

An Express Constitutional Right to Vote? The Case for Reviving Section 41

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Abstract

Section 41 of the *Australian Constitution* appears, on its face, to guarantee state electors the right to vote in Commonwealth elections. However, the High Court held in *R v Pearson; Ex parte Sipka* that the provision was merely transitional and no longer has any effect. This article takes issue with that conclusion. The authors contend that the majority's reasoning in *Pearson* is unpersuasive. Further, a revived s 41 would cohere well with some of the central themes in Australia's recent constitutional evolution, including the High Court's changing approach to the protection of voting rights and the role of the states in constitutional reform under the *Australia Acts 1986*. The time is therefore ripe for the High Court to reconsider *Pearson* and integrate s 41 into its voting rights jurisprudence.

I Introduction

It is conventional wisdom that the *Australian Constitution* does not expressly guarantee the right to vote.¹ Speculation over the existence of a constitutional right to vote therefore tends to centre on the possibility that such a right is implied by the requirement in ss 7 and 24 that parliamentarians be 'directly chosen by the people'. The High Court resisted such an implication in *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth*,² ruling by majority that the *Constitution* does not guarantee universal adult suffrage. The subsequent case of *McGinty v Western Australia*³ likewise rejected an implied guarantee of equal voting value. A number of judges in those cases expressed support for the view that adults can only be

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¹ See, eg, Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis, 3rd ed, 2012) 77–8; Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart, 2010) 142–3; Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 92.

² (1975) 135 CLR 1 ('*McKinlay*').

³ (1996) 186 CLR 140 ('*McGinty*').

excluded from the vote for substantial reasons.⁴ Nonetheless, until recently, it was widely accepted that the *Constitution* contains no guarantee of franchise.

Two recent decisions suggest that the High Court is becoming increasingly willing to scrutinise Commonwealth legislation limiting adult suffrage. *Roach v Electoral Commissioner*⁵ examined amendments to the *Commonwealth Electoral Act 1918* (Cth) ('*Electoral Act 1918*') concerning the right of prisoners to vote in federal elections. The *Commonwealth Franchise Act 1902* (Cth) ('*Franchise Act 1902*') had originally excluded federal and state prisoners serving sentences of one year or longer from the Commonwealth franchise. The *Electoral Act 1918*, which repealed the *Franchise Act 1902*, maintained this rule until 1983, when the disqualification was restricted to prisoners serving sentences of five years or longer. In 2004, the *Electoral Act 1918* was amended to reduce the disqualifying sentence to three years. Then, in 2006, the legislation was further amended to make any prisoner serving a current sentence, regardless of its length, ineligible to vote.

A majority of the High Court (comprising Gleeson CJ, Gummow, Kirby and Crennan JJ) upheld the 2004 amendment, but struck down the 2006 change. Gleeson CJ endorsed the view of McTiernan and Jacobs JJ in *McKinlay*. He was willing to recognise that 'the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote'.⁶ However, the right is subject to exceptions. The disqualification of prisoners serving substantial sentences falls into this category. Gummow, Kirby and Crennan JJ reached a similar result, using more cautious language. They declined to endorse an implied constitutional right to vote,⁷ but nonetheless held that ss 7 and 24 rule out disproportionate restrictions on the franchise. The 2004 change was a proportionate restriction, but the 2006 amendment was not.

The High Court took a similarly robust view of the significance of ss 7 and 24 for adult franchise in the 2010 case of *Rowe v Electoral Commissioner*.⁸ The case concerned the validity of amendments to the *Electoral Act 1918* that effectively prevented applications for inclusion or change of details on the Commonwealth electoral roll from being accepted after the day that writs were issued. Applications received after that date were not to be processed until after polling day. Late applicants were therefore unable to vote, whether or not they were otherwise eligible. The previous arrangement, adopted in 1983, had allowed a seven-day grace period from the issuing of the writs to the closing of the rolls. This enabled eligible voters to apply for registration after the election had been called. The High Court ruled by a bare majority that the early closure of the rolls was unconstitutional. The majority, comprising French CJ, Gummow, Bell and

⁴ See, eg, *McKinlay* (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ), 68–9 (Murphy J); *McGinty* (1996) 186 CLR 140, 170 (Brennan CJ), 201 (Toohey J), 221–2 (Gaudron J), 286–7 (Gummow J). See also *Langer v Commonwealth* (1996) 186 CLR 302, 343 (McHugh J).

⁵ (2007) 233 CLR 162 ('*Roach*').

⁶ *Ibid* 174.

⁷ *Ibid* 199–200.

⁸ (2010) 243 CLR 1 ('*Rowe*').

Crennan JJ, viewed the change as placing a disproportionate restriction on the franchise.

The High Court in *Roach* and *Rowe* has affirmed, more clearly than ever before, the constitutional importance of adult franchise. Most members of the Court resisted endorsing a constitutional right to vote, speaking instead of the need for a ‘substantial reason’ to justify a departure from universal suffrage,⁹ but the reasoning favoured by the majority in both cases suggests something very like an implied conditional right. This qualified right to vote, like the implied freedom of political communication,¹⁰ derives from the vaguely worded ‘directly chosen’ clauses of ss 7 and 24. It is therefore unsurprising that commentators who criticised the political communication cases have also expressed doubts about *Roach* and *Rowe*.¹¹

Constitutional implications have been controversial in Australia at least since Isaacs J railed against them in the *Engineers’ Case*.¹² There is no scope in this article to enter into that debate.¹³ It seems clear, however, that the constitutional position on voting rights would be less tenuous if it were anchored in an express constitutional guarantee, rather than implications from the text. It is ironic, in this regard, that the High Court’s decisions in *Roach* and *Rowe* make only passing reference to the one constitutional provision that enshrines an express right to vote.¹⁴ Section 41 of the *Constitution* seems to have vanished from the constitutional discourse.

Section 41 is entitled ‘Right of electors of States’. It is the first provision in Chapter I, Part IV of the *Constitution*, dealing with issues relating to ‘Both Houses of the Parliament’. The section reads as follows:

No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

The meaning of this provision seems, on the face of it, tolerably clear. No adult who has the right to vote for the lower house of his or her state legislature may be deprived of the right to elect the Commonwealth Parliament. The section’s drafting

⁹ *Roach* (2007) 233 CLR 162, 199 (Gummow, Kirby and Crennan JJ).

¹⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559.

¹¹ See, eg, Nicholas Aroney, ‘Towards the “Best Explanation” of the Constitution: Text, Structure, History and Principle in *Roach v Electoral Commissioner*’ (2011) 30 *University of Queensland Law Journal* 145; James Allan, ‘Until the High Court Otherwise Provides’ (2011) 55(10) *Quadrant* 35.

¹² *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (‘*Engineers’ Case*). Isaacs J’s textualist rhetoric is somewhat undermined by his own integral use of background principles to guide his interpretive choices. For discussion, see Ratnapala and Crowe, above n 1, 244–6.

¹³ Cf Ratnapala and Crowe, above n 1, ch 10.

¹⁴ In *Roach*, Gummow, Kirby and Crennan JJ describe s 41 as a ‘somewhat delphic provision’, but otherwise give it little attention: (2007) 233 CLR 162, 195 [70]. A number of brief references also appear in the judgments in *Rowe* (2010) 243 CLR 1, 14 [9], 16–17 [14], 28 [49], 31 [59] (French CJ), 48 [122] (Gummow and Bell JJ), 80 [236] (Hayne J), 113–15 [348]–[354] (Crennan J), 127 [409] (Kiefel J).

history is more complex, as we will see below. However, on its face, the provision guarantees state electors the vote in Commonwealth elections.

Section 41, then, contains an express, albeit conditional, right to vote. The title of the section states that it pertains to a ‘Right of Electors’. Two High Court decisions, however, have essentially relegated the provision to the status of a footnote in Australian constitutional history. In *King v Jones*,¹⁵ the High Court interpreted s 41 narrowly, ruling that the term ‘adult person’ in the provision did not cover persons below the age of 21. Eleven years later, in *R v Pearson; Ex parte Sipka*,¹⁶ the Court went substantially further, declaring that s 41 was a merely transitional provision and therefore no longer of any effect. The majority judges took the view that s 41 only protected the voting rights of persons who were enfranchised under state law prior to the adoption of the *Franchise Act* in 1902, despite the lack of any such qualification in the words of the section. It is therefore now generally accepted that the provision is a mere historical artefact.

This article argues that the prevailing view of s 41 as a spent provision should be reconsidered.¹⁷ We begin by outlining the treatment of s 41 by the High Court, focusing particularly on the decisions in *King* and *Pearson*. We then examine the reasoning of the majority judges in *Pearson* in more detail, arguing that it is unpersuasive. The drafting history of s 41 is not decisive and should not be used to override the plain terms of the provision. The rationale for the section did not cease when the *Franchise Act 1902* was enacted. The continuing operation of s 41 does not undermine the objective of a uniform national franchise. There is no inconsistency between s 41 and other constitutional provisions granting the Commonwealth Parliament discretion over electoral arrangements, such as s 30. We therefore contend that *Pearson* should be regarded as wrongly decided. The minority view of Murphy J in *Pearson*, shared by Menzies J in *King*, should be preferred.

The article then expands upon the contributions made by scholars regarding s 41 by examining the role s 41 can play in the contemporary Australian constitutional context. A reinvigorated s 41 would constitutionally protect the right to vote at the Commonwealth level, by allowing the states to serve as a check against its removal. It would generally ensure that the national franchise expands over time, but does not contract. We argue that this form of protection would be consistent with two central themes in the recent evolution of the Australian constitutional framework. First, a revived s 41 would cohere with the democratic

¹⁵ (1972) 128 CLR 221 (*‘King’*).

¹⁶ (1983) 152 CLR 254 (*‘Pearson’*).

¹⁷ For critical discussion of the prevailing interpretation of s 41, see Adrian Brooks, ‘A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise’ (1993) 12 *University of Tasmania Law Review* 208; Deborah Cass and Kim Rubenstein, ‘Representation/s of Women in the Australian Constitutional System’ (1995) 17 *Adelaide Law Review* 3, 10–12; Anne Twomey, ‘The Federal Constitutional Right to Vote in Australia’ (2000) 28 *Federal Law Review* 125; Kim Rubenstein, ‘Can the Right to Vote be Taken Away? The Constitution, Citizenship and Voting Rights in 1902 and 2002’ in John Chesterman and David Philips (eds), *Selective Democracy: Race, Gender and the Australian Vote* (Melbourne Publishing Group, 2003); Elisa Arcioni and Kim Rubenstein, ‘Commentary and Judgment: *R v Pearson; Ex parte Sipka*’ in Heather Douglas et al (eds), *The Australian Feminist Judgments Project* (Hart, 2014) (forthcoming).

movement of the *Constitution*, as reflected in the free speech and voting rights cases. Second, it would give the states a defined role in the evolution of the Commonwealth franchise. This is consistent with the way that both s 128 of the *Constitution* and s 15 of the *Australia Acts 1986* give the states a role in constitutional reform.

The final part of the article briefly discusses the High Court's ruling in *King* that the term 'adult person' in s 41 did not extend to persons below the age of 21. We argue that the factors discussed in the preceding sections of the article all support Murphy J's view in *Pearson* that *King* should be overruled. We conclude by summarising the implications of our argument for the protection of voting rights in the *Constitution*. A revived s 41 would absolve the High Court from relying on implications from ss 7 and 24 in at least some potential voting rights decisions. It would therefore mitigate the concerns some authors have expressed about *Roach* and *Rowe*, while strengthening the democratic movement of the *Constitution* reflected in those cases. We conclude that the time is ripe for the High Court to reconsider *Pearson* and integrate s 41 into its voting rights jurisprudence.

II Section 41 in the High Court

The High Court jurisprudence on s 41 is surprisingly sparse. The cases of *King* and *Pearson*, discussed in detail below, supply by far the most robust discussions. There are, of course, other passing references to the provision. In the relatively early case of *Judd v McKeon*, for example, Isaacs J characterised s 41 as expressing a 'right to vote', noting '[t]hat the franchise may be properly regarded as a right, I do not for a moment question. It is a political right of the highest nature.'¹⁸ This invocation of s 41 contrasts with more recent obiter dicta on the provision, which tend simply to reiterate its lack of effect following *Pearson*.¹⁹ The majority of the High Court in *King* viewed s 41 as a permanent constitutional provision, but nonetheless foreshadowed *Pearson* by adopting a narrow reading of the section.

A *King: A Narrow Reading*

The High Court engaged in its first substantive discussion of s 41 in *King*.²⁰ Susan King was one of three South Australian applicants, each of whom had attained the age of 18 but had not yet turned 21, who applied under the *Electoral Act 1918* to be placed on the Commonwealth electoral roll. King was entitled to vote in elections for the South Australian House of Assembly, as a result of an amendment

¹⁸ (1926) 38 CLR 380, 385. See also *Muramats v Commonwealth Electoral Officer (WA)* (1923) 32 CLR 500, 504 (Higgins J).

¹⁹ See, eg, *Muldowney v Australian Electoral Commission* (1993) 178 CLR 34, 38–9 (Brennan ACJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 235 [151], 236–7[154] (Gummow and Hayne JJ); *Roach* (2007) 233 CLR 162, 195 [70] (Gummow, Kirby and Crennan JJ); *Rowe* (2010) 243 CLR 1, 14 [9], 16 [14], 28 [49], 31 [59] (French CJ), 48 [122] (Gummow and Bell JJ), 80 [236] (Hayne J), 114–16 [348]–[354] (Crennan J), 127–8 [409] (Kiefel J); *Holmdahl v Australian Electoral Commission (No 2)* (2012) 277 FLR 101, 111–12 [26] (Gray J).

²⁰ (1972) 128 CLR 221.

to the *Constitution Act 1934* (SA) that was passed in 1971. She wished to exercise her right to vote in the upcoming Commonwealth election. The matter was ultimately removed to the High Court by the Commonwealth Attorney-General under s 40 of the *Judiciary Act 1903* (Cth).

The High Court was required to determine whether King could rely on s 41 to guarantee her right to enrol for and vote at Commonwealth elections. In order to resolve this question, the Court needed to establish whether a person who had reached the age of 18 years qualified as an ‘adult person’ within s 41. A majority of the High Court reasoned that, when s 41 was adopted in 1900, a person would not have been considered ‘adult’ until she attained the age of 21 years. As Barwick CJ commented, ‘[t]he words of the Constitution are to be read in that natural sense they bore in the circumstances of their enactment’.²¹ On this basis, the Court concluded that King could not avail herself of s 41.

The High Court in *King* was not required to examine whether s 41 was intended to operate as a permanent or transitional provision, as the case was determined by the meaning of ‘adult person’. However, the case contains obiter dicta regarding the nature of the right conferred by s 41. Barwick CJ, for example, characterised s 41 as a ‘permanent provision of the Constitution’²² and noted that it could potentially apply to a person who acquired a right to vote under state electoral law subsequent to the passing of the Commonwealth franchise in 1902.²³ His Honour acknowledged that this interpretation of s 41 was not without difficulty, as it could distort the uniformity of the franchise. Ultimately, Barwick CJ deemed it ‘unnecessary to express an opinion’ on this issue.²⁴ However, according to his Honour, the very presence of s 41 indicated that the qualifications for electors of the Commonwealth Parliament ‘will not necessarily at any time be entirely uniform’.²⁵

McTiernan J did not address the status of s 41 in his brief judgment.²⁶ Gibbs J also concluded that it was unnecessary to express a final opinion on that issue.²⁷ Gibbs J noted that differing interpretations of the section had been offered by commentators. While his Honour seemed more inclined to adopt John Quick and Robert Garran’s view that s 41 guaranteed the voting rights of people whose right to vote at state elections was acquired before the passing of the *Franchise Act 1902*, he noted it was ‘far from clearly correct’.²⁸

Walsh and Stephen JJ likewise declined to reach a clear position on the issue. However, Walsh J was willing to accept that the words of s 41 ‘are not limited so as to refer only to a right to vote given by a law of a State already in force when the Constitution became operative’.²⁹ His Honour also accepted that

²¹ Ibid 229.

²² Ibid 231.

²³ Ibid 232.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid 244.

²⁷ Ibid 259.

²⁸ Ibid.

²⁹ Ibid 251.

the scope of the right conferred under s 41 was ‘capable ... of being affected by changes made from time to time in the electoral laws of a State’.³⁰ The section could therefore have applied to King, had she been an ‘adult person’. Stephen J likewise held that s 41 applied to an ‘adult person’ who, at any time, acquired the right to vote at a state election.³¹

Menzies J adopted a similar interpretation of s 41, but expressed it in more definitive language. His Honour clearly regarded s 41 as a permanent, prospective constitutional provision, remarking:

The character of s 41 is that of a permanent constitutional provision. It is not a provision to make temporary arrangements for the period between the establishment of the Constitution and the making of Commonwealth laws. It applies to a person, who, in 1901, had or who, in the future, acquires particular voting rights by the laws of a State.³²

The upshot of *King* for s 41 was highly equivocal. The High Court’s originalist interpretation of the term ‘adult person’ effectively meant that s 41 could not be invoked by persons enfranchised in their state as a result of a lowering of the voting age, as had occurred in South Australia. On the other hand, four of the six judges in the case expressed the view, albeit tentatively and in obiter dicta, that s 41 was a permanent constitutional provision. The tenor of the case therefore foreshadows *Pearson* in some respects, but runs contrary to it in others.

B Pearson: A Spent Provision

Section 41 was subsequently considered by the High Court in *Pearson*.³³ In this case, because all but one of the four prosecutors were adults, the High Court’s attention was directed more clearly at the status of s 41. *Pearson* concerned four prosecutors who wanted to exercise their right to vote in the 1983 Commonwealth election, but had not been placed on the Commonwealth electoral roll by the required time of 6:00pm on 4 February 1983. Although the prosecutors were enrolled to vote in New South Wales, the Registrar was of the view that, pursuant to s 45(a) of the *Electoral Act 1918*, they could not be permitted to enrol to vote, as their claims had not been received by the prescribed deadline.

The High Court was required to determine whether s 41 of the *Constitution* conferred on the prosecutors a right to vote in the Commonwealth election, by virtue of their enrolment on the New South Wales electoral roll. A majority of the Court (Murphy J dissenting) answered this question in the negative. The Court held that s 41 preserved only those rights that existed before the passing of the *Franchise Act 1902*,³⁴ despite the lack of any such qualification in the words of the section. As none of the prosecutors had acquired the right to vote at a state level before 1902 (and, indeed, had only done so relatively recently), they could not rely

³⁰ Ibid.

³¹ Ibid 267.

³² Ibid 246.

³³ (1983) 152 CLR 254.

³⁴ Ibid 264 (Gibbs CJ, Mason and Wilson JJ); 279 (Brennan, Deane and Dawson JJ).

on s 41. Brennan, Deane and Dawson JJ went on to declare that s 41 was intended as a transitional provision and no longer had any practical effect.³⁵

Gibbs CJ, Mason and Wilson JJ construed s 41 narrowly in their joint judgment. Their Honours held that s 41 ‘prevents the Commonwealth Parliament from taking away a right to vote; it does not create an entitlement which does not otherwise exist’.³⁶ The judges reasoned that the word ‘prevented’ in s 41 suggested that the provision only covered persons who acquired the right to vote prior to the commencement of the *Franchise Act 1902*.³⁷ Their Honours went on to explain:

[O]nce a Commonwealth law had been passed completely establishing the franchise, no person, not already qualified to vote at Commonwealth elections [in accordance with ss 8 and 30 of the Constitution], could become so qualified by virtue of the Constitution alone ... the right to vote to which s 41 refers must have been acquired by the persons concerned before the federal franchise was established.³⁸

Gibbs CJ, Mason and Wilson JJ sought to justify their narrow reading of s 41 by referring to the policy considerations raised by the section. Their Honours also referred to the drafting history of s 41, endorsing Quick and Garran’s preferred interpretation.³⁹ The debates surrounding the provision at the Adelaide and Melbourne sessions of the Constitutional Convention were construed as suggesting that the central purpose of s 41 was to safeguard the voting rights of women in South Australia until the enactment of a federal franchise. Gibbs CJ, Mason and Wilson JJ also dismissed the relevance of *King*,⁴⁰ notwithstanding that Barwick CJ and Menzies J had characterised s 41 in that case as a ‘permanent provision’⁴¹ and Gibbs J had opined that Quick and Garran’s interpretation was ‘far from clearly correct’.⁴²

Brennan, Deane and Dawson JJ delivered a separate joint judgment; however, they too concluded that s 41 should not be construed as conferring a right to vote.⁴³ Their Honours did not have detailed recourse to the drafting history of the section, but endorsed the view that s 41 was intended to apply solely to those persons who had already acquired the right to vote before the statutory franchise was enacted, pursuant to ss 8 and 30 of the *Constitution*.⁴⁴ Accordingly, their Honours concluded that ‘the practical effect of s 41 is spent’.⁴⁵

Murphy J held in dissent that the majority’s interpretation would effectively deny ‘one of the few guarantees of the rights of persons in the Australian Constitution’.⁴⁶ His Honour took the view that:

³⁵ Ibid 280 (Brennan, Deane and Dawson JJ).

³⁶ Ibid 260.

³⁷ Ibid 260, 264.

³⁸ Ibid 261.

³⁹ Ibid 262.

⁴⁰ Ibid 263.

⁴¹ *King* (1972) 128 CLR 221, 231 (Barwick CJ), 246 (Menzies J).

⁴² Ibid 259.

⁴³ *Pearson* (1983) 152 CLR 254, 278.

⁴⁴ Ibid 278–9.

⁴⁵ Ibid 280.

⁴⁶ Ibid 268.

[a] right to vote is so precious that it should not [be] read out of the Constitution by implication. Rather every reasonable presumption and interpretation should be adopted which favours the right of people to participate in the elections of those who represent them.⁴⁷

Murphy J reasoned that the words of s 41 were not transitional,⁴⁸ and, accordingly, s 41 operated to protect the prosecutors from disfranchisement in the Commonwealth election. His Honour rejected the majority's reading of s 41, instead giving the section a 'purposive interpretation which accords with its plain words, with its context of other provisions of unlimited duration, and its contrast with transitional provisions'.⁴⁹ This yielded a view of s 41 as 'prospective, ambulatory and constantly speaking'.⁵⁰

III Problems with *Pearson*

Six judges of the High Court in *Pearson* construed s 41 as a merely transitional provision. The prevailing view of the section had clearly shifted in the 11 years since *King*. Gibbs J, who was the only judge in *King* clearly to interpret s 41 as a transitional section, was also the only member of the Court to rule in both cases. He had, of course, become Chief Justice by the time *Pearson* was decided. In our view, however, the majority reasoning in *Pearson* is unconvincing. The approach of Murphy J in *Pearson* and Menzies J in *King* (which also seemed to be favoured by Barwick CJ, Walsh and Stephen JJ in the earlier case) is more persuasive. In order to explain why, we consider four of the main arguments relied upon by the majority judges in *Pearson*. We argue that all four lines of reasoning are misguided.

A *The Framers' Intentions*

The majority judges in *Pearson* placed considerable emphasis on the drafting history of s 41, particularly as reported by Quick and Garran.⁵¹ However, the drafting history of the provision is far from decisive and, at any rate, should not be used to override the plain terms of the section. Quick and Garran's account focuses particularly on the views of Frederick Holder, former Premier of South Australia and later the first Speaker of the House of Representatives, and Edmund Barton, later the first Prime Minister of Australia and a founding member of the High Court.⁵² Holder raised concerns at the Adelaide session of the Constitutional Convention that the recently enfranchised women of South Australia not potentially be denied the right to vote in elections for the new Commonwealth

⁴⁷ Ibid.

⁴⁸ Ibid 269.

⁴⁹ Ibid 268.

⁵⁰ Ibid 269.

⁵¹ (1983) 152 CLR 254, 261–2 (Gibbs CJ, Mason and Wilson JJ), 278–9 (Brennan, Deane and Dawson JJ).

⁵² John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 483–4.

Parliament.⁵³ This provoked a broader debate among the Convention delegates about the issue of female suffrage.⁵⁴

The Convention delegates failed to support two amendments endorsed by Holder that sought to preserve female franchise after Federation. Barton then intervened to suggest a provision reading as follows:

And no elector who has at the establishment of the Commonwealth or who afterwards acquires a right to vote at elections for the more numerous House of the Parliament of a State shall be prevented by any law of the Commonwealth from exercising such right at the elections for the House of Representatives.⁵⁵

Sir George Turner expressed concern that this proposal went further than Holder had originally intended.⁵⁶ Barton conferred with Holder and then sought to clarify the scope of the provision. He argued that the clause was only meant to protect voting rights existing prior to the enactment of a Commonwealth electoral law.⁵⁷ However, the subsequent discussion shows that some other delegates interpreted the provision as requiring the Commonwealth to enfranchise anyone placed on a state electoral roll after the creation of a national franchise.⁵⁸ The provision was nonetheless adopted and referred to the drafting committee. Further discussion later in the Convention failed to clearly settle the clause's meaning.⁵⁹

The debate was reopened at the Melbourne session of the Convention the following year. Barton moved an amendment to the wording adopted at the Adelaide Convention. The amendment was designed to make it explicit that the provision only preserved voting rights acquired under state law in force at Federation.⁶⁰ Barton took the view that the Adelaide delegates had 'made a mistake' by not placing such a limitation in the words of the provision.⁶¹ Holder opposed Barton's amendment, arguing that persons enfranchised by the states after Federation should not face the loss of their vote under a subsequent Commonwealth electoral law. He also objected to reopening an issue that had been considered settled in Adelaide.⁶² Barton eventually withdrew his proposal in favour of a compromise, under which the words 'no adult person' were inserted into the provision in order to head off concerns that it could be used to enfranchise people as young as 16.⁶³

It is doubtful that this drafting history clearly supports the High Court's interpretation of s 41 in *Pearson*. The Convention delegates ultimately opted for an

⁵³ *Official Report of the National Australasian Convention Debates*, Adelaide, 15 April 1897, 715–17 ('*Convention Debates Adelaide*').

⁵⁴ *Ibid* 717–25.

⁵⁵ *Ibid* 731 (Edmund Barton).

⁵⁶ *Ibid*.

⁵⁷ *Ibid* 731–2.

⁵⁸ *Ibid*.

⁵⁹ *Ibid* 1195–7.

⁶⁰ *Official Report of the National Australasian Convention Debates*, Melbourne, 3 March 1898, 1840–1 ('*Convention Debates Melbourne*').

⁶¹ *Ibid* 1841 (Edmund Barton).

⁶² *Ibid* 1842–3 (Frederick Holder).

⁶³ *Ibid* 1853.

expansively worded version of the provision. Holder himself only desired to protect voting rights acquired up until the enactment of a Commonwealth franchise law. However, no such limitation was placed into the text of s 41, despite repeated debate over the scope of the clause. Barton pointed out explicitly at the Melbourne session that the clause extended further than its drafters may have intended and offered an amendment to limit its application. Nonetheless, his proposal failed to gain the support of the delegates. The delegates, then, knew the clause was broadly worded and were offered more than one opportunity to narrow its scope. However, they ultimately declined to make any major changes.⁶⁴

Section 41 was extensively debated before being adopted by the Convention delegates. The starting point for interpreting the provision must therefore be that the delegates meant what they said and adopted the wording they intended to adopt. The provision should, at least presumptively, be given its plain meaning. The plain meaning of s 41, as we noted earlier, is that no adult who has the right to vote for the lower house of her state legislature may be prevented by federal law from voting for the Commonwealth Parliament.⁶⁵ A reading that limits the provision to voting rights acquired either before Federation or prior to the adoption of a Commonwealth franchise relies, as Quick and Garran concede,⁶⁶ on a strained interpretation of ‘acquires’ and ‘prevented’ as they appear in the section.

The underlying question here is how much weight should be placed on the intentions of the framers in construing the otherwise clear and unambiguous words of a constitutional provision. There is no scope in this article to enter into a general discussion of the proper role of authorial intention in constitutional interpretation. It is one thing, however, to rely upon the framers’ intentions in cases of vagueness or ambiguity and quite another to use them to change the plain meaning of the constitutional text. The latter approach seems particularly unsafe where the drafting history itself is ambiguous. The exact reasons why the expansive wording of the provision was retained in preference to Barton’s proposed amendment no doubt differed widely from delegate to delegate. We therefore agree with Anne Twomey that ‘[t]he Convention debates are ... illuminating only to the extent that they show there was no clear rationale behind s 41’.⁶⁷

B *The Rationale for the Provision*

The above discussion leads into a related point about the putative rationale for including s 41 in the *Constitution*. The majority judges in *Pearson* presented their interpretation of the provision as giving effect to its underlying purpose. According to Gibbs CJ, Mason and Wilson JJ, ‘the apprehended mischief which s 41 was designed to prevent was that the women of South Australia might be deprived of the federal franchise by the Commonwealth Parliament’.⁶⁸ South Australia was, at

⁶⁴ For an argument to similar effect, see *Pearson* (1983) 152 CLR 254, 272 (Murphy J).

⁶⁵ Cf *Pearson* (1983) 152 CLR 254, 267–8 (Murphy J).

⁶⁶ Quick and Garran, above n 52, 487.

⁶⁷ Twomey, above n 17, 130. Similar observations are made in George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 226–7.

⁶⁸ (1983) 152 CLR 254, 262. See also 277–8 (Brennan, Deane and Dawson JJ).

the time, the only state to grant women the vote, although Western Australia followed suit shortly before the *Constitution* came into effect. Their Honours concluded that once the Commonwealth enacted a uniform franchise allowing women to vote, as occurred with the *Franchise Act 1902*, the mischief targeted by s 41 disappeared and the provision no longer served any role.

As Murphy J's dissenting judgment highlights,⁶⁹ the majority judges' reading of constitutional history is more than a little complacent. Women were not the only group to be enfranchised in some states and not others prior to federation. Indigenous people were in an even more ambiguous position, being conditionally enfranchised in some jurisdictions and not at all in others. The *Franchise Act 1902* enfranchised women across the nation, but it sidestepped the issue of indigenous voting rights. Indeed, the legislation explicitly disenfranchised Aborigines, except for those who were enfranchised at a state level and therefore protected by s 41.⁷⁰ This haphazard treatment of indigenous voters continued until 1962.⁷¹ The notion that s 41 had no continuing purpose after 1902 therefore ignores a significant and historically vulnerable segment of the population.

The issue of indigenous voting rights raises a broader issue about the majority judges' understanding of the rationale for s 41. The rationale for the provision can be understood at a number of different levels. There can be little doubt that the enfranchisement of women in South Australia was the issue at the forefront of the framers' minds in adopting the provision,⁷² but this does not mean the purpose of the section was limited to that particular case. We have already noted that the Constitutional Convention delegates likely had a range of different motivations in adopting the clause's final wording. There is evidence that at least some delegates were motivated by broader concerns of democracy and equality in addition to the specific issues raised by female suffrage.⁷³

The case of South Australian women is itself capable of being considered at different levels. Holder was clearly concerned that the recent expansion of the franchise in South Australia not be undone at a national level. There were, however, broader issues at stake. These included the importance to the federation of equality between the states and uniform enfranchisement of voters from different regions. The debates about s 41 return repeatedly to the objective of a uniform national franchise, even if not all delegates thought uniformity was constitutionally required.⁷⁴ There are references throughout the discussion to both the right of states to fix their own franchise⁷⁵ and the considerations of fairness

⁶⁹ Ibid 269–71.

⁷⁰ *Franchise Act 1902* s 4. The effect of this provision was continued by the *Electoral Act 1918* s 39(5) (later amended by the *Commonwealth Electoral Act 1961* (Cth) s 4 and repealed by the *Commonwealth Electoral Act 1962* (Cth) s 2).

⁷¹ *Commonwealth Electoral Act 1962* (Cth) s 2.

⁷² Cf Quick and Garran, above n 52, 483–4.

⁷³ See, eg, *Convention Debates Adelaide*, above n 53, 715–16, 719, 722–4, 1195; *Convention Debates Melbourne*, above n 60, 1855.

⁷⁴ See, eg, *Convention Debates Adelaide*, above n 53, 715–32, 1195–6; *Convention Debates Melbourne*, above n 60, 1840–55.

⁷⁵ See, eg, *Convention Debates Adelaide*, above n 53, 725–32, 1195; *Convention Debates Melbourne*, above n 60, 1850–3.

involved in depriving individual electors of rights they enjoyed by virtue of state legislation.⁷⁶

The decision of the Convention delegates to adopt a broadly worded version of s 41 therefore reflects a range of pragmatic, political and moral considerations. Many of these factors clearly have applications beyond the specific case of South Australian women. The desirability of a uniform franchise, the importance of equality between the regions, the democratic legitimacy of the new *Constitution*, and issues of fairness and equality in relation to individual voters all have resonance extending beyond the historical context of the time. None of these issues ceased to be relevant to the Australian nation when Federation occurred or even when the first Commonwealth franchise legislation was enacted.

The position of the indigenous population after Federation is instructive here. If it were not for the existence of s 41, it seems plausible that Aborigines would have been entirely excluded from the Commonwealth franchise in 1902.⁷⁷ This would have been not only a setback for indigenous rights and social equality, but also a denial of the reasonable expectations of the minority of indigenous inhabitants who were allowed to vote under state electoral arrangements. The broader problems posed by defeating the expectations of persons enfranchised at state level clearly extend beyond the transitional arrangements prevailing at Federation. It is hard to imagine that a group of people enfranchised at state level today, but denied the right to vote in federal elections, would not feel that their reasonable expectations had been denied. The Commonwealth and state franchises are, in this sense, mutually supporting. Any decision to recognise a group of voters at one level, while excluding them at the other, has broader implications for the legitimacy of the federation.

The principle that individual voters should not have their status disregarded by the Commonwealth, leading to the denial of legitimate expectations, is not limited to the case of South Australian women. The wider concern here is not merely that the Commonwealth may enact legislation disenfranchising persons able to vote at state level, but that the right to vote at Commonwealth elections could be denied in more insidious ways, such as through administrative errors or requirements. These are not issues that were fully and permanently resolved by the *Franchise Act 1902*. They continued to affect indigenous voters for many decades afterwards and could affect other groups of electors at any time.

C *The Uniform Franchise*

Brennan, Deane and Dawson JJ purported to justify their narrow construction of s 41 in *Pearson* by placing particular emphasis on the possibility that s 41 could be used by the states to ‘destroy’ the Parliament’s ability to legislate for a uniform

⁷⁶ See, eg, *Convention Debates Adelaide*, above n 53, 725–6, 732, 1196; *Convention Debates Melbourne*, above n 60, 1850, 1854–5.

⁷⁷ Aborigines were, in any event, widely excluded in practice from the Commonwealth franchise after 1902 because of narrow and pedantic interpretations of s 41 by electoral officials. See Pat Stretton and Christine Finnimore, ‘Black Fellow Citizens: Aborigines and the Commonwealth Franchise’ (1993) 25 *Australian Historical Studies* 521.

federal franchise.⁷⁸ A similar concern was expressed by Gibbs CJ, Mason and Wilson JJ.⁷⁹ Brennan, Deane and Dawson JJ were particularly concerned that if s 41 was construed as a continuing guarantee, a state could, theoretically, expand its franchise to include classes of people previously excluded from voting in Commonwealth elections, such as property owners not ordinarily resident in a state, aliens, prohibited immigrants or prisoners.⁸⁰ Their Honours reasoned that this construction of s 41 could result in an undesirable departure from the uniform federal franchise and were unsettled by the prospect of a state using s 41 unilaterally to increase its electors for the purposes of referenda under s 128.⁸¹

The majority judges premised their arguments on the assumption that the franchise enacted by the *Franchise Act 1902* was, in fact, uniform. However, Murphy J noted that while the *Franchise Act 1902* purported to be ‘An Act to provide for [a] Uniform Federal Franchise’, it disqualified Aborigines from the vote.⁸² Section 4 provided:

No aboriginal native of Australia, Asia, Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution.

Therefore, in Murphy J’s view, the *Franchise Act 1902* ‘deliberately abstained from introducing uniform federal franchise’ by failing to extend the franchise to Aborigines.⁸³ For those Aborigines who were entitled to vote in New South Wales, Victoria, South Australia and Tasmania, s 41 should have guaranteed their right to vote in Commonwealth elections. However, Quick and Garran’s narrow interpretation of s 41 was employed by electoral officials to refuse the enrolment of any individual in reliance on the provision unless they had been entitled to a state vote prior to 1902.⁸⁴ As many Aborigines were not enrolled to vote at state level prior to 1902, the electoral officials’ adherence to a narrow interpretation of s 41 had the effect of denying Aborigines their right to vote.

Although the *Electoral Act 1918* was amended in 1949⁸⁵ to give effect to a broader interpretation of s 41, it only extended the Commonwealth vote to Aborigines residing in New South Wales, Victoria, South Australia and Tasmania or who had completed military service. The federal franchise only became uniform in 1962, when the *Electoral Act 1918* was again amended, this time to remove the disqualification preventing Aboriginal people from voting in Commonwealth elections and provide for general adult suffrage.⁸⁶

⁷⁸ (1983) 152 CLR 254, 279.

⁷⁹ *Ibid* 261.

⁸⁰ *Ibid* 279.

⁸¹ *Ibid*.

⁸² *Ibid* 269–70.

⁸³ *Ibid* 270.

⁸⁴ For a critical discussion of how restrictive interpretations of s 41 were employed by electoral officers and public servants to disenfranchise Aboriginal, Indian and other non-white voters, see Stretton and Finnimore, above n 77.

⁸⁵ *Commonwealth Electoral Act 1949* (Cth).

⁸⁶ *Commonwealth Electoral Act 1962* (Cth).

Section 128 expressly confronts the difficulties posed by the lack of a uniform franchise at Federation. It provides that:

until the qualification of electors becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

It might seem at first that this wording poses a challenge for the continuing operation of s 41. Section 128 might perhaps be interpreted as requiring that any state that departs from the uniform franchise — for example, by enfranchising prisoners or persons under the age of 18 — would be required to forfeit half its electors for constitutional referenda.⁸⁷ However, this interpretation is unpersuasive. The clear purpose of the above wording in s 128 is to deal with the position immediately following Federation where women were enfranchised in some states and not others. This is why the provision refers to ‘one-half the electors’.

We noted above that the federal franchise only became truly uniform in 1962, but there was no suggestion prior to that time that states that enfranchised Aborigines should lose half their voters at referenda. Indeed, such an approach would have made no sense considering the numbers of people involved. It seems far better to construe the above wording in s 128 as limited to the issue of female franchise. It would therefore have been open to those states that had denied Aborigines the right to vote, such as Queensland or Western Australia, to increase the number of electors in the state for the purposes of referenda by granting Aborigines the right to vote at any time prior to 1962. However, it is doubtful whether this would have afforded any real value, given the rarity of referenda and the requirement of s 128 calling for a majority of voters in a majority of states. Twomey argues, persuasively in our view, that a state would be unlikely to change its franchise solely for the ‘dubious’ advantage of increasing the number of its electors for the purposes of s 128.⁸⁸

Section 41 preserves a right that states have chosen to give. It is interesting to compare the High Court’s concern about potential misuse of s 41 by the states with the relatively dismissive attitude towards the prospect of abuse of s 122 by the Commonwealth adopted by the majority judges in the *Territory Senators Cases*. The *First Territory Senators Case*⁸⁹ upheld the *Senate (Representation of Territories) Act 1973* (Cth), which provided for the Northern Territory and the Australian Capital Territory to each elect two senators with full voting rights, in the face of challenges from Western Australia and Queensland. The plaintiffs argued that a wide interpretation of s 122 would allow the Commonwealth Parliament to swamp the Senate with territory representatives. However, this argument was pilloried by Mason J as ‘an exercise in imagination’ and by Jacobs J as ‘preposterous’.⁹⁰ The prospect of the Commonwealth Parliament using its power under s 122 to distort the balance between the Houses of Parliament or subvert the intended character of the Senate as the states’ house was therefore summarily dismissed.

⁸⁷ We are grateful to Margaret Davies and Kim Rubenstein for helpful discussion on this issue.

⁸⁸ Twomey, above n 17, 140–1.

⁸⁹ *Western Australia v Commonwealth* (1975) 134 CLR 201 (‘*First Territory Senators Case*’).

⁹⁰ *Ibid* 271 (Mason J), 275 (Jacobs J). See also 286–7 (Murphy J).

The question of territory representation in the Senate resurfaced in the *Second Territory Senators Case*,⁹¹ where the interpretation of s 122 from the preceding case was upheld by a differently constituted majority, including Gibbs and Stephen JJ, who had dissented in the earlier case. Stephen J held that the spectre of excessive territory representation was taken into account when the *First Territory Senators Case* was decided. The extent of territory representation under s 122 was therefore properly regarded as a matter solely for Parliament.⁹² Why, then, was the High Court so blasé about potential abuse of s 122 by the Commonwealth in the *Territory Senators Cases*, but so concerned about misuse of s 41 by the states in *Pearson*, decided relatively soon afterwards? It is tempting to view the two cases as distinguished more by the judges' conceptions of federalism than by a careful examination of the relevant constitutional provisions and their likely outcomes.

Not only is it unlikely that states would give persons such as aliens, prohibited immigrants or prisoners the right to vote, but in the former two cases it is unlikely that they would be 'people of the State' or 'people of the Commonwealth' within the meaning of ss 7 and 24 of the *Constitution*.⁹³ Further, even if a state did expand its franchise to include previously disqualified groups, thereby affecting the federal franchise under s 41, the uniform franchise is not likely to be undermined in the long run. On the contrary, Australian constitutional history suggests that the franchise of the more liberal states will eventually be adopted by the more conservative states. Women and Aborigines were first allowed to vote in South Australia, but this eventually became uniform. The expansion of the voting population over time not only created a truly uniform franchise, but also increased the classes of people able to vote in Commonwealth elections, leading to near universal adult suffrage.⁹⁴ We will suggest later in this article that the propensity of s 41 gradually to expand the franchise to cover previously disqualified groups should be regarded as a merit, rather than a disadvantage. It also sits well with central themes in the High Court's recent jurisprudence on ss 7 and 24.

D *The Constitutional Context*

A related concern expressed by the majority judges in *Pearson* pertains to the relationship between s 41 and other constitutional provisions granting the Commonwealth Parliament discretion over electoral arrangements, such as ss 30 and 8.⁹⁵ Section 30 provides:

Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more

⁹¹ *Queensland v Commonwealth* (1977) 139 CLR 585 ('*Second Territory Senators Case*').

⁹² *Ibid* 604.

⁹³ Cf *Hwang v Commonwealth* (2005) 80 ALJR 125, 130 (McHugh J).

⁹⁴ We say 'near universal', because some adults remain unable to vote, such as prisoners serving sentences of three years or longer: *Electoral Act 1918* s 93.

⁹⁵ (1983) 152 CLR 254, 260–1 (Gibbs CJ, Mason and Wilson JJ), 278–9 (Brennan, Deane and Dawson JJ).

numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

Section 8 provides that the qualifications of electors for the Senate will be the same as for the House of Representatives.

The majority in *Pearson* interpreted s 41 as guaranteeing the right to vote of Commonwealth electors who had been enfranchised under ss 30 and 8 of the *Constitution*. Gibbs CJ, Mason and Wilson JJ reasoned that the combined effect of ss 30 and 8 was to establish a provisional franchise that would continue in force until the Parliament legislated for a federal franchise.⁹⁶ Once the *Franchise Act 1902* was passed, no elector could acquire a qualification to vote at Commonwealth elections by virtue of the *Constitution* alone, as only the concluding words of s 30 had any continuing operation.⁹⁷

Their Honours concluded that the right to vote to which s 41 referred was the provisional franchise that had been acquired by an elector under ss 30 and 8 of the *Constitution*, before the *Franchise Act 1902* established a statutory equivalent.⁹⁸ In reaching this conclusion, Gibbs CJ, Mason and Wilson JJ drew support from an opinion given by Sir Robert Garran in 1914 when he was Secretary of the Attorney-General's Department:

[T]he intention of section 41 is that an elector, who under the provisional franchise established by section 30, has (at the establishment of the Commonwealth) or acquires (before the Parliament passes a Franchise Act) a right to vote at Commonwealth elections by virtue of his State right, that right shall not be taken away by any law of the Commonwealth.⁹⁹

Brennan, Deane and Dawson JJ reached a similar conclusion. Their Honours limited the scope of the guarantee contained in s 41 to those electors who had acquired a right to vote at Commonwealth elections by virtue of the provisional franchise established by ss 30 and 8 of the *Constitution*.¹⁰⁰ However, a person could no longer acquire a right to vote at federal elections by virtue of ss 30 and 8 once the federal franchise was enacted.¹⁰¹ Sections 30 and 8 therefore ceased to generate new rights with the passage of the *Franchise Act 1902* and, according to Brennan, Deane and Dawson JJ, the same applied to s 41.¹⁰²

The majority in *Pearson* held the view that s 41 was intended to guarantee the voting rights of Commonwealth electors enfranchised by ss 30 and 8. However, the plain words of s 41 do not support this interpretation. As discussed above, s 30 operates '[u]ntil the Parliament otherwise provides'. The wording of the section suggests it was intended to operate as a transitional provision, and was inserted for the purposes of the first election.¹⁰³ Section 41, by contrast, is worded as a continuing guarantee, rather a merely transitional measure. The provision is clear

⁹⁶ Ibid 261.

⁹⁷ Ibid.

⁹⁸ Ibid 264.

⁹⁹ Ibid (emphasis by Sir Robert Garran).

¹⁰⁰ Ibid 279.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ See Brooks, above n 17, 235.

and unambiguous. It purports to protect the right to vote of state electors who have been enfranchised by the laws of their state.

The majority judges in *Pearson* effectively read into s 41 words that are not there. They did not afford s 41 its plain meaning. Section 41, on its face, is not the ‘somewhat delphic provision’ described by Gummow, Kirby and Crennan JJ in *Roach*;¹⁰⁴ its ambiguity has been largely imposed on it by the High Court. Murphy J was correct to view the majority ruling in *Pearson* as reading s 41 ‘out of the Constitution by implication’.¹⁰⁵ There is arguably less basis for this implication in the constitutional text and structure than there is for other more hotly contested constitutional implications, such as the implied freedom of political communication. However, the implications involved in the High Court’s reading of s 41 have largely escaped the fierce scrutiny levelled at the free speech cases.

The constitutional context of s 41 further supports our argument that it should not be interpreted as a transitional provision. Murphy J made this point in his dissenting judgment in *Pearson*. His Honour argued persuasively that the majority was incorrect in reading s 41 in conjunction with ss 30 and 8.¹⁰⁶ Sections 30 and 8 are situated in ch I pts II and III of the *Constitution*, dealing with the individual Houses of Parliament. They are surrounded by other transitional provisions, such as ss 10, 29, 31 and 34. Section 41, by contrast, is the first provision in ch I pt IV, dealing with both Houses of Parliament. It is immediately followed by a series of other prospective and permanent provisions. Chapter I pt IV also includes some transitional provisions (ss 46–8), but these are all clearly designated by the opening words: ‘Until the Parliament otherwise provides’.¹⁰⁷

Murphy J declined to read the words ‘[u]ntil the Parliament otherwise provides’ into s 41, holding that their omission was ‘intended to ensure that the Parliament could not prevent adult persons with a right to vote in State elections from voting in federal elections’.¹⁰⁸ His Honour viewed it as inappropriate to imply a statement of transitional effect into a provision guaranteeing a fundamental right. Barwick CJ made a similar observation in *King*, characterising s 41 as a permanent provision intended ‘to find its principal operation when the Parliament had made a law determining the Commonwealth franchise’.¹⁰⁹ His Honour reasoned that the framers saw a need to ensure that Parliament did not enact or enforce a franchise that was less liberal than the most liberal franchise at state level.¹¹⁰ Menzies J also construed s 41 in *King* as a ‘permanent constitutional provision’ and denied that it is ‘a provision to make temporary arrangements for the period between the establishment of the Constitution and the making of Commonwealth laws’.¹¹¹

Gibbs CJ, Mason and Wilson JJ held in *Pearson* that *King* could not be relied upon due to its focus on the meaning of ‘adult person’, but provided no

¹⁰⁴ (2007) 233 CLR 162, 195 [70].

¹⁰⁵ (1983) 152 CLR 254, 268.

¹⁰⁶ *Ibid* 268–9.

¹⁰⁷ *Ibid* 269.

¹⁰⁸ *Ibid*.

¹⁰⁹ (1972) 128 CLR 221, 231.

¹¹⁰ *Ibid*.

¹¹¹ *Ibid* 246.

reasons for disregarding the views of Barwick CJ and Menzies J outlined above.¹¹² The constitutional context for s 41 suggests that it was intended as a continuing guarantee. The drafters could have indicated otherwise by including the words '[u]ntil the Parliament otherwise provides', as they did for numerous other provisions.¹¹³ However, they elected not to do so. The words of s 41 are clear on their face and it was unnecessary for the majority in *Pearson* to read into the section a limitation that did not exist. The majority in *Pearson* effectively excised an express constitutional guarantee from the *Constitution*. They did so, in our view, for no good reason.

IV The Case for Reviving s 41

We argued in the previous section that the reasoning of the majority judges in *Pearson* does not withstand close scrutiny. The drafting history of s 41 does not clearly support an interpretation that relegates the provision to a transitional measure. The interpretation adopted in *Pearson* is also unsupported by the rationale for s 41, the desirability of a uniform national franchise or the position of s 41 within the *Constitution*. The majority position in *Pearson* relied on unsound constitutional implications to read out of the *Constitution* one of its few express rights. The case should be viewed as wrongly decided.

The paucity of the reasoning employed by the majority in *Pearson*, however, is not sufficient by itself to justify reinstating s 41 as an active constitutional provision. Section 41 has never been central to a High Court ruling since *Pearson*, but its status as a transitional provision has been reaffirmed in obiter dicta.¹¹⁴ It might therefore be argued that the provision would be out of place in the High Court's contemporary jurisprudence. Alternatively, it might be thought that the potential role of s 41 in the *Constitution* has since been filled by other constitutional doctrines. The aim of this section, therefore, is to show that s 41 still has an important role to play in the constitutional framework. It would cohere well with recent developments in constitutional law and theory, while serving as a useful supplement to current doctrines on representative government.

A Democratic Movement

The decades following *King* and *Pearson* produced a series of High Court decisions concerning the extent to which the *Constitution* enshrines universal adult suffrage. The High Court rejected the notion of a constitutional guarantee of adult suffrage in *McKinlay*¹¹⁵ and declined in *McGinty* to establish a guarantee of equal

¹¹² (1983) 152 CLR 254, 263.

¹¹³ See, eg. *Constitution* ss 3, 7, 10, 20, 29–31, 34, 39, 46–8, 65–7, 73, 87, 93, 96–7.

¹¹⁴ See, eg. *Muldowney v Australian Electoral Commission* (1993) 178 CLR 34, 38–9 (Brennan ACJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 235 [151], 236–7 [154] (Gummow and Hayne JJ); *Roach* (2007) 233 CLR 162, 195 [70] (Gummow, Kirby and Crennan JJ); *Rowe* (2010) 243 CLR 1, 14 [9], 16 [14], 28 [49], 31 [59] (French CJ), 48 [122] (Gummow and Bell JJ), 80 [236] (Hayne J), 114–16 [348]–[354] (Crennan J), 127–8 [409] (Kiefel J); *Holmdahl v Australian Electoral Commission (No 2)* (2012) 277 FLR 101, 111–12 [26] (Gray J).

¹¹⁵ (1975) 135 CLR 1.

voting value.¹¹⁶ However, there were references throughout both these cases to the important position of representative democracy in the constitutional framework.¹¹⁷ McTiernan and Jacobs JJ took the view in *McKinlay* that:

the long established universal adult suffrage may now be recognized as a fact and as a result it is doubtful whether, subject to the particular provision in s 30 [of the *Constitution*], anything less than this could now be described as choice by the people.¹¹⁸

In the same case, Murphy J reasoned that democratic elections necessarily required uniform adult suffrage and any law of the Parliament that deprived persons of a right to vote on the ground of sex, race or lack of property ownership would be incompatible with the constitutional requirement in s 24 that the House of Representatives be ‘directly “chosen by the people”’.¹¹⁹

These sentiments were echoed by some of the judges in *McGinty*. Brennan CJ and Gummow J declined to uphold the principle of equal vote value, but they were nevertheless open to the possibility that Parliament cannot place new restrictions on adult franchise. Brennan CJ noted that the franchise has expanded in scope over time and thought that it was ‘at least arguable that the qualifications of age, sex, race and property which limited the franchise in earlier times could not now be reimposed so as to deprive a citizen of the right to vote’.¹²⁰ Gummow J expressed a similar view, opining that what amounts to popular choice must be ‘determined by reference to the particular stage which then has been reached in the evolution of representative government’.¹²¹ His Honour endorsed the conclusion of McTiernan and Jacobs JJ in *McKinlay* that universal adult franchise ‘has become a characteristic of popular election ... which could not be abrogated by reversion to the system which operated in one or more colonies at the time of federation’.¹²² Gaudron and Toohey JJ likewise opined in *McGinty* that a system that denied universal adult franchise would not satisfy the requirement in ss 7 and 24 that representatives be ‘chosen by the people’.¹²³

The view of McTiernan and Jacobs JJ in *McKinlay* found further support in the judgment of Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills*.¹²⁴ Their Honours adopted the position that representative government necessarily requires ‘all citizens of the Commonwealth who are not under some special disability’ to have equal voting rights.¹²⁵ This understanding of the democratic franchise as an evolving aspect of the constitutional framework was echoed by McHugh J in *Langer v Commonwealth*.¹²⁶ His Honour observed in that case that the question

¹¹⁶ (1996) 186 CLR 140.

¹¹⁷ See George Williams, ‘Sounding the Core of Representative Democracy’ (1996) 20 *Melbourne University Law Review* 848.

¹¹⁸ (1975) 135 CLR 1, 36.

¹¹⁹ *Ibid* 69.

¹²⁰ (1996) 186 CLR 140, 166–7.

¹²¹ *Ibid* 286–7.

¹²² *Ibid* 287.

¹²³ *Ibid* 201 (Toohey J), 221–2 (Gaudron J).

¹²⁴ (1992) 177 CLR 1.

¹²⁵ *Ibid* 72.

¹²⁶ (1996) 186 CLR 302.

‘[w]hether or not a member has been “chosen by the people” depends on a judgment, based on the common understanding of the time, as to whether the people as a class have elected the member’.¹²⁷

The notion that the democratic structure of the *Constitution* forms an integral part of the context for constitutional provisions is central to the High Court’s reasoning in the ‘free speech’ cases. The High Court noted unanimously in *Lange v Australian Broadcasting Corporation* that the *Constitution* provides for ‘the fundamental features of representative government’.¹²⁸ It follows that:

[f]reedom of communication on matters of government and politics is an indispensable incident of that system of government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be ‘directly chosen by the people’ of the Commonwealth and the States.¹²⁹

The High Court’s reasoning in these cases has consistently had regard to the democratic theme of the *Constitution*. There is significant judicial support for the idea that the franchise could not now be narrowed so as to disqualify certain classes of people from voting in Commonwealth elections. Kirby J put the point as follows in *Mullholland v Australian Electoral Commission*:

What might in 1901 have been regarded as acceptable for a Parliament ‘directly chosen by the people’ might not pass muster today. In particular circumstances, if a majority in the Parliament endeavoured to disqualify women voters or citizens of Asian ethnicity or to entrench its power in a disproportionate way ... the requirement of direct election by the people might well afford protection against the offending electoral law.¹³⁰

However, it was not until *Roach* in 2007 that a High Court majority clearly acknowledged the constitutional importance of a universal adult franchise and confirmed the need for a ‘substantial reason’ to justify a departure from universal suffrage.¹³¹ Gleeson CJ reasoned that:

[b]ecause the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.¹³²

Gummow, Kirby and Crennan JJ likewise held that ss 7 and 24 rule out disproportionate restrictions on the franchise. Their Honours took the view that ‘a franchise ... is held generally by all adults or adult citizens unless there be substantial reasons for excluding them’.¹³³ This line of reasoning was taken a step further in *Rowe*. The High Court has therefore now established something very like a qualified constitutional right to vote.

¹²⁷ Ibid 343.

¹²⁸ (1997) 189 CLR 520, 557.

¹²⁹ Ibid 559.

¹³⁰ (2004) 220 CLR 181, 261 [233] (Kirby J).

¹³¹ (2007) 233 CLR 162, 174 (Gleeson CJ), 199 (Gummow, Kirby and Crennan JJ).

¹³² Ibid 174.

¹³³ Ibid 198, quoting *McGinty* (1996) 186 CLR 140, 170 (Brennan CJ).

The themes of the High Court's recent voting rights jurisprudence identified above bolster the case for reviving s 41. There is a substantial degree of coherence between the High Court's evolving conception of voting rights and the way a revived s 41 would operate in practice. The trend in the High Court cases considered above has been gradually to strengthen constitutional protection of voting rights over time, reflecting the changing nature of Australian representative democracy. Parliament undoubtedly has wide discretion to determine electoral arrangements, but there is significant judicial resistance to the idea that this discretion could be used to roll back the hard-won gains of the past in regard to adult franchise. Graeme Orr has described this trend as the 'voting rights ratchet'.¹³⁴ We prefer to call it the democratic movement of the *Australian Constitution*.¹³⁵

A revived s 41 would be likely to bolster this constitutional trend towards gradual expansion of the franchise. It would enable the states to push forward in expanding the right to vote to groups who presently remain excluded, such as prisoners and permanent residents. Section 41 would then allow such newly enfranchised voters to uphold their right to vote at a Commonwealth level, providing both legal and political impetus for a national expansion of the franchise. There is little reason to expect that this impetus would lead to radical or precipitous upheaval in electoral arrangements. States would be unlikely to expand their franchises lightly. More fundamentally, why should a person whose state is willing to enfranchise him or her be prevented from voting at a federal level? Why, indeed, should any adult person living permanently in Australia be denied a say in community governance?

A revitalised s 41 would allow the principle of universal franchise to find its full expression in the Australian system of government. However, it would allow state legislatures, rather than the High Court, to drive the reform process. Critics of the use of constitutional implications in cases such as *Roach* and *Rowe* should welcome the constructive role s 41 can play in returning control over expansion of the franchise to the legislative branch, albeit at a regional rather than a national level. At the same time, those who find the reasoning in *Roach* and *Rowe* supportable (including the present authors) can welcome the role s 41 could play in the ongoing democratic evolution of the Australian constitutional framework.

B *The Role of the States*

The arguments explored above lead into a second reason why a revived s 41 would cohere well with the current Australian constitutional framework. Section 41 gives the states an important role in defining the scope of the national franchise. The primary power to define the federal franchise still rests with the Commonwealth, but under s 41 a collaborative process arises whereby the states can make a difference to local arrangements and potentially affect the outer margins of the franchise at a national level. The states have always had an important role in constitutional change at the Commonwealth level. This is reflected most obviously

¹³⁴ Graeme Orr, 'The Voting Rights Ratchet' (2011) 22 *Public Law Review* 83.

¹³⁵ Cf Michael Detmold, 'Australian Law: Federal Movement' (1991) 13 *Sydney Law Review* 31.

in the referendum process in s 128, which calls for approval by not only a majority of Australian electors, but a majority of voters in a majority of states.

A more recent and symbolically important development in this regard can be found in the *Australia Acts 1986* ('*Australia Acts*'). The *Australia Acts* were enacted as an extraordinary package of legislation passed in similar form by each of the Australian Commonwealth and state legislatures, along with the Parliament of the United Kingdom. This was done partially in fulfilment of the request and consent procedure for United Kingdom legislation applicable to Australia under s 4 of the *Statute of Westminster 1931* (Imp) 22 & 23 Geo 5, c 4 ('*Statute of Westminster*'). It was also done, however, to enable the Commonwealth Parliament to enact its legislation under s 51(xxxviii) of the *Constitution*.¹³⁶ The involvement of the states ensured that the changes were effective as a matter of state law, but also provided the constitutional basis for the Commonwealth statute.

Section 15 of the *Australia Acts* is a remarkable provision. It sets out a special amendment process applicable to both the *Australia Acts* themselves and the *Statute of Westminster*. Section 15(1) provides:

This Act or the *Statute of Westminster 1931*, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States and, subject to subsection (3) below, only in that manner.

The reference to subsection (3) makes it clear that this process does not alter the existing procedure for constitutional change under s 128. Nonetheless, s 15 supplements s 128 in an interesting and significant way. It makes it possible for the Commonwealth and state legislatures, acting together, to change Australia's constitutional arrangements, at least so far as these depend upon the terms of the *Australia Acts* and the *Statute of Westminster*.¹³⁷

The vision of the Commonwealth and state legislatures acting together to bring about constitutional change in Australia is a compelling one. It resonates with a picture of Australian federalism as involving measures of both cooperation and competition between the Commonwealth and the regions. Section 41 puts in place a process whereby the states can innovate and compete in relation to the scope of the franchise. It establishes an interactive procedure where states may initiate modest changes to the national electoral process, sparking a process of national debate and negotiation between the states involved and the Commonwealth government. This process captures the same federalist conception of constitutional legitimacy embodied in both the enactment of the *Australia Acts* and the amendment process set out in s 15. It recognises that constitutional legitimacy depends upon accommodating the federally divided character of the Australian polity.

¹³⁶ For further discussion, see Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) ch 5.

¹³⁷ Cf Christopher Gilbert, 'Section 15 of the *Australia Acts*: Constitutional Change by the Back Door' (1989) 5 *Queensland University of Technology Law Journal* 55.

The High Court's gradual but relentless expansion of Commonwealth heads of power since the *Engineers' Case* has resulted in a process of organic constitutional change that is slanted towards the Commonwealth. Constitutional provisions such as s 96, which offer the potential for collaboration between the state and federal governments, too often work, in practice, as methods for the Commonwealth to exert its constitutional dominance. Section 41 offers a small but significant counterbalance to this trend. It delineates a region of constitutional and electoral reform where the states may take the initiative. The revival of s 41 therefore promises to make a positive contribution to the federal balance in Australia by reiterating the important role of the states in shaping the national polity. It would reclaim the federalist spirit of s 128 and resonate with s 15 of the *Australia Acts*.

V 'No Adult Person'

We have seen that in *King*¹³⁸ the High Court examined the meaning of 'adult person' in s 41. The question was whether the applicants, who were between the ages of 18 and 21, qualified as 'adult' for the purposes of the section. The majority ruled that they did not, since the word must be given the meaning it had in 1900, when the *Constitution* was adopted. At that time, a person would not have been considered adult until the age of 21. We have argued above that *Pearson* should be viewed as wrongly decided. Section 41 should be revived. This raises the question of whether the section should be confined to persons over the age of 21, as decided in *King*. We argue that it should not. The term 'adult person' in s 41 should be permitted to evolve with social practices and norms.

There is an ambiguity about how the term 'adult person' in s 41 applies to persons such as the applicants in *King*. One way of settling this issue would be to opt for the original meaning of the provision. This is the approach taken by the majority judges in *King*. However, the original meaning of 'adult person' can itself be interpreted at different levels of abstraction. At one level, the term would have been understood in 1900 as meaning a person over the age of 21. At a slightly more abstract level, it would have been understood as referring to a person who has attained the age of social and legal majority. The age of majority was 21 in 1900, but people are now generally treated as adults at 18.

The age of majority is a product of social judgments on a range of matters, including intellectual maturity, social and political participation, contractual competence, earning and borrowing capacity, criminal accountability, marital capacity and sexual autonomy. At this level, many of the factors that tended, in 1900, to fix the meaning of 'adult' as 'over the age of twenty-one' would have been viewed in a different light in 1972, when *King* was decided. Social norms shift over time and the plain meaning of terms such as 'adult person' shifts with them. The need for certainty in constitutional interpretation, in our view, indicates a presumption in favour of applying plain meaning. The majority judges in *King* failed to do this. They applied an outdated meaning of the term 'adult person',

¹³⁸ (1972) 128 CLR 221.

leading to a construction of s 41 that appears strained from a contemporary standpoint.

There is no scope in this article for a detailed excursion into theories of constitutional interpretation. However, one possible way to respond to interpretive problems like that in *King* is to apply a counterfactual test.¹³⁹ We might begin with specific lexical meanings from the time of enactment: for example, the principle adduced in *King* that ‘adult’ means ‘over the age of twenty-one’. The next step is to identify the broader contextual factors that underpin those meanings. We can then pose a counterfactual question of the following kind: would the framers of s 41 still have intended the same meaning of ‘adult’ if their ideas of intellectual maturity, social and political participation, contractual capacity and so on had been different? Presumably not. This shows that these social assumptions, rather than the lexical meaning of ‘adult person’, dominate the interpretive context. The ordinary meaning of ‘adult person’ has changed with these shifts in social attitudes.

VI Conclusion

We have argued in this article that the received understanding of s 41 as a transitional provision should be reconsidered. *Pearson* should be viewed as wrongly decided, as the reasoning of the majority judges does not stand up to scrutiny. This conclusion is bolstered by the positive role a revitalised s 41 could play in the current Australian constitutional framework. It would cohere well with the democratic movement of Australian constitutional law and would help to partially revive the federalist dimension of constitutional change expressed in s 128 of the *Constitution* and s 15 of the *Australia Acts*. We have further argued that the High Court was wrong in *King* to conclude the term ‘adult person’ in s 41 did not extend to persons below the age of 21. A revived s 41 should ideally be interpreted so as to protect the rights of all voters who attain the contemporary age of majority.

There is an irony in the comparison between the effect of *Pearson* on s 41 and the emergence of something akin to a qualified constitutional right to vote in *Roach* and *Rowe*. The High Court in *Pearson* effectively read out of the *Constitution* the closest thing it contains to an express right to vote. This was done by relying on implications from the context and history of s 41 to read into the provision qualifying words that it does not contain. *Roach* and *Rowe*, on the other hand, seem to have unearthed an implied right to vote on the basis of ss 7 and 24. The High Court has therefore read an express right to vote out of the *Constitution*, only to find itself a few decades later reading an implied right to vote into it.

A revived s 41 would, of course, be far from identical in its implications to the protection derived from ss 7 and 24 in *Roach* and *Rowe*. Section 41 is itself a highly conditional right, insofar as it only protects voters who are enfranchised at state level. The provision, therefore, does not remove the need for a more general constitutional protection against disproportionate restrictions on the franchise. Nonetheless, a revived s 41 would allow the High Court to avoid relying on

¹³⁹ For a detailed argument in support of this approach, see Jonathan Crowe, ‘The Role of Contextual Meaning in Judicial Interpretation’ (2013) 41 *Federal Law Review* 417.

implications from ss 7 and 24 in at least some potential voting rights decisions. Those who are sceptical about constitutional implications should welcome the revival of s 41, due both to the questionable reasoning by the majority in *Pearson* and the role s 41 could play in reducing reliance on an implied right to vote. The broader significance of s 41, however, is the constructive role it can potentially play in both the democratic and federal movements of the *Australian Constitution*.