[142] banned plural voting,[143] and required Members in the House of Representatives (the more representative body) to be twice the number of Senators.[144]

Most importantly, a provision in the new constitutional draft (which would become s 128 of the *Constitution*) gave the Australian people (and not Parliament) legal sovereignty to alter the *Constitution*.[145] Under the rules of this provision, a double majority of the Australian people had the power to alter the *Constitution*. The drafters saw this text as a clear expression of the Australian people's constituent power.[146] In his summary of the constitutional draft in the Melbourne Convention, Edmund Barton (who would soon become Australia's first Prime Minister) described this provision as one of the 'greatest advances' of the proposed constitution on the prior draft because 'the people themselves' are now 'free to alter the *Constitution* themselves, care only being taken that it is done deliberately and faithfully'.[147]

The future s 128 of the *Constitution* drew clearly on the American tradition of constituent power through law. The people play a fundamental role in constitutional alteration in cooperation with Parliament. At least one house of

[140] Quick and Garran (n 116) 166.

[141] La Nauze (n 124) 128, 185, describing how this change triggered comment in Britain that '[t]he wording of this preamble is likely to give rise to some observation in the Imperial Parliament'.

[142] *Australian Constitution* ss 7, 24.

[143] Ibid ss 8, 30.

[144] Ibid s 24.

[145] W Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 328, comparing the *Australian Constitution* with the *United States Constitution* and stressing how the people 'play a direct part' in 'every function of government' in the *Australian Constitution*.

[146] See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 717 (Isaac Isaacs) ('*9 February Convention Debates*').

[147] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 17 March 1898, 2475 (Edmund Barton).

Parliament is required to allow the people to decide on any constitutional change. Further, Parliament regulates the referendum process. In addition, the constituent power through law tradition was critical in guaranteeing that the Australian people remained constituted legally along federal lines. This provision's double majority rule — requiring not just a majority of Australians but also a majority in a majority of Australian states — reflects Australia's federal distribution of power.[148]

The future s 128, however, did not reflect constituent power at the Australian founding. The Australian people acting through extraordinary conventions and referendums in 1897 and 1898 did not themselves exercise legal sovereignty. Instead, the Imperial Parliament held the legal power to make the Australian constitutional order at the time.[149] Arriving in London, the delegates from Australia stressed the popular nature of the process to place political pressure on the Imperial Parliament to adopt the draft constitution in an unaltered form, arguing that 'the constitution, having been approved by the Australian people, could be altered only by them'.[150] The Colonial Office in London, however, made it clear that the British Parliament would not become 'a mere registry office for Australian decrees'.[151] The Colonial Office therefore put the Bill to Parliament with a key change that allowed appeals to the Privy Council.[152] In response, the Australians threatened to walk away because of the failure to accept the Australian draft.[153] Further, the British Opposition Leader opposed changes to the draft constitution in the language of constituent power in Parliament, calling it 'an open rebuff to the Australian people'.[154] A compromise was eventually reached, which is now s 74 of the *Constitution*.[155]

The Australian people's constituent power was therefore only activated once the *Australian Constitution* itself came into effect. Although there is some debate about the remaining constituent power of the UK Parliament to alter Australian constitutional law after 1901, any such UK parliamentary power clearly ended with the signings of the *Australia Act 1986* (Cth) and *Australia Act 1986*

148 See Nicholas Aroney, 'Constituent Power and the Constituent States: Towards a Theory of the Amendment of Federal Constitutions' (2017) 17 *Jus Politicum* 5, 11–12 ('Constituent Power and the Constituent States').

149 Weis (n 12) 259.

150 Hirst, *The Sentimental Nation* (n 7) 237.

151 Ibid.

152 Ibid 241.

153 Ibid.

154 Ibid.

155 This provision altered the draft by allowing appeals to the Privy Council but required the High Court to certify questions involving 'the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States': *Australian Constitution* s 74.

(UK).[156] Since at least then (and most likely earlier), s 128 has given the Australian people legal sovereignty to exercise their constituent power to alter the *Constitution* through a cooperative process including law.

C *Conclusion*

This history therefore helps to more fully understand the evolving role of the Australian people in their constitutional system. In 1901, Australia's constitutional system was born in an act of constituent power by the UK Parliament.[157] At that stage, the Australian people only enjoyed political sovereignty. But, after that, the Australian people gained legal sovereignty to alter the *Constitution* in s 128 (through law).[158] This constituent power, however, has remained obscured behind the powerful influence of Diceyan categories of parliamentary sovereignty as well as the assumption that the people's constituent power requires a revolutionary process of popular constitution-making. The next two parts will explore the implications of remembering this Australian constituent power through law tradition.

V Understanding and Revitalising the Role of the People in Australia's Constitutional Order

Remembering Australia's constituent power tradition has important ramifications for understanding the nature of Australia's constitutional system and reinvigorating the Australian people's constituent power today. It demonstrates that the people have legal sovereignty to make constitutional law in a special form of extra-parliamentary representation that cooperates with ordinary law and institutions. This legal sovereignty suggests a practical way of reinvigorating the people's role in constitution-making: convening a fully-elected convention for drafting proposed amendments to the *Constitution*.

156 George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) *Federal Law Review* 1, 8–9 ('Popular Sovereignty and Constitutional Continuity'), describing how at least since the *Australia Acts* (n 102) (and likely earlier), the Australian people have the sole constituent power to alter the *Constitution*.

157 Bennett, 'Australia's Constitutional Milestones' (n 92), citing *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12.

158 Winterton, 'Popular Sovereignty and Constitutional Continuity' (n 156) 8–10.

A *The Legal Sovereignty of the Australian People*

Remembering the history and textual basis of Australian constituent power helps us more fully understand the role of the people in Australia's constitutional order. Put simply, it shows that the Australian people have more than just political sovereignty to act through Parliament in altering the *Constitution*. Instead, they possess *legal sovereignty* to decide on particular constitutional changes in a cooperative process involving ordinary law and institutions.

Although Parliament plays an important role in this exercise of the Australian people's legal sovereignty, s 128 of the *Constitution* makes it clear that the Australian people (and not Parliament) are the foundational players in constitution-making. Only the Australian people acting through a referendum can alter the *Constitution*. Moreover, both houses of Parliament need not agree on a proposed constitutional change for it to be considered by the people. If Parliament is deadlocked on a proposed constitutional change, one house can send a proposed change to the people (if it votes to do so twice over a three-month period).

The importance of the one-house rule can be seen in its drafting history. Isaac Isaacs (future High Court justice and Governor-General) introduced this rule as a way to allow the people to ultimately decide on constitutional change if Parliament was deadlocked.[159] He argued that this one-house rule was needed to avoid the rigidity of the American amendment process and ensure that 'the political development of the Commonwealth shall keep pace with the social and commercial development of the people'.[160] Major figures such as Alfred Deakin and the Premier of New South Wales, George Reid, agreed.[161] This one-house rule, however, faced strong criticism from those committed to the categories of Diceyan parliamentary sovereignty. John Downer, for instance, described this provision as 'destroy[ing] one of the Houses'.[162] Many others joined

[159] *9 February Convention Debates* (n 146) 717–18 (Isaac Isaacs).

[160] Ibid 759.

[161] Ibid 727–8 (Alfred Deakin). See also at 735 (George Reid):

> The Senate will be a a [sic] popular body springing from the people of the states; and surely the representatives of all the states, if they agree that a certain amendment of the *Constitution* should be proposed to the people, should not be blocked by the representatives of the nation in the House below.

[162] Ibid 725 (Sir John Downer).

in.[163] They were ultimately overruled as the one-house rule is now a key part of s 128.[164]

Section 128 of the *Constitution*, therefore, fundamentally breaks with the 'monism' of Diceyan parliamentary sovereignty which makes Parliament the key institution for constitutional change.[165] Australia's system of constituent power therefore is such a significant modification of Diceyan parliamentary sovereignty that it produces a 'misleading sense' of the actual role of the Australian people in their constitutional order.[166] As the next section will argue, the assumptions about popular involvement which accompany parliamentary sovereignty have helped to undermine the ability of Australian people to alter their constitutional order.

B *Revitalising Australian Constituent Power through a Specialised Drafting Convention Elected by the People*

Remembering the legal sovereignty of the Australian people has the potential to revitalise the Australian people's exercise of their power to alter the *Constitution* by showing how to design a better constitutional amendment process.[167] In particular, it shows that the Australian people can and, I will argue, should more fully realise their legal sovereignty by formulating new constitutional law norms outside of Parliament by electing representatives to a specialised constitution-making convention.

During the founding period, the Australian framers repeatedly hoped that the Australian people could renew or correct any mistakes made in the initial *Constitution*.[168] They therefore wanted a system of constituent power that would avoid the rigidity of the *United States Constitution*. Section 128 of the *Australian Constitution* was written for this purpose. After the *Constitution* was

[163] Ibid 729 (Bernhard Wise), 730 (Henry Dobson), 731 (Josiah Symon).

[164] See generally Harry Hobbs and Andrew Trotter, 'The Constitutional Conventions and Constitutional Change: Making Sense of Multiple Intentions' (2017) 38(1) *Adelaide Law Review* 49. This one-house rule was ultimately restored in the final constitutional text to secure New South Wales' ratification of the draft constitution in the second round of colony-based referendums: at 80, citing Quick and Garran (n 116) 218.

[165] See Bruce Ackerman, 'Constitutional Politics/Constitutional Law' (1989) 99(3) *Yale Law Journal* 453, 463–4.

[166] Goss (n 94) 73–4. See also Paul Finn, 'A Sovereign People, a Public Trust' in PD Finn (ed), *Essays on Law and Government* (Law Book, 1995–96) vol 1, 1, 13.

[167] Although beyond the scope of this article, the fact that the Australian people exercise legal sovereignty also helps to support the High Court's interpretative implications from ss 7 and 24 of the *Constitution*: see generally William Partlett, 'Remembering Australian Constitutional Democracy' (Unpublished Manuscript, The University of Melbourne).

[168] *9 February Convention Debates* (n 146) 718–19 (Isaac Isaacs).

adopted in 1901, a prominent scholar assumed that the Australian people would frequently use their constituent power under s 128 to alter their constitutional arrangements. In fact, he worried that this provision would lead to the 'habit of tinkering' with the *Constitution*.[169]

But since Federation, the Australian people have rarely exercised their constituent power to alter the *Constitution*. In over 120 years, only eight amendments (out of 45) have been successful under s 128.[170] This has led Geoffrey Sawer to refer to Australia as '[c]onstitutionally speaking … the frozen continent'.[171] The failure of constitutional amendment has stemmed from a number of complex factors.[172]

A key cause is the fact that 'the amendment process has been captured by parliamentary politics'.[173] In particular, the brooding omnipresence of Diceyan parliamentary sovereignty and its monist assumptions have led most constitutional lawmaking processes to be dominated by Parliament and the party that forms the government. For instance, since Federation, proposals to amend the *Constitution* have been generated by institutions partially or fully appointed by Parliament.[174] In 1921, the Hughes government introduced a Bill (ultimately abandoned) to establish a constitutional convention with 75 popularly-elected delegates and 36 other delegates, half of whom would be nominated by the Commonwealth Parliament and half by the state parliaments.[175]

Another example of this problem was the failed amendment proposals of the mid-1980s. These proposals were generated by a Constitutional Commission appointed by the Hawke Labor government in 1985.[176] Although this Commission included a number of eminent people, its proposed amendments

169 Moore (n 145) 332.

170 'Referendum Dates and Results', *Australian Electoral Commission* (Web Page, 7 November 2023) <https://www.aec.gov.au/elections/referendums/referendum_dates_and_results.htm>, archived at <https://perma.cc/2CML-PQPS>.

171 Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

172 See, eg, RD Lumb, 'Methods of Constitutional Revision in the Federal Sphere: An Elected Constitutional Convention?' (1992) 22(1) *University of Western Australia Law Review* 52, 53, describing how the desire to centralise has been another key reason why referendums have been unsuccessful.

173 Weis (n 12) 262. A lack of bipartisanship and popular ownership are key factors in Australia's failed referendums: see George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 106–98.

174 Hobbs and Trotter (n 164) 60–1.

175 Cheryl Saunders, 'The Parliament as Partner: A Century of Constitutional Review' (Research Paper No 3, Parliamentary Library, Parliament of Australia, 15 August 2000) 15, discussing Constitution Convention Bill 1921 (Cth) cl 5.

176 Saunders (n 175) 16.

failed in part because they were viewed as Labor proposals.[177] The 1998 republican movement also reflected this problem.[178] The proposal for a republic was devised in a specialised convention that was only half-elected.[179] The remainder were either appointed by government (36) or were members of the national and state parliaments (40).[180] This convention proposed a minimalist model that would replace the Queen with a head of state elected by a two-thirds majority of the Parliament.[181] The yes/no referendum campaign became a partisan battle between the Australian Republican Movement (arguing 'yes') and Australians for Constitutional Monarchy (arguing 'no').[182] The 'no' camp was also able to label the republic model as 'fundamentally elitist'.[183] For instance, Tony Abbott told a town hall meeting that the proposed procedure by which an Australian president would be chosen amounted to a 'Mickey Mouse public nominations committee comprising politicians and mates of politicians'.[184]

Remembering Australian constituent power can help to address some of these problems. In particular, it suggests that Australia should fully embrace its dualist tradition and disentangle constitutional lawmaking from parliamentary politics. A specialised, fully-elected constitutional convention created by Parliament (perhaps in response to bottom-up pressure from the people) to draft constitutional proposals would do just that, unlocking a new form of representation that could change the way that the constitution-making process is conducted and understood. The creation of a fully-elected drafting convention is a straightforward process for the Commonwealth Parliament. Parliament clearly has constitutional power to legally convene this kind of convention through the

177 See John McMillan, 'Constitutional Reform in Australia' (Papers on Parliament No 13, Department of the Senate, November 1991) 68–70.

178 Saunders (n 175) 24–5. The exception that proves the rule is the 1967 referendum on amending the *Constitution* which deleted s 127 of the *Constitution* and gave the Commonwealth power to legislate with respect to Indigenous Australians under s 51(xxvi) of the *Constitution*: see Weis (n 12) 266–8.

179 George Winterton, 'Australia's Constitutional Convention 1998' (1998) 5(1) *Agenda* 97, 103 ('Australia's Constitutional Convention 1998').

180 Ibid 104.

181 Brenton Holmes, 'Tracking the Push for an Australian Republic' (Background Note, Parliamentary Library, Parliament of Australia, 24 April 2013) 38.

182 Ibid 4.

183 Ibid 8, quoting George Williams and David Hume, 'Convincing a Nation of Naysayers', *The Sydney Morning Herald* (online, 11 September 2010) <https://www.smh.com.au/politics/federal/convincing-a-nation-of-naysayers-20100910-154ux.html>, archived at <https://perma.cc/QR4A-TKEE>.

184 Gerard Henderson, 'The Truth about Politicians', *The Sydney Morning Herald* (Sydney, 25 January 2000) 19.

incidental power under s 51(xxxix) of the *Constitution*.[185] The Commonwealth enabling Act to create this specialised drafting convention would then regulate its activities by, for instance, containing the key procedures and dates for the election of the deputies to this convention, as well as details about the voting requirements and length of the constitution-making assembly. This specialised body would then generate a set of proposed constitutional changes. These proposals would then follow the rules of s 128 of the *Constitution*, being proposed by an absolute majority in either both houses or one house (twice) and then going to a nationwide referendum (requiring a double majority).

Australia's founding history shows how this specialised convention would then likely impact both the drafting and ratification stages of constitutional reform. At the drafting stage, its new form of representation is likely to bring in representatives and debate better suited to the project of constitutional reform. Next, at the ratification stage, it can help to improve the likelihood of successful constitutional reform by ensuring that the draft is viewed as the product of a special form of constitutional politics.

C *A New Kind of Representation*

A specially-elected, constitutional drafting convention creates a new form of political representation. Because these bodies are temporary and are focused on one issue (drafting constitutional amendments), they can 'avoid the "noise" of "regular politics"'.[186] In addition, elections for a specialised constitution-making body can encourage the participation of those who have played or would like to play a key role in constitutional lawmaking rather than ordinary lawmaking.

In the 1890s, this was clear in the representatives that ran and were chosen for the 1897–98 Convention. The elections to the Constitutional Convention included for the first time a woman and a Catholic cardinal.[187] Moreover, the

[185] Another mechanism would be for the states to refer their power over a convention to the Commonwealth. Another approach would be to formally introduce a proposing convention into the *Australian Constitution*.

[186] Partlett, 'Expanding Revision Clauses' (n 35) 65; Ruth Gavison, 'Legislatures and the Phases and Components of Constitutionalism' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) 198, 206. This different form of representation was arguably on show in the deliberative process of constitutional drafting by Indigenous Australians that produced the *Uluru Statement from the Heart* (Statement, First Nations National Constitutional Convention, 26 May 2017) ('*Uluru Statement from the Heart*'): Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501, 502–8, describing the bottom-up process of formulating proposed constitutional text.

[187] Hirst, *The Sentimental Nation* (n 7) 147.

elections themselves returned individuals who, although Parliamentarians, were themselves particularly involved with the federation movement.[188] For instance, John Quick was returned second in Victoria for his 'contribution to the federal cause'.[189] James Walker — an expert in federal finance and outsider to ordinary politics — was also elected to the Convention.[190] These individuals were critical in changing the direction of Australian constitution-making. In New South Wales, the cause of constitution-making 'benefited enormously' by being removed from ordinary politics.[191]

D *Changing the Debate*

Specially-elected conventions — particularly if they are paired with other forms of deliberative democracy such as citizens' assemblies or structured consultation — can also help to disentangle constitutional discussions from ordinary politics and change the nature of the debate.[192] This is the natural product of a form of representation that involves an election campaign focused on constitution-making process and that involves candidates interested in broader constitutional issues and questions. This is critical to separating constitutional lawmaking from ordinary lawmaking and further fostering a general public discussion about the fundamental constitutional rules of politics.

This was the case in Australian constitution-making in the 1890s. The decision to create one electoral district for each colony changed the nature of the debate by severing the link between constitutional drafting and local political concerns. In particular, it was able to transcend some of the ordinary political issues that threatened to undermine the process. In New South Wales, for instance, the contentious debate over free trade and protectionist policies was 'more or less laid aside'.[193] In addition, the fully-elected body had a completely different approach to constitution-making from the first meeting in Adelaide. At the first meeting of this fully-elected convention, George Turner, the Premier

188 Ibid 142. See Helen Irving, '"Old Familiar Hacks", Just When They're Needed: The NSW Delegation' (1998) (1) *New Federalist* 39; Peter A Howell, 'The Strongest Delegation: The South Australians at the Constitutional Convention of 1897–98' (1998) (1) *New Federalist* 44; Scott Bennett, 'The Tasmanians: The Convention Election' (1998) (1) *New Federalist* 51; Geoffrey Bolton, 'The Western Australians: A Silent Majority' (1998) (1) *New Federalist* 57.

189 Hirst, *The Sentimental Nation* (n 7) 146.

190 Ibid.

191 Ibid 144.

192 See Levy (n 13) 813.

193 Hirst, *The Sentimental Nation* (n 7) 144.

of Victoria, set the tone by advocating a number of voting guarantees that ensured that the people could hold the Parliament to account.[194]

E *A New Political Dynamic*

A specially-elected constitution-making assembly also carries important symbolic power that can increase the chances of success of proposed constitutional changes at the ratification stage. Although it is notoriously hard to ensure full-scale popular participation in any political process, a well-designed and well-run convention will make it harder for any proposed change to be described as a partisan proposal drafted by one political party. Instead, proposed changes are more likely to be seen as the product of the people, particularly if the convention generates significant bottom-up political interest. This can help to increase the chances of general acceptance by the population in a referendum.

The historical precedent of the 1890s supports this: a key driver of the ultimate success of the draft constitution in the referendums was the new, more popular process of constitution-making. The first draft constitution was created by a convention appointed by the parliaments of each colony and completed in five weeks.[195] This draft drew heavily on the British parliamentary sovereignty and included an appointed upper house, allowed ministers to sit outside Parliament, and placed very few constitutional guarantees of representative democracy.[196] This draft constitution, however, generated little interest and was ultimately abandoned.[197]

By contrast, the second draft was produced by a specially-elected body which meant it was less likely to be seen as elitist or partisan.[198] In fact, the convention attracted popular submissions, with numerous petitions from civic groups (such as women's groups) considered during the conventions.[199] A key argument for those advocating a 'yes' vote on the new constitution was that the document was the product of '[t]he people, not the politicians'.[200] In the campaign, many stressed how the proposed constitution created the 'most democratic' federation in existence.[201] For instance, Alfred Deakin argued that the

194 La Nauze (n 124) 118.

195 Hirst, *The Sentimental Nation* (n 7) 99–101.

196 See, eg, *Official Report of the National Australasian Convention Debates*, Sydney, 9 April 1891, 946, 955.

197 See Hirst, *The Sentimental Nation* (n 7) 117.

198 See La Nauze (n 124) 94–5; ibid 124–5, 248–71.

199 Hirst, *The Sentimental Nation* (n 7) 149.

200 Ibid 124.

201 Ibid 185.

draft was grounded in the democratic legitimacy of a federal convention that was the first to represent all of Australia.[202] This appeal to the Australian people was important in convincing Melbourne's most influential newspaper, *The Age*, to finally support the constitutional draft. For years, the editor of *The Age*, David Syme, had believed that federation had anti-democratic tendencies, and *The Age* had opposed the first constitutional draft.[203] But the democratic process and substance itself helped to finally sway the newspaper, and played a critical role in ratification.[204]

F *Conclusion*

A fully-elected and specialised drafting convention could therefore help to solve a key problem underlying Australia's failed referendums: the domination of ordinary parliamentary lawmaking processes in the formulation of new constitutional norms, and the resulting perception that proposed constitutional changes are elitist or partisan. The new form of representation contained in these conventions has the potential to capture the kind of broader popular consensus that should be at the basis of constitutional lawmaking.

VI Broader Implications of the Tradition of Constituent Power through Law

Remembering Australia's constituent power tradition also demonstrates the importance of theorising the constituent power through law tradition. This tradition offers a normatively attractive approach in relatively well-functioning democracies for unlocking the people's constituent power without initiating a revolutionary track of politics. It therefore contributes to other theoretical efforts to understand how constituent power can be regulated by law. For instance, Andrew Arato writes that constituent power is better exercised through a multistage, post-sovereign process that is regulated by law.[205] Similarly, Joel Colón-Ríos has recently argued that constituent power is an 'eminently juridical concept' that can be exercised through law.[206]

Moreover, it helps to better understand constitution-making experiences around the world. Many democratic nations have rejected the revolutionary

[202] Ibid 182–3, quoting Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause 1880–1900*, ed JA La Nauze (Melbourne University Press, 2nd ed, 1963) 177–9.

[203] Hirst, *The Sentimental Nation* (n 7) 178–9.

[204] Ibid 179–84.

[205] Arato (n 16) 417–18.

[206] Colón-Ríos, *Constituent Power and the Law* (n 1) 295.

continental European tradition and instead engaged the people's constituent power through law.[207] Perhaps the best recent example is the closely watched constitutional replacement process in Chile. This drafting process was centred around a specialised constitutional convention elected by the people but legally created and limited by the Chilean legislature.

A *Advantages*

A key advantage of the constituent power through law tradition is that it helps to minimise the dangers of a revolutionary form of constitutional lawmaking. In particular, it avoids a serious problem associated with the continental European tradition: that a majoritarian faction will capture this revolutionary process, claim to represent the people, and 'run away' with the process. Once in control, this faction can set up the formal constitutional order in a way that entrenches them in power.

This problem of revolutionary constitution-making by 'We the Majority' and not 'We the People' is more than just a theoretical one.[208] This problem has emerged in constitution-making practice around the world.[209] A classic example is Venezuela in 1999, where President Hugo Chávez issued a decree calling for a referendum to ask the people whether to call a constituent assembly to 'transform the state and to create a new juridical order that would allow for the effective functioning of a social and participatory form of democracy'.[210] Chávez then took advantage of the openness to unilaterally draft rules for this constituent assembly. David Landau describes how these rules 'brilliantly maximized his electoral representation and completely marginalized the opposition'.[211] In particular, Chávez created a majoritarian system of voting, which over-represented forces with majority support nationally. This allowed him to win 65.8 per cent of the votes but take 94.5 per cent of the seats.[212]

[207] Ibid 1–2.

[208] *United States Constitution* Preamble; Partlett, 'Expanding Revision Clauses' (n 35) 57–9.

[209] Examples can be found in former Soviet republics: William Partlett, 'The Dangers of Popular Constitution-Making' (2012) 38(1) *Brooklyn Journal of International Law* 193, 209–33; and in Latin America: David Landau, 'Abusive Constitutionalism' (2013) 47(1) *UC Davis Law Review* 189, 200–7.

[210] Joel I Colón-Ríos, 'Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia' (2011) 18(3) *Constellations* 365, 369.

[211] David Landau, 'Constitution-Making Gone Wrong' (2013) 64(5) *Alabama Law Review* 923, 941.

[212] José Molina and Bernard Thibaut, 'Venezuela' in Dieter Nohlen (ed), *Elections in the Americas: A Data Handbook* (Oxford University Press, 2005) vol 2, 535, 568.

With control of the drafting assembly, Chávez then unilaterally declared that all existing institutions would have 'to subordinate themselves not only to the word but to the concrete fact, before the sovereign mandates that emanate from here, before this center of light'.[213] Chávez's assembly then went on to severely curtail the powers of the existing constituted powers (including the legislature). With control of this unlimited constituent assembly, Chávez reshaped the institutional landscape of the country in his own interests.[214]

A desire to engage the people but avoid the dangers of constitutional politics played a strong role in driving Chile's decision to draft a new constitution through a fully-elected constitutional convention that was created by the Chilean legislature. This enabling Act states that the convention can only sit for nine months (unless extended) and must put its new constitutional draft to a referendum within 60 days of completion.[215] The legislation creating the convention therefore makes it clear that it does not exercise any power beyond that of proposing a new constitution to the people to vote on in a referendum.[216]

Second, while avoiding a revolutionary track of constitutional politics, the constituent power through law tradition also disentangles constitutional lawmaking from ordinary politics. As described above, the Australian use of a specialised convention helped to ensure a different kind of popular representation in the process of constitution-making. This was also the case in the Chilean convention election. The elections for Chile's specialised Constitutional Convention fundamentally changed the existing political 'correlation of forces' by including a number of candidates who were not normally involved in politics.[217] In the end, 66 per cent of the representatives were independent of a

213 Landau, 'Constitution-Making Gone Wrong' (n 211) 946.

214 William Partlett, 'Hugo Chavez's Constitutional Legacy', *Brookings* (Web Page, 14 March 2013) <https://www.brookings.edu/opinions/hugo-chavezs-constitutional-legacy/>, archived at <https://perma.cc/ACR6-XBP2>.

215 Richard M Sanders, 'Chile's Constitutional Convention: A Bumpy Start, Much Work Ahead' (Report, Wilson Center, December 2021) 4 <https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Chile%E2%80%99s%20Constitutional%20Convention_A%20Bumpy%20Start%2C%20Much%20Work%20Ahead.pdf>, archived at <https://perma.cc/W38X-4ZBW>.

216 Rodrigo Kaufmann, 'Constituent Process and Constituent Power: Keeping Chile's Political Space Open', *Verfassungsblog* (Blog Post, 25 June 2021) <https://verfassungsblog.de/constituent-process-and-constituent-power/>, archived at <https://perma.cc/7N2Q-7FU8>, describing how a minority of delegates (34) unsuccessfully attempted to claim that the convention was not bound by the 'country's entire legal framework'.

217 Marcela Ríos Tobar, 'Chile's Constitutional Convention: A Triumph of Inclusion', *United Nations Development Programme* (Blog Post, 3 June 2021) <https://www.latinamerica.undp.org/content/rblac/en/home/blog/2021/chile-s-constitutional-convention--a-triumph-of-inclusion.html>, archived at <https://perma.cc/X76G-CWPJ>.

major political party.[218] In this outcome, the ruling coalition failed to even secure one third of the seats.[219] The separate track of constitutional politics thereafter transformed the political dynamic and produced a constitution with a number of new ideas.[220]

Third, the constituent power through law tradition is critical to understanding constituent power in federal democracies. The continental European tradition of constituent power ignores federal distinctions because of its commitment to defining the people as a unified, pre-constitutional majority of the nation.[221] But, as Nicholas Aroney writes, constituent power in federations must capture a 'plurality' of people.[222] The only way to respect this federal nature of the people is through law. As described above, s 128 of the *Australian Constitution* requires a double majority to ensure the people reflect the federal nature of the Australian people. Similarly, Switzerland's federal status also requires a double majority of the people in referendums to change the constitutional text.[223]

Constituent power through law is critical to federal or devolved states. Some argued that the legal rules determining whether the people had spoken in the Brexit referendum should have reflected the UK's quasi-federal constitutional system of devolved subnational units.[224] For instance, the Scottish government had proposed that a double majority be required in the 2016 Brexit referendum: a majority of UK voters and a majority of voters in each of the devolved components of the UK.[225] Moreover, the constituent power through law tradition

218 Javier Couso, 'Chile Elects Its Constitution-Making Body: The Potential and Risks of a Fragmented Convention', *ConstitutionNet* (Web Page, 31 May 2021) <https://constitutionnet.org/news/chile-elects-its-constitution-making-body-potential-and-risks-fragmented-convention>, archived at <https://perma.cc/M594-9NET>.

219 Will Freeman and Lucas Perelló, 'Chilean Voters Have Turned Their Backs on Traditional Coalitions: What's Next?', *Foreign Policy* (online, 17 May 2021) <https://foreignpolicy.com/2021/05/17/chile-elections-independents-to-write-new-constitution/>, archived at <https://perma.cc/WKD4-YE5W>.

220 Catherine Osborn, 'Chile Unveils Its Proposed New Constitution', *Foreign Policy* (online, 8 July 2022) <https://foreignpolicy.com/2022/07/08/chile-new-constitution-rewrite-boric-protests-pinochet-dictatorship-referendum/>, archived at <https://perma.cc/7R99-BHNH>.

221 See Arato (n 16) 31.

222 Aroney, 'Constituent Power and the Constituent States' (n 148) 11–12.

223 *Bundesverfassung der Schweizerischen Eidgenossenschaft* [Federal Constitution of the Swiss Confederation] arts 142(2), 195.

224 Roger Masterman, 'Brexit and the United Kingdom's Devolutionary Constitution' (2022) 13 (Supp 2) *Global Policy* 58, 61–3.

225 Nicola Sturgeon, 'First Minister Speech to European Policy Centre' (Speech, European Policy Centre, 2 June 2015), archived at <https://web.archive.org/web/20191230152635/https://news.gov.scot/speeches-and-briefings/first-minister-speech-to-european-policy-centre>. See also ibid 62.

also helps to understand the constituent power of the people in the subnational units of a federal state. In the Australian context, this can help to answer a number of important questions about the higher law status of state constitutions and the proper process of constitutional amendment.[226]

B *Problem One: The Status Quo Problem*

The constituent power through law tradition, however, has potential downsides. First, it has long been criticised for allowing elites (acting through constituted institutions like parliament) to block the will of the people.[227] In particular, this 'status quo' problem fears that entrenched players will use their control of constituted institutions to stifle the will of the majority of the people.[228] It has therefore underpinned the longstanding argument that any kind of constituent power through law cannot be a real exercise of the unlimited power of the people; instead, it is an exercise of the derived power of the people and therefore unauthentic.[229]

There is little question that status quo, ordinary institutions (namely, the legislature) play a central role in the constituent power through law tradition. But these status quo institutions are far more likely to be problematic in contexts in which constituted institutions have been captured by powerful elites and are unresponsive to the people. In those contexts, the continental European revolutionary tradition of constituent power is more normatively attractive. But in democratic contexts with constituted institutions that are accountable to the will of the people, this problem is less concerning. In Australia, for instance, as long as Parliament is accountable to the will of the people through election, it is unlikely to block a concerted attempt by the people to alter their constitutional order. Furthermore, in Chile, the legislature cooperated with the process of constitution-making in response to a strong majority of Chileans calling for a new constitution.[230]

Both examples therefore show that the status quo problem will vary based on context. In functioning democracies with institutions that are accountable

[226] Nicholas Aroney, 'Popular Ratification of the State Constitutions' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012) 210, 211.

[227] Partlett, 'Expanding Revision Clauses' (n 35) 56–7.

[228] Ibid.

[229] See Colón-Ríos, *Constituent Power and the Law* (n 1) 1.

[230] John Bartlett, 'Chile's Protesters Have Won a Path to a New Constitution', *Foreign Policy* (online, 15 November 2019) <https://foreignpolicy.com/2019/11/15/chile-protests-constitution-politics-latin-america/>, archived at <https://perma.cc/SLN6-69BY>.

to the people, this problem will be mitigated by the accountability of institutions to public opinion. This is particularly the case if close attention is given to how representative the drafting convention is and therefore how much it symbolises the voice of the people, as this places constituent pressure on the constituted authorities.

C *Problem Two: An Unrepresentative Text*

Another potential criticism of the constituent power through law tradition is that a separate track of constitutional politics can become so detached from ordinary politics that it produces a draft constitution that is unrepresentative of existing political coalitions and therefore unacceptable to the people at a referendum. This objection has been made in the Australian context above. George Winterton, a leading Australian constitutional law scholar, has argued that Parliament should be heavily involved in drafting constitutional text in order to ensure that Parliament — a key constituency required to propose any changes under s 128 of the *Constitution* — is represented in the drafting process.[231] Building on this argument, he also explained that Members of Parliament were more likely to have 'a facility for compromise' and the government appointees represent 'a less passionate range of community views together with some legal and governmental experience'.[232] This critique has also been heavily discussed in the Chilean context. In Chile, some argued that the elected Convention was captured by leftist delegates who created a draft that is too 'radical' to be adopted by the general population.[233]

This is an important critique. Chile clearly shows the dangers that a separately-elected drafting convention will produce an unrepresentative draft. The constitutional draft was ultimately rejected by more than 60 per cent of Chileans.[234] One of the key reasons was that the draft was viewed as one produced by a group of representatives that excluded and ignored concerns from centre-

[231] Winterton, 'Australia's Constitutional Convention 1998' (n 179) 104.

[232] Ibid 104–5.

[233] John Bartlett and Samantha Schmidt, 'Chile Writes a Woke Constitution: Are Chileans Ready for It?', *The Washington Post* (online, 5 July 2022) <https://www.washingtonpost.com/world/2022/07/05/chile-constitution-draft-boric/>, archived at <https://perma.cc/6CDN-KAKL>.

[234] Jack Nicas, 'Chile Says "No" to Left-Leaning Constitution after 3 Years of Debate', *The New York Times* (online, 4 September 2022) <https://www.nytimes.com/2022/09/04/world/americas/chile-constitution-no.html>, archived at <https://perma.cc/LR74-JXXR>.

left and right-wing parties.[235] This suggests that disentangling constitutional politics from ordinary politics cannot go too far. Although new representatives might inject fresh ideas into the process, they ultimately must compromise on a draft that is broadly acceptable to a wide range of society.

One way to continue to achieve this balance is to create the kind of cooperative process we see in s 128 of the *Australian Constitution*, which requires at least one house of Parliament to approve any constitutional change before it is sent to the people. This one-house rule requires the delegates in the fully-elected drafting convention to compromise on the text so that it is acceptable to a broad range of existing political forces. It therefore places a significant 'downstream' constraint on the draft that the delegates in the specialised convention will produce.[236] Another possibility is to carry out a form of structured consultation with the people before convening a specialised and fully-elected drafting convention. This process of consultation could enable the kind of deliberation that would ensure that the process of drafting in a specialised drafting convention remains in line with the broad views of the entire people.[237]

VII Conclusion

This article has remembered how Federation-era Australians turned to specially-elected constitutional conventions and referendums to revitalise the process of constitutional foundation in the 1890s. Understood in light of the American tradition of constituent power through law, this process ultimately created a constitutional order which gave the Australian people legal sovereignty to remake their constitutional orders outside of Parliament in a cooperative process regulated by ordinary law.

Remembering this history has both practical and conceptual importance. For Australia, it shows more fully the nature of Australia's contemporary constitutional order where the people act through *parliamentary* representation to make ordinary law and *special*, *extra-parliamentary* representation to alter their

[235] Sergio Verdugo, 'The Paradox of Constitution-Making in Democratic Settings: A Tradeoff between Party Renewal and Political Representation?', *I·CONnect: Blog of the International Journal of Constitutional Law* (Blog Post, 24 September 2022) <http://www.iconnectblog.com/2022/09/i-connect-symposium-on-the-chilean-constitutional-referendum-the-paradox-of-constitution-making-in-democratic-settings-a-tradeoff-between-party-renewal-and-political-representation/>, archived at <https://perma.cc/JKS2-3F38>.

[236] See Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45(2) *Duke Law Journal* 364, 373–4.

[237] See Gabrielle Appleby, 'The Imperative of Process in the Australian Republic Debate' (2018) 29(4) *Public Law Review* 277, 278 ('The Imperative of Process in the Australian Republic Debate'), describing how deliberative consultation can work in engaging the people.

constitutional order. This dualist system challenges key assumptions of parliamentary sovereignty and shows that the Australian people now exercise a form of legal (and not political) sovereignty to alter their constitutional order. It also suggests that a possible way of rejuvenating the weakness of Australian constituent power under s 128 of the *Constitution* is to draft constitutional norms in a specialised constitutional convention elected by the people.

This is an important lesson. For instance, the Australian Republic Movement (the flagship organisation advocating for Australia to become a republic) has recently moved away from serious engagement with the people in formulating an Australian republic.[238] Instead, after consultation with an eminent group of experts, they have formulated a proposal themselves that they term the 'Australian Choice Model'.[239] This proposal might serve as an important starting point for an elected drafting convention but should not itself be the basis for a republic proposal to the people. A specialised, fully-elected drafting convention — one that could operate after a process of structured consultation — could then be used to decide the final details of this model.[240]

More broadly, the Australian example provides further evidence of the need to fully theorise the constituent power through law tradition. By joining other recent scholarly work that understands constituent power through law, it suggests that downgrading constituent power through law to a 'derived' or secondary expression of popular will reflects a particular revolutionary view of constituent power grounded in continental European thinkers. In other historical traditions, however, exercising constituent power through law in a process that cooperates with existing institutions can ensure a more 'authentic' expression of constituent power. Future work should therefore seek to better understand how the tradition of constituent power through law can be used to engage the people's voice in democratic contexts.

[238] See Gabrielle Appleby, 'The Republic Debate in Australia', *Verfassungsblog* (Blog Post, 23 September 2022) <https://verfassungsblog.de/the-republic-debate-in-australia/>, archived at <https://perma.cc/L96C-RLY8>.

[239] Australian Republic Movement, *The Australian Choice Model* (Policy, 2022), archived at <https://perma.cc/HUS9-HV56>.

[240] Appleby, 'The Imperative of Process in the Australian Republic Debate' (n 237) 279–80, describing the formulation of the *Uluru Statement from the Heart* (n 186) as a model for extensive consultation with the people.