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Unified or Plural? Competing Conceptions of Popular Sovereignty in the Australian Constitution and the 2023 Voice Referendum

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The 2023 referendum on the Aboriginal and Torres Strait Islander Voice to Parliament was not only a vote on a specific institution. It was a collision between two very different ideas of who "the Australian people" actually are, one that sees them as a single, formally equal mass, and one that sees them as plural, made up of distinct groups with their own histories and claims. This article argues the No campaign's victory reflected a deep and unresolved argument at the heart of Australian constitutional law, one that no referendum result can settle.

1. Introduction

On 14 October 2023, Australians voted to reject a constitutional amendment that would have established an Aboriginal and Torres Strait Islander Voice to Parliament. Every state rejected it, with sixty percent of electors voting No.[1] Opposition Leader Peter Dutton summed up the winning argument the moment polls closed: "The proposal and the process should have been designed to unite Australians, not to divide us."[2]



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That single sentence captures something larger than a campaign slogan. It expresses a particular, and contested, idea about who "the people" of Australia are, and what the Constitution is meant to do for them. This article argues the defeat of the Voice cannot be fully understood without examining a tension that runs through Australian constitutional history: the tension between "the people" imagined as one homogenous, formally equal body, and "the people" imagined as plural and differentiated, made up of distinct communities with different relationships to the Constitution.

This is not an argument about whether the Voice should have passed, nor about which vision of "the people" is correct. As a non-Indigenous writer working in a field of colonial law, it is not this article's place to advocate for particular forms of recognition, or to speak on behalf of the Uluru Statement from the Heart. The point is narrower and, in some ways, more unsettling: both visions of the Australian people have deep roots in the country's constitutional text and history, and the contest between them cannot be resolved simply by holding a vote. It will resurface, in one form or another, in the debates still to come.

2. Background

To understand the argument, it helps to start with what "popular sovereignty" even means in Australian law. The idea concerns the source from which the Constitution draws its authority.[3] For most of the twentieth century, Australian courts traced that authority back to the British Parliament, treating the Constitution as, at bottom, an ordinary statute of an imperial legislature. That changed in 1992, when the High Court in Australian Capital Television Pty Ltd v Commonwealth held that the Australia Acts of 1986 had ended the legal sovereignty of the Imperial Parliament, and that ultimate sovereignty now resided in the Australian people.[4]

It was a genuine turning point, but who "the people" actually were remained, in the words of one scholar, "ambiguous," and in the words of another, "opaque."[5] The constitutional text offers little help. The preamble refers only to the people of the original colonies [excluding Western Australia]. Sections 7 and 24 require senators and members of the House to be "directly chosen by the people." Section 25, and the former section 127, contemplate the exclusion of entire races from being counted among "the people" of the Commonwealth.[6]

That ambiguity is where Aboriginal and Torres Strait Islander sovereignty claims sit. When Arthur Phillip landed at Botany Bay in 1788, his commission asserted British sovereignty over a continent, a claim one legal historian has called "incredible" given that

contemporary international law would only have recognised sovereignty over a much smaller area, and only as against other European powers.[7] Colonial courts initially drew distinctions between Aboriginal people and British subjects, recognising some form of Indigenous legal autonomy, before that reasoning hardened into the fiction that Australia was, in the words of the Privy Council in Cooper v Stuart, "a tract of territory practically unoccupied, without settled inhabitants."[8]

From that point, Australian law proceeded as though Indigenous sovereignty simply did not exist, even as Aboriginal and Torres Strait Islander peoples continued to assert distinct sovereign identity.[9] The historical response of the Australian state, as one set of scholars puts it, has been to exclude Aboriginal people from, and later assimilate them into, a "unified" conception of the Australian people.[10] Aboriginal people were denied the vote at Federation in Queensland and Western Australia, and the Commonwealth Franchise Act 1902 (Cth) actively excluded them from federal suffrage. Full electoral equality did not arrive until 1983.[11]

The Uluru Statement from the Heart, released in May 2017, was a direct response to this history. It declared that Aboriginal and Torres Strait Islander sovereignty "is a spiritual notion... [that] has never been ceded or extinguished, and co-exists with the sovereignty of the Crown," and called for a constitutionally enshrined Voice to Parliament.[12] After years of delay, the Albanese Government announced a referendum in May 2022, and in July 2023 the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 passed both houses of Parliament to be put to the people under section 128.[13] The proposed text opened with the words: "In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia."[14] Those words, some scholars argued, could have carried real legal weight, potentially informing how courts understood the makeup of Australia's constitutional "people" themselves, not merely establishing a consultative body.[15]

3. Analysis

3.1 Core Argument

This article's central claim draws on the work of the Canadian political theorist James Tully, whose 1995 book Strange Multiplicity asked whether a modern constitution can genuinely recognise and accommodate cultural diversity.[16] Tully argued that a dominant strand of Western constitutional theory, running from Hobbes through Rousseau to Mill and Dicey, was built on the opposite premise: that a legitimate constitutional order requires "the people" to be conceived as a single, uniform, formally equal entity.[17]

That construction was not accidental. Tully traces it to the chaos of the European wars of religion, and to thinkers like Hobbes who sought a way to end the "horrifyingly bloody" conflict caused by competing, overlapping claims to authority.[18] Hobbes's solution was a "covenant" in which every individual in the multitude agreed to transfer their will to a single sovereign, producing "one indivisible entity with a unitary will."[19] Rousseau's "general will" performed a similar function for popular sovereignty itself: the people remained sovereign, but only as a single, indivisible body whose will subordinated any "partial society" within it.[20] Dicey later split this into "legal" and "political" sovereignty, but the underlying picture stayed the same: Parliament should "give effect to the will of... the electoral body, or of the nation," understood as one thing.[21]

Crucially, Tully argues this same conceptual apparatus did double duty as an instrument of colonial dispossession. The distinction drawn between "modern" constitutions [formal, abstract, uniform] and "ancient" or customary constitutions [irregular, plural, rooted in tradition] served to relegate Indigenous political orders to an earlier, lesser "stage of development," justifying their exclusion or assimilation.[22] The very idea of a uniform, homogenous "people" was, on this account, part of the machinery that "vacated" land for settlement without consent.[23]

This is the picture, this article argues, that continues to dominate Australian constitutional jurisprudence. It was not until 2013 that the High Court began articulating a vision of the sovereign people fully consistent with Tully's diagnosis: a body of formally equal electors, expressing sovereignty exclusively through representative Parliament. Justice Patrick Keane, writing extra-judicially, argued that Australia's constitutional "unity" provided a firmer foundation for equal treatment than reasoning like that in Brown v Board of Education, and helped avoid what he called the "contortions" of American affirmative action jurisprudence.[24] For Keane, "the prospect of a tyrannous majority... was a chimera in a polity in which there were no rigidly defined social strata and antagonistic societal groupings."[25]

That same commitment to a "unified" people shaped much of the language deployed against the Voice. The official No case pamphlet argued the Constitution "belongs to all Australians," that Parliament exists "to represent all Australians," and that the Voice "would permanently divide Australians, in law and spirit."[26] Australians for Unity, the primary No campaign organisation, ran with the message that the Voice would "divide Australians by race and completely change our democracy."[27] Polling conducted shortly after the vote found that eighty two percent of No voters listed "it will divide Australia" among

their top three reasons for voting the way they did, with forty one percent naming it their primary reason.[28] This is not incidental rhetoric. It is, on this article's reading, a direct expression of the modern constitutional commitment to a homogenous, formally equal people, deployed at the precise moment that commitment was challenged.

The "plural" account did not emerge from nowhere in 2023. This article argues it has quietly coexisted with the unified account throughout Australian constitutional history, most visibly in federalism itself. At Federation, Australia was conceived not as an aggregate national mass but as, in James Bryce's phrase, "a community made up of communities."[29] The Senate represents "the people of the States," distinct from the House of Representatives, which represents "the people of the Commonwealth."[30] Section 128's requirement of a "double majority" [a majority of electors nationally and a majority of states] deliberately inflates the voting power of less populous states, and gives residents of any state a functional veto over amendments affecting that state's constitutional position.[31] Justice McHugh put the point bluntly in McGinty v Western Australia: "the Australian people do not have equal shares in that sovereignty."[32] Plurality, in other words, is not a foreign import into Australian constitutional law. It is built into the document's architecture.

The Voice proposal threatened, or promised, to extend this plural logic to Indigenous recognition. Two theoretical frameworks illustrate how. The first, deliberative constitutionalism, treats a constitution as a vehicle for ongoing dialogue between a society's constituent groups rather than a fixed, finished settlement.[33] Scholars Gabrielle Appleby, Ron Levy and Helen Whalan argued the Voice could function as exactly this kind of institution, "creating a dialogue between peoples" and allowing "multiple sovereignties [to] be accommodated" through negotiated, ongoing processes rather than a single majoritarian vote.[34] The second framework, closer to Tully's own "democratic constitutionalism," reconceives a constitution not as an abstraction standing above an unformed mass of people, but as something built out of the actual, evolving practices and values of a diverse community.[35] Justice Brennan's reasoning in Mabo v Queensland [No 2], which overturned the doctrine of terra nullius by appealing to "contemporary values" and "contemporary notions of justice and human rights," is one visible expression of this approach.[36]

That tension surfaced most sharply in Love v Commonwealth in 2020, a case Elisa Arcioni has aptly called "a battle for the identity of 'the people'."[37] A bare majority of the High Court held that Aboriginal Australians could not be

classified as “aliens” under section 51(xix) of the Constitution, effectively recognising a distinct constitutional relationship between Aboriginal peoples and the Australian state. Justice Edelman, writing for himself, put the point most directly: Australian history has never “assimilated Aboriginal people within a unitary, homogenous political community... defined almost entirely by legislative norms of citizenship.” He accused formal equality reasoning of ignoring “the one thing that is essential to real community: difference.”[38] Chief Justice Kiefel and Justice Keane dissented, insisting that Aboriginal people’s legal status “has not been different from other Australians” since British settlement, and that there could be no “special class within the people of the Commonwealth.”[39] The two sides of Love mapped, almost exactly, onto the two sides of the Voice debate three years later.

3.2 Counter arguments and Limitations

A reasonable objection to this whole framing is that it risks overstating the role of abstract constitutional theory in what was, in practice, a messy political campaign shaped by misinformation, a struggling Yes side message, and the historical fact that no Australian referendum has ever passed without bipartisan support.[40] That objection has real force. Voters were not, for the most part, reading Tully or debating Hobbes. The “divide us” argument succeeded because it was simple, emotionally resonant, and repeated constantly, not because sixty percent of the electorate had internalised a particular theory of popular sovereignty.

But this objection, while fair, does not fully answer the argument. Political slogans do not appear from nowhere. The No campaign’s central claim, that

	The Unified People	**The Plural People**
Core idea	A single, formally equal, undifferentiated body	Divisible into distinct groups with different constitutional relationships
Historical source	Hobbes, Rousseau, Dicey, Mill; the "modern constitutional" tradition	Federalism (states as "peoples"); Indigenous sovereignty claims never ceded
Institutional expression	Parliamentary supremacy; majoritarian representative government	The Senate as representing "the people of the States"; section 128's double majority; the Voice proposal
Key case law	The ACTV line read narrowly; the dissent in *Love v Commonwealth*	*Mabo v Queensland [No 2]*; the majority in *Love v Commonwealth*
Role in the Voice debate	Underpinned the No campaign's "we are one" argument	Underpinned the Yes campaign and models of deliberative and democratic constitutionalism

the Voice would create “different classes of citizenship” and compromise “the universality of the Australian constitution,” drew explicitly on Enlightenment era arguments about equality, with one prominent No aligned organisation invoking the American and French revolutionary traditions by name.[41] The language of “unity,” “equality” and “one people” that saturated the campaign has an intellectual pedigree, even if most voters encountered it as slogan rather than theory. The point of this article is not that voters were doing constitutional philosophy in the ballot box. It is that the available vocabulary for opposing the Voice, the words and concepts that made the No case feel intuitively persuasive to many Australians, was itself the product of a specific, historically contingent tradition of thinking about who “the people” are.

A second limitation concerns positionality. This article is written by a non-Indigenous author, engaging with a body of theory [Tully’s] developed primarily with reference to Canadian and comparative settler colonial contexts. Some Indigenous scholars have specifically warned against non-Indigenous commentators projecting frameworks like deliberative constitutionalism onto the Voice before its actual function was settled, arguing this risks assuming a non-Indigenous perspective on questions of Indigenous sovereignty and self-determination that are not, in the end, primarily about constitutional legitimacy for most Indigenous people at all.[42] That critique should be read as a genuine constraint on how far this article’s argument can be pushed, not a footnote to be dismissed.

4. Implications

If this analysis holds, several things follow for how Australians and Australian institutions think about constitutional recognition going forward.

First, any future attempt at constitutional recognition of Indigenous peoples will need to reckon directly with the “unity” argument rather than assuming it can be outflanked with better messaging alone. The No campaign’s success suggests that appeals to a homogenous, formally equal Australian people carry genuine persuasive weight, rooted in ideas with centuries of intellectual history behind them. Future campaigns will likely need to engage that tradition head on, showing, for instance, how plurality already exists comfortably within Australian federalism, rather than treating recognition as an unprecedented departure from national unity.

Second, courts and legal scholars should pay closer attention to the places where plural conceptions of “the people” already operate successfully in Australian law, particularly in the

structure of federalism itself. If unequal Senate representation and the section 128 double majority requirement are accepted, largely without controversy, as legitimate departures from strict formal equality among individual voters, the argument that Indigenous constitutional difference represents some radical, unprecedented break from Australian constitutional tradition becomes considerably harder to sustain.

Third, this article's framework suggests the defeat of the Voice should not be read as a final verdict on which conception of "the people" is correct, only as evidence of which conception currently holds greater rhetorical and political power. Indigenous sovereign difference survives the referendum result. Australian federalism continues to sit in tension with ideals of national uniformity. Both visions remain live options within Australian constitutional culture, and the argument between them is likely to recur.

Key Takeaways

1. The Voice referendum's defeat reflected a deeper, longstanding tension in Australian constitutional law between "the people" understood as a unified, formally equal body, and "the people" understood as plural and differentiated.
2. The "unified" conception draws on a well established Western constitutional tradition [Hobbes, Rousseau, Dicey] that James Tully
   - has argued historically served to justify the exclusion and assimilation of culturally distinct, including Indigenous, communities.
   - A "plural" conception of the Australian people already exists within the Constitution's own federal architecture, and surfaced explicitly in the High Court majority's reasoning in Love v Commonwealth.
   - The No campaign's central "unity" argument, though delivered as political slogan, drew on this same intellectual tradition, and proved more persuasive to the electorate than the plural, recognition based framing advanced by the Yes campaign.
   - This tension is not something a single referendum, or any single legal decision, can permanently resolve. It is likely to structure future debates over Indigenous recognition and Australian constitutionalism more broadly.

5. Conclusion

The defeat of the Voice referendum is often explained, not wrongly, by reference to misinformation, a faltering campaign message, and Australia's historically high bar for constitutional change. All of that is true. But underneath those explanations sits something older and less easily fixed: a genuine, unresolved disagreement about what kind of thing "the Australian people" actually are. Thomas Hobbes called this the "double

signification" of the people, simultaneously a single collective and a scattered multitude.[43] Australia's Constitution, and its constitutional culture more broadly, has never fully settled which of these two pictures should govern.

The No campaign's victory does not mean the "unified" account has won that argument permanently. It means, for now, that account holds greater political sway. Indigenous sovereign difference persists regardless of the referendum

- outcome. Federal plurality remains embedded in the Constitution's basic structure, no matter how much the language of national "unity" tries to paper over it. Both visions have genuine roots in Australian constitutional text and history, and neither can simply absorb or dissolve the other by winning a single vote.
- What the Voice debate offers, in the end, is not a resolution but a clearer view of the paradox itself, the fact that, constitutionally and culturally, Australians remain, in the phrase this article borrows for its title, one people, but many.

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