

The sovereignty of the governed and contemporary constitutionalism

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Government requires make-believe. Make believe that the king is divine, make believe that he can do no wrong or make believe that the voice of the people is the voice of God (Morgan 1988: 13).

...it is clear that there is a considerable fictional element in both concepts included in the new doctrine, namely, 'sovereign' and 'people'... (Zines 1997: 98).

If one wants to look for a non-disciplinary form of power, or rather, to struggle against disciplines and disciplinary power, it is not towards the ancient right of sovereignty that one should turn, but towards the possibility of a new form of right, one which must indeed be anti-disciplinarian, but at the same time liberated from the principle of sovereignty (Foucault 1980: 108).

One of Foucault's more widely cited aphorisms concerns what is often taken to be his approach to the concept of sovereignty: 'political theory,' he said, 'has never ceased to be obsessed with the person of the sovereign'. Rather than concentrating on 'the problem of sovereignty', he suggested that what is needed is

a political philosophy that isn't erected around the problem of sovereignty, not therefore around the problems of law and prohibition. We need to cut off the King's head: in political theory that has still to be done (1980: 121; also 1978: 88-9).

Hannah Arendt similarly proposed that freedom is premised on the transcendence of sovereignty (1977: 165), and Harold Laski also identified the dangerousness of a homogenous, unitary, non-federative, conception of sovereignty (1917: 23-5; 1925). What I would like to reflect on are some of the possible reasons for this reluctance to sever the king's head, reasons concerning the changing nature and political representation of the royal body. A central, defining characteristic - or rather, continuing achievement - of political thought and practice since the sixteenth century, particularly in the form of constitutionalism, has been the transmutation of 'the king's body' into something which does not belong to any particular Royal individual, nor even to an abstraction such as the 'state' or 'the government', but which has come to be constructed precisely as the governed themselves, collectively expressed and represented.

The on-going survival of the sovereign, head and all, is thus a feature not only of political theory, but also of political practice, maintaining sovereignty as a 'live' issue requiring continuing and systematic attention in social and political theory and research as well as in jurisprudence. If 'we' are reluctant to prepare the guillotine for the king's head, this may be because it would be removed, not from some alien entity from which it is easy to be distant, an unknown human torso with or without assorted limbs attached, become merely a piece of meat, but from diverse and heterogenous expressions of 'us' ourselves, 'the' people collectively represented as 'the sovereign'. Today such disparate and often disputed expressions of sovereignty in turn play a central role in whatever is understood as 'liberty' in

contemporary society and politics, particularly in connection with the political and social relationships between variously defined social, cultural, ethnic and racial groups living within the boundaries of any given state. It is virtually impossible to speak of democracy outside of its normal 'container', the sovereign state, not least because the difficulty of developing any mechanism for the realisation of democratic principles which can operate across state borders, but also because any form of nation or political community necessarily requires some sort of sovereignty to exist at all.

There also seems to be a certain dissonance between at least some of Foucault's constructions of the concept 'sovereignty' on the one hand, and those of writers in politics, law and constitutional theory on the other.¹ It is as if they are speaking different languages and the word 'sovereignty' is sometimes a 'false friend', one that appears to refer to the same set of things in the two languages, while actually meaning something entirely different. For example, since sovereignty concerns the relationship of a prince or state both to their subjects and to other princes and states, a distinction exists between internal and external sovereignty, although each is interwoven with the other. Much of the current work done by political theorists on the state, democracy and contemporary forms of governance tends to concentrate on the latter, on the workings of sovereignty within particular relations between states.² From that 'externalist' perspective, the Westphalian logic which still underpins the global system of (nation-)states would ensure that the removal of any King's head can lead only to the substitution of either a new King with a more or less endearing head, or another kind of sovereign. Although it is not possible to pursue this line of argument in any depth here, it is worth at least recognizing that any adequate understanding of sovereignty and constitutionalism drawing on Foucault's later ideas on liberalism and governmentality requires at least the framing of our studies of particular articulations of the relationships *between governors and the governed* (internal sovereignty) alongside considerations of those *between governors* (external sovereignty) (Stenson 1998: 343).

But we can tackle the issue from a different angle. My central proposal is that the fashioning of the idea of sovereignty as 'the sovereignty of the governed' within modern constitutionalism can be given more systematic attention than is usually suggested by the 'King's head' comment.³ If we look further afield in Foucault's own work, Stoler's (1995) analysis of his observations on 'state racism' in his 1976 Collège de France lectures, for example, suggests that his reflections on bio-power were organised around precisely the forms taken by the sovereign right over life - to make *or* allow to live *or* die. Rather than being a sort of pre-modern 'relic' of absolutist forms of rule, the transformation of the conception of sovereignty within varying constitutionalist constructions of political consent is as crucial an element of the development of liberalism as are the disciplinary and pastoral forms of power which lie 'behind' or 'below' the sovereign and the State, and it continues to remain central to the emergence of what has been called 'advanced liberal' forms of governance.⁴ The democratisation of sovereignty is thus not merely one more transformation of a form of power which remains distinct from - either pre-dating, operating parallel to, or ideologically disguising - the emergence of various arts of government, but lies right at the heart of the development of liberal strategies and techniques of governance. Put simply, if particular constructions of freedom, liberty and democracy are integral to the forms of government characteristic of liberalism (Rose 1999), then so, too, is the contemporary language of sovereignty, since freedom, liberty and democracy under liberal constitutionalism are organised precisely around specific vocabularies of popular sovereignty, especially in the period since 1989 (Preuss 1995).

I will be examining the possibilities of this line of argument both in general,

theoretical terms, and in relation to the particular example of the role of the concept of 'popular sovereignty' in Australian constitutional law, specifically the ways in which that can be said to have changed in relation to the 'free speech' High Court cases in 1992-1994. This particular example has been chosen partly because it is one I happen to have some familiarity with, but also because it is useful and important to organise our understanding of sovereignty around specific empirical examinations of the shifting ways in which the idea of sovereignty, particularly in conditioning and structuring liberty and citizenship in contemporary democracies, operates within both current strategies of power and governance and the critical responses to them.⁵ In this case, the Australian High Court's construction of the 'sovereignty of the governed' can be seen to throw up a particular set of problems and themes which have the potential to open up new and distinct lines of enquiry into the articulation of sovereignty within contemporary governance.

The peculiar fiction that is the idea of sovereignty has, I will suggest, a double-sided potential, enabling us better to recognize, on the one hand, the ways in which relations of power and governance are organized around particular conceptions of sovereignty and, on the other, the ways in which sovereignty might be configured and re-worked as a conceptual and theoretical *resource*, into a kind of liberal 'agonic sovereignty' in aid of our various critiques of contemporary forms of law and government.

Foucault and the sovereignty question

We can identify an initial starting point for this discussion by highlighting four of the themes running through Foucault's observations on law, sovereignty, power and government: first, his comments on the extension of power beyond the sovereign, law and the State, the idea of *extra-sovereign forms of power* which fashion subjectivity in particular, productive rather than merely negative and prohibitive, ways. Second, his corollary argument against the accuracy of contractarian understandings of any sort of legitimate sovereignty, arising from the problem which extra-sovereign power raises for the whole idea of political consent. Third, the distinction he made between the object and aim of sovereign power as the rule of a territory, and governmental power as addressed to the governance of things and the relationships between things and persons. Fourth, his suggestions concerning the relationship of the democratisation of sovereignty to both extra-sovereign power (discipline), and the workings of liberal government.

1. Foucault proposed that an initial difficulty with organising our understanding of power around the idea of sovereignty is that power actually extends well beyond the activities of State, fashioning subjectivity in particular ways. The problem with focusing on law, the state and sovereign authority seen as 'rules backed by sanctions', is that they are largely negative and prohibitive forms of power, and the concern with sanction-based rules renders us unable to see the more *productive* workings of power relations.

In order to conduct a concrete analysis of power relations, one would have to abandon the juridical notion of sovereignty. That model presupposes the individual as a subject of natural rights or original powers; it aims to account for the ideal genesis of the state; and it makes law the fundamental manifestation of power. One would have to study power not on the basis of the primitive terms of the relation but starting from the relation itself, inasmuch as the relation is what determines the elements on which it bears: instead of asking ideal subjects what part of themselves or what powers of theirs they have surrendered, allowed themselves to be subjectified, one would need to inquire how relations of subjectivation can manufacture subjects.....Finally, instead

of privileging law as a manifestation of power, it would be better to try and identify the different techniques of constraint that brings it into play. (1997a: 59)

1. which means that questions of 'consent' and the legitimation of power relations are not worth very much attention, because 'consent' is granted by subjects already formed by relations of power; Hindess says that Foucault is critical of the concept of 'sovereignty as rule-based-on-consent' because government moulds public and private behaviour.....**but**, the construction of consent around particular conceptions of sovereignty - which have to be *achieved* at various historical junctures - is precisely a central element of this 'moulding of public and private behaviour'.
2. the object and aim of sovereign power is the rule of a territory, whereas governmental power is addressed to the governance of things and the relationships between things and persons. The two can still run parallel to each other - sovereignty-discipline-government.
the concept of sovereignty can be regarded not as expressing a theory or model of the *centring* of power in a monarch or state, or even of the desired operation of power and governance (on things instead of territory), but rather a theory or model of the *sourcing* (legitimation) of power - most frequently, in 'the people' - which in turn articulates with particular modes of its operation as 'government'.
law in fact central to the management of relationships between things and men.

Foucault (1997b) says this himself:

Liberalism does not derive from juridical thought...but in the search for a liberal technology of government, it appeared that regulation through the juridical form constituted a far more effective tool than the wisdom or moderation of the governors. (p. 76)

Liberalism sought that regulation in "the law"...because the participation of the governed in the formulation of the law, in a parliamentary system, constitutes the most effective system of governmental economy (pp. 76-7).

3. the democratisation of sovereignty, the development of the notion of popular sovereignty, both helped create the space of 'freedom' within which liberal forms of government could develop and concealed their character as forms of authority and rule, as well as being itself dependent on the prior discipline of the population.
 - problem of liberty being conditioned by sovereignty

Rather than *either* sovereignty *or* discipline/governance, sovereignty or freedom, we need to look at their articulation with each other - the governmentalisation of law/sovereignty?

So, Foucault's understanding of sovereignty pertains to a particular mobilisation of it, rather than sovereignty itself, and it's an understanding which actually undermines his own aims, which are better realised with a more nuanced approach to sovereignty's contemporary meanings.

Tully: idea of sovereignty is problematic and undermines ‘freedom’ because it is a non-agonic, ‘settled’ model of power, arguing only over the source and legitimation of power, but leaving intact a fundamentally ‘unfree’ mode of governance in which rules are prevented from being re-negotiated, in which the governed are unable to have any sort of dialogue with their governors. But isn’t what he’s arguing for in terms of recognition of diversity precisely an argument for an ‘agonic sovereignty’?

Popular sovereignty in Australian constitutional law and theory

Some conception of ‘the people’ has been part of Australian constitutional theory and law since the Constitutional Conventions in the 1890s. Since the ‘free speech’ cases in 1992,⁶ however, the role and influence of the High Court’s construction of ‘the people’ in relation to its understanding of sovereignty seems to have changed significantly, with commentators speaking of a ‘paradigm shift’ in constitutional interpretation (Blackshield 1994a; McDonald 1994), a ‘dramatic turning point in Australian constitutional development’ (Hanks and Cass 1999: 904), a shift in the Constitutional *grundnorm* (Wright 1998), and the possibility of individual rights implied by the Constitution so solid that we might as well speak of an implied Bill of Rights (Lindell 1994: 33).

In assessing these arguments, it is useful to make a distinction between two issues which observers often run together, for the good reason that they are closely related, but which we can separate for analytical purposes. First, the question of an implied right of freedom of communication arising from ss 7 and 24 of the Australian Constitution. Should the Constitution’s proscription that both Houses of Parliament be ‘directly chosen by the people’ be read so as impliedly to restrict the powers of the Commonwealth Parliament, should they be seen inappropriately to restrict the forms of political communication necessary for a representative democracy?

Second, the question of foundations of sovereignty and the sources of the legal authority of both the Constitution and the High Court, especially in relation to that of Parliament. Should the Constitution be seen as an Imperial Statute, the expression of the framers’ original model of democracy, or as authorised by an entity known as ‘the Australian people’? If the latter, how does this relate to the authority conferred by that same entity on Parliament? The two issues are intimately related in the sense that the response to one will influence the answers given to the other. For example, if ‘the people’ are seen as the source of the Constitution’s authority, this raises the stakes concerning the boundaries drawn around legislative restrictions of the rights of those ‘people’, making it more plausible to interpret particular legislative confinements of the rights of ‘the people’ as attacks on the Constitution itself.

In relation to both issues we can ask whether the ‘free speech’ cases themselves, as well as the High Court’s working through the arguments raised there in subsequent cases, indicate real changes in law, or merely surface changes in theory and symbolism. In one sense, of course, the distinction between legal theory and legal principle is a strained one, because legal principle always operates within the framework of particular ‘interpretive regimes’ (Iverson 1997), so that changes in constitutional theory - especially when articulated by the High Court itself - are likely to have consequential effects on the ‘fabric’ of constitutional characterisation and interpretation. However, even though it is difficult to maintain a strict distinction between ‘real’ changes in law and ‘merely’ symbolic or theoretical changes, it is still worth investigating the extent to which the ideas concerning popular sovereignty expressed in the High Court’s recent jurisprudence might be considered

excursions into political philosophy which were not really necessary to the questions of law. In other words, is it plausible to suggest that the Court could have come to the very same conclusions via older routes of constitutional interpretation, free of the concept of popular sovereignty, or does the notion of popular sovereignty generate significant changes in the political effectivity of both the Constitution itself and its interpretation by the High Court?

The ‘free speech’ cases and implied freedom of communication

Blackshield and Williams point out that there was an early reference to an ‘implied right of access to government and to the seat of government’ (1998:1055-56) by Griffith CJ and Barton J in 1912,⁷ but Murphy J was the first High Court Justice to pursue the notion of implied rights and freedoms with significant vigour. Justice Murphy’s judgment in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*,⁸ in particular, introduced the argument that the Constitution’s provision for elections of federal parliament has far-reaching implications for ‘freedom of movement, speech and other communication’ integral to ‘the proper operation of the system of representative government’.⁹ However, the overall inclination of the other High Court Justices was captured by the joint judgment in *Union Steamship Co of Australia Pty Ltd v King*,¹⁰ where they defined the characterisation of Parliament’s power to make laws ‘for the peace, order and good government’ as imposing no limitations on the plenitude of that power, and certainly as establishing no basis for judicial review of parliament’s legislative power. The question raised by Murphy J was simply dodged as follows: ‘Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law....is another question which we need not explore’.¹¹ Indeed, in the NSW Supreme Court Kirby P argued that the health of representative democracy depended precisely on the Courts *not* rising to the defence of any fundamental rights, and that ‘respect for long standing political realities and loyalty to the desirable notion of elected democracy’ should inhibit ‘any lingering judicial temptation, even in a hard case, to deny loyal respect to the commands of Parliament by reference to suggested fundamental rights that run ‘so deep’ that Parliament cannot disturb them’.¹²

Contrary to Murphy J’s vision, and Street CJ’s in the *BLF* case, then, the High Court’s jurisprudence as a whole appears to lead it away from seeing itself as a defender of ‘the people’, their rights or their freedoms. That is Parliament’s job, and Parliament’s only. The Constitution, on the other hand, is a different matter. In the two leading ‘free speech’ cases, *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd v Commonwealth*,¹³ the majority read ss 7 and 24 as establishing a particular type of political system, one which would be mocked if free political communication were restricted. As Mason CJ put it:

Absent such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.¹⁴

The right to freedom of political communication was thus seen as ‘inherent in the idea of representative democracy,’¹⁵ which was in turn constitutionally entrenched by ss 7 and 24. The United Kingdom Parliament, suggested Brennan J, could, if it wished, abolish freedom of speech - according to the Diceyan model of parliamentary sovereignty. But in the Australian context, such an exercise of Parliamentary power is confined by the Constitution, by virtue of its entrenchment of a particular form of governance. ‘Once it is recognized,’

wrote Brennan J, 'that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains...'¹⁶

More precisely, the Parliament's capacity to restrict such political communication is restricted 'to the extent necessary to protect other legitimate interests', and in any case, 'not to an extent which substantially impairs the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions...'¹⁷ The idea proposed here is not that the Constitution implies a *positive* right to freedom of communication; it is more the *negative* idea that the Constitution's insistence on a form of government requiring 'direct election' impliedly places limits on Parliament's powers to confine precisely those activities demanded by such a form of government, namely, free political communication.

The essentially negative character of the 'right' being proposed was made clear by Brennan J's insistence that Parliament is in principle entitled to curtail communicative freedom, and that such an entitlement is opposed by no inherent rights possessed by 'the people' themselves. As the Court stated in *Engineers*:

(T)he extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts...If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper. Therefore, the doctrine of political necessity, as means of interpretation, is indefensible on any ground.¹⁸

The High Court, agreed Brennan J, 'cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the court's opinion, should be preserved'.¹⁹ Later, in *Theophanous v Herald & Weekly Times Ltd*,²⁰ Brennan J explained that 'unlike the freedoms conferred by a Bill of Rights in the American model, the freedom cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation; rather, it is a freedom of the kind for which s 92 provides: an immunity consequent on a limitation of legislative power'.²¹ This point was reiterated in *Lange v Australian Broadcasting Corp*²² and *Levy v Victoria*.²³ What *does* restrict the range of legitimate legislative choice are the limitations imposed by the Constitution itself. As McHugh J suggested, 'To fail to give effect to the rights of participation, association and communication identifiable in ss 7 and 24 would be to sap and undermine the foundations of the Constitution'.²⁴

It is not entirely accurate to say, then, as Geoffrey Lindell does, that the two leading judgments 'open the way to the development by our judges of an implied Bill of Rights' (p. 33). Despite the occasional looseness of phraseology in the leading 'free speech' cases, the Court has consistently argued against such an interpretation, in large part by clearly rejected the notion of positive rights in favour of a negative immunity, one which *could* be infringed upon by legislative action if executed 'proportionately'. For example, in *Cunliffe v Commonwealth*,²⁵ although Toohey J agreed that the case fell within the realm of constitutionally protected political communication, he swung the majority against the plaintiff by finding that the legislation was proportionate to the legitimate aim being pursued by Parliament. Rather than seeing the later cases as some sort of 'retreat' by the High Court from the articulation of implied rights in the leading 'free speech' cases, then, it is more

accurate to see them as working through the precise effects of their essentially *negative* approach to such rights in relation to different fact situations.

In the process of specifying the logic of the form of government prescribed by the Constitution, the High Court also said a range of things about the authority underlying both the Constitution and the Court itself, especially in relation to Parliament. All these arguments about the definition of representative democracy contained within the fabric of the Constitution, as well as the role that ‘the people’ were meant to play within it, were thus in turn coloured by a second issue, of a different order, arising from how the place of popular sovereignty within the relationship between the Constitution and the High Court on the one hand, and parliament on the other was to be understood. The way in which ‘the people’ were placed in relation to the legal authority of the Constitution shifted the foundations of the High Court’s understanding of the scope of the limits to be placed on parliamentary sovereignty, in turn, arguably, paving the way for the ‘free speech’ judgments.

The two-headed Sovereign

For Dicey (1959), ‘sovereignty’ was divided between a *political* sovereignty residing in ‘the people’, and *legal* sovereignty residing in Parliament. Such legal sovereignty was more or less autonomous, restricted only by its ultimate linkage to political sovereignty, i.e. the requirement that Parliament be popularly elected. He rejected the idea that Parliament should see itself as the ‘trustee’ of popular will; once elected, it was its own business how it went about governing, and there was not meant to be an alternative source of sovereign power which could confine it (Dicey 1959: 48). There are numerous problems with this approach even in the British context (Jennins 1959; Walker 1985; McKinley 1994), not the least of which is the contradiction between Dicey’s understanding of parliamentary sovereignty and his second ‘primary principle’, the ‘rule of law’. But in any case Dicey’s conception of parliamentary sovereignty was of limited utility in any federalist context, such as the Australian one, where there was a Constitution at all. In the interests of federalism, if nothing else, the legal sovereignty of the Australian Commonwealth Parliament was forever to be constrained by a Constitution which established particular rules for the exercise of both federal and state governmental power.

Nonetheless, certain presumptions have restrained the ways in which those limiting power are exercised, and one of those was precisely a Diceyan conception of parliamentary, as opposed to popular sovereignty. In arguing against Murphy J’s reference on the US Constitution in developing a particular construction of the Australian Constitution, Barwick CJ put the matter as follows:

The contrast in constitutional approach is that, in the case of the American Constitution, restriction on legislative power is sought and readily implied whereas, where confidence in the parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers. Thus, discretions in parliament are more readily accepted in the construction of the Australian Constitution.²⁶

Australian law and politics have thus been characterized by a complex combination of the British understanding of parliamentary sovereignty with constitutionalism and federalism, and the overall tendency of the High Court, as exemplified by *Engineers*, has been to err on the side of the powers of the Commonwealth Parliament as opposed to either the States or citizens’ rights and freedoms, excepting only where it has been possible to find the ‘express words’ in the Constitution to strike down particular legislative endeavours.²⁷

This was all very well while the Constitution possessed some sort of ‘external’

character as an Imperial statute. As Sir Owen Dixon put it, the Australian Constitution ‘is not a supreme law purporting to obtain its force from the direct expression of a people’s inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King’s Dominions’ (Dixon 1935: 597). But the passage of the *Australia Acts* in 1986 left, as Paul Finn argued, a ‘void’ in our constitutional theory (1995: 4). If the Constitution could no longer be said to be binding because of its paramount force as a statute of the Imperial Parliament, this essentially removed its underlying *grundnorm* - the ultimate source of legal authority - and we needed another. The need is not an overpowering and certainly not a legal one, as Lindell pointed out, for with the passage of the *Australia Acts* ‘nothing has happened to change the pre-existing inability of the Parliaments of the Commonwealth and States to legislate inconsistently with the Constitution whatever changes may have occurred in relation to the ability of those Parliaments to enact legislation which is inconsistent with other British Acts of Parliament’ (Lindell 1986: 37). However, there is a need in terms of how the Constitution is understood by the wider population, making it ‘understandable’ that an alternative basis of legitimacy be sought and found. Lindell proposed that the explanation for the binding character of the Constitution could be found in three areas concerning ‘the people’ :

- the reference in the preamble to ‘the agreement of the people to federate’, supported by
- the role provided to them by s 128 in altering the Constitution, as well as
- their ‘continued acquiescence in the continued operation of the Constitution as a fundamental law.

Although *legally* the *Australia Acts* raised no problems, ideologically and politically it seemed to ‘make sense’ to present the Constitution as enjoying ‘its character as a higher law because of the will and authority of the people’. Such a ‘reliance placed on the authority of the people of Australia,’ we were reassured, ‘need not involve any major changes to the judicial interpretation of the Constitution’ (Lindell 1986: 49). It would, however, have a certain ‘advantage’, of providing an account which conforms ‘as much as possible with the present political and social reality, as well as having the merit of being readily understood by persons who are not versed in the niceties of constitutional law’ (Lindell 1986: 49). As introduced by Lindell, then, and in contrast to Murphy J’s approach, the notion of the ‘sovereignty of the people’ was explicitly intended to generate no change in legal principle at all. Its function was instead to be confined to the symbolic and theoretical one of framing the relationship between constitutional law and the wider population in a way more in accordance with contemporary understandings of the nature of the state, politics and the law.

However, in practice, when articulated with a particular construction of the implications of ss 7 and 24, the idea that ‘the people’ give authority to the Constitution also re-configured the relationship between the High Court itself and Parliament. In the ‘free speech’ cases it tipped the balance towards greater confidence in limiting legislative power for reasons other than federal considerations, and Lindell found himself among the strongest opponents to the decisions. He argued that they ‘open the way to the development by our judges of an implied Bill of Rights’ for which the Court has no democratic mandate, that they ‘clash with the doctrine of parliamentary supremacy’ which assumes ‘that the ballot box should serve as the ultimate sanction for abuse’, and that they allow ‘the judges to give expression to their own subjective values’ (Lindell 1994: 33, 38), although he was also sanguine about the likelihood that anyone out there would actually mind very much (p. 45).

It is probably unhelpful, then, to think in terms of some sort of ‘transition’ from parliamentary to popular sovereignty, as a number of commentators have suggested

(e.g., Blackshield 1994: 25; Wright 1998: 165). The concept of ‘parliamentary sovereignty’ referred to *legal* sovereignty, which was always subject to popular *political* sovereignty in any case. However, until Murphy J’s judgements in the 1970s, the authority seen to be backing parliament on the one hand, and the Constitution and the High Court on the other, was regarded as different. Parliament was more or less the manifestation of popular sovereignty, whereas it was less clear what authority lay behind the Constitution - only Murphy J expressed the maverick opinion that it was the Australian people. But by 1984 Deane J was proposing that ‘the Australian Federation was and is a union of people and that, whatever may be their immediate operation, the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called Commonwealth and States derive their authority,’²⁸ and the ‘free speech’ cases linked this general idea with the implications of the *Australia Acts* to place ‘the people’ firmly behind the Constitution and the High Court, to virtually the same extent that they stood behind Parliament. Australian constitutional law now seems to be organised around the concept of a *two-headed sovereign*, the body of which is made up by ‘the Australian people’, with one head consisting of parliament, and the other of the Constitution and the common law, as well as their defender, the High Court.

Although it is true, as Winterton suggests, that ‘orthodox methods of constitutional interpretation are not incompatible with recognition that the Constitution is founded upon the ultimate sovereignty of the people’, this does not mean that there is only ‘remarkable continuity’ (Winterton 1998: 13), or that because a recognition of representative democracy is not new, there has been no change in constitutional interpretation (Williams 1994: 100). If that were so, the judgments in *ACTV* would have been unanimous. The High Courts has managed to *combine* an acknowledgement of popular sovereignty with a confinement of its expression to a relatively strict textual approach to the Constitution remaining within the conceptual framework of the two-headed sovereign, which generates a very particular form of judicial reasoning, captured by, for example, the difference between Dawson J’s judgment in *ACTV* and that of the majority (Blackshield 1994b: 235).

From subject to citizen?

The precise way in which the High Court has approached popular sovereignty is clearly not without its problems. These include difficulties with the concept ‘the people’ itself (Williams 1995; Zines 1997), whether an actual Bill of Rights would overcome the difficulties posed for democracy (Zines 1997: 104-7; Patmore 1998) by the High Court determining which law-making ‘track’ a particular piece of legislation is on, or its ‘proportionality’ (Toohey 1993: 172), the fact that this form of constitutionalism divides public but not private power, the difference between individual and corporate actors seems to be overlooked (Anderson 1998), and the Court’s conception of ‘freedom’ clearly needs greater critical scrutiny. Indeed, the more one asks after how ‘the people’ actually exercise their ‘sovereignty’, being largely limited to voting at elections and being the passive recipients of ‘political communication’, the more illusory the concept appears. If popular sovereignty is not the opiate of the people, it might be their Prozac.

The issue I would like to conclude with, however, is M.J. Detmold’s (1994) suggestion that these cases, together with *Leeth v Commonwealth*,²⁹ make up an entirely new form of constitutional law, one which treats all of us as individual citizens rather than ‘subjects of the Crown.’³⁰ Detmold argues that the major change signalled by the High Court’s increased reference to ‘the people’ is that the Constitution has come to be seen less as

an instrument regulated the relations between the States, and more as one managing the relationship between citizens and their governors. In his words: 'As citizens we have the constitution rather than the sovereign has us' (1994: 236), and this 'movement from sovereign to citizen is also a movement from states to citizens' relations' (p. 237).

Possibly. However, the language used in this 'new constitutional law' is still that of 'sovereignty', and in particular of a unified and undivided 'sovereignty of the people'. As Paul Finn (1995: 5) and Frank Brennan (1995) have argued, such a construction of sovereignty around a concept of 'the' people places an impassable barrier before the notion of a distinct indigenous sovereignty, and this is made clear in the cases dealing with Aboriginal sovereignty³¹ as well as the current Prime Minister's hostility to any suggestion of a treaty between Indigenous and non-Indigenous Australians. More generally, Andrew Fraser has argued along 'new wine in old bottles' lines that the concept of 'the people-at-large' operates more to provide unlimited political legitimacy to our governors, that the concept of 'popular sovereignty', because of the *abstract* character of the concept 'the people', is not very different in its operation from either monarchical or parliamentary sovereignty. 'The truth,' suggests Fraser, 'seems to be that the High Court has invented a fictitious popular sovereign to endow the heavily eroded constitutional authority still legally vested in the British Crown with an aura of political legitimacy' (1994: 224).

The problem for constitutional law and theory then becomes, not the category which we place before the concept 'sovereignty', but sovereignty itself. In Australian constitutional law, the High Court has renamed the King 'the people', and given it a second head, but perhaps the King needs to be given additional bodies, instead.

- there are problems with sovereignty, then, but different ones.
- sovereignty organised around distinction between barbarism and civilization - Hobbes
- if liberalism is about asking whether one is governing too much, this restraint of the state is precisely what discussions of sovereignty are about.
- disturbing thing about HC's conception of concept of sovereignty is that there's only a weak sense of natural law, contrary to the original coupling of the idea of state sovereignty with natural justice (Polat), maintaining the foundations of both international and domestic state violence.

Between singular sovereignty and multiple sovereignties

Notes

1 Stoler, for example, describes Foucault's definition of sovereignty as 'idiosyncratic' (1995: 62)

2 Useful overviews of the literature focusing on sovereignty as organised around relations between states, between (actually or potentially) competing governors, include Bartelson (1995), Jackson (1999), James (1999), Philpott (1999) and Walker (1993).

3 Kevin Stenson (1998) and Michael Dillon (1995) have pursued similar lines of reasoning in their own expressions of discomfort with the conceptualization of sovereignty both by Foucault himself and by subsequent studies of governmentality.

4 Nikolas Rose has suggested that instead of looking for a 'succession of forms', we should see the theme of sovereignty as having been 'relocated within the field of governmentality'. As the problems of government change, old forms of rule, including the idea 'the sovereignty of the people', 'find novel spaces of deployment and new points of support, and enter new dynamics of antagonism and conflict' (1999: 23-4).

5 Other examples of such analyses include Dillon's (1995) discussion of post-1989 international relations and migration and Constable's (1993) examination of immigration law.

- 6 *Nationwide News v Wills* (1992) 177 CLR 1 (*Nationwide*); *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106 (*ACTV*); *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 (*Theophanous*); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 (*Stephens*); as well as the earlier *Davis v Commonwealth* (1988) 166 CLR 79
- 7 *R v Smithers; Ex parte Benson* (1912) 16 CLR 99
- 8 *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 (*Ansett*)
- 9 *Ansett* Note 10 at 88
- 10 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1
- 11 *Union Steamship* Note 12 at 10
- 12 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 405
- 13 Note 1
- 14 *ACTV* Note 2 at 139, per Mason CJ
- 15 *Nationwide* Note 2 at 48, per Brennan J
- 16 *Nationwide* Note 2 at 48-9, per Brennan J
- 17 *Nationwide* Note 2 at 51, per Brennan J
- 18 *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129 at 151-2
- 19 *Nationwide* Note 2 at 43; see Williams (1994: 85) for a general discussion of the High Court's disinclination to defend citizens' rights or freedoms in their own right, in turn resulting in 'a preoccupation with the characterisation of Commonwealth powers'.
- 20 (1994) 182 CLR 104 (*Theophanous*)
- 21 *Ibid.*, at 147-8
- 22 (1997) 189 CLR 520
- 23 (1997) 189 CLR 579 at 605, 620 and 628
- 24 *ACTV* at 232, per McHugh J
- 25 (1994) 182 CLR 272 at 383
- 26 *A-G (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 24; but, exactly the opposite position is found in O'Connor J's comment in *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-8
- 27 For example, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1
- 28 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 59
- 29 (1992) 174 CLR 455
- 30 The old position is captured by the definition of 'the people' in *A-G (Cth); Ex rel McKinlay v Commonwealth*: 'The people is the body of subjects of the Crown inhabiting the Commonwealth regarded collectively as a unity or whole, and the sum of those subjects regarded individually' (1975 135 CLR 1 at 35, per McTiernan and Jacobs JJ); see also Paul Finn's (1994) arguments.
- 31 *Coe v Commonwealth of Australia* (1979) 24 ALR 118; (1993) 118 ALR 193; *Walker v State of New South Wales* (1994) 182 CLR 45