

## UNDEMOCRATIC, UNCERTAIN AND POLITICALLY UNVIABLE? AN ANALYSIS OF AND RESPONSE TO OBJECTIONS TO A PROPOSED RACIAL NON-DISCRIMINATION CLAUSE AS PART OF CONSTITUTIONAL REFORMS FOR INDIGENOUS RECOGNITION

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*The aim of this paper is to further understand and respond to objections to the proposal for a constitutional prohibition on racial discrimination, proposed as part of constitutional reforms for Indigenous recognition. These common objections are: first, that a racial non-discrimination clause in the Constitution would be undemocratic; second, that its operation would be too uncertain; and third, that the proposal would be politically unviable in any case, and would fail at a referendum. I seek to respond to the three objections in the following manner. First, I argue that the undemocratic objection to the proposed clause is outweighed by the fact that the race clauses in the Constitution are in themselves undemocratic. In a liberal democracy, citizens should have an equal say via their equal vote, and should be treated equally by governments on the basis of individual circumstances, rather than on the basis of race, ethnicity or skin colour. I argue, therefore, that those who see the Constitution as a structural document which sets up the procedures of government and democracy — without supporting entrenchment of a broader bill of rights — should nonetheless support correcting the undemocratic ‘race error’ in our Constitution. While a restraint on government’s power to racially discriminate would be judicially adjudicated, like the rest of the Constitution, this does not necessarily mean that such a clause is undemocratic. Rather, a reform entrenching a basic element of liberal democracy — equality before the law with respect to race — would be a democratic improvement on the current situation, which promotes and allows differential treatment of citizens on the arbitrary, unfair and unclear basis of race. Second, in response to the uncertainty objection, I argue that given the fact of racial discrimination in the Constitution the proposed racial non-discrimination clause may be the most clear and certain way to address the problems at hand. Third, responding to the political unviability objection, I make the political argument that a stable and cohesive society requires a sense of national unity on the basis*

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*of equal citizenship that is free from racial differentiations, and that the racial non-discrimination proposal is capable of winning bipartisan and popular support by appealing to these ideals.*

## I INTRODUCTION

In January 2012, the Expert Panel on Constitutional Recognition of Indigenous Australians ('Expert Panel') published its recommendations for constitutional reform. The Expert Panel proposed reforms for the constitutional recognition of Indigenous peoples, which included the recognition of Indigenous peoples as the first inhabitants of Australia, recognition of Indigenous relationships to land, and recognition of Indigenous languages, cultures and heritage. The Expert Panel also proposed reforms to eliminate racial discrimination from the *Constitution* and to entrench a prohibition on racial discrimination by governments.<sup>1</sup>

This paper will focus on the legal and political arguments regarding the racial non-discrimination reforms proposed by the Expert Panel, specifically the proposal to adopt a new provision prohibiting racial discrimination by governments. My aim is to further understand and respond to common objections to the proposed racial non-discrimination clause, and to help progress the current debate.

The introductory section of this paper examines why the Expert Panel proposed the racial non-discrimination reforms that it did. The second part explains the main objections to the racial non-discrimination proposal. I characterise these objections under three broad themes: the undemocratic (or majoritarian) objection, the related uncertainty objection, and the political unviability objection.

The third part canvasses some counterarguments to these objections. First, I contend that the undemocratic objection to the proposed clause is dwarfed by the fact of the race clauses in the *Constitution*, which are in themselves undemocratic. *In a liberal democracy, citizens should have an equal say via their equal vote, and should be treated equally by governments on the basis of individual circumstances, rather than on the basis of race, ethnicity or skin colour.* Therefore, those who see the *Constitution* as a structural document which sets up the procedures of government and democracy without supporting a broader bill of rights — should nonetheless support correcting the undemocratic 'race error' in the *Constitution*. While a racial non-discrimination clause in the *Constitution* would be judicially adjudicated, just as the rest of *Constitution* is judicially adjudicated, this does not show that the clause is undemocratic. Rather, a restraint of government's power to racially discriminate would entrench a basic missing element of liberal democracy — equality before the law with respect to race. It would therefore be a democratic improvement on current constitutional

1 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) xviii ('Expert Panel Report').

(and also judicially adjudicated) arrangements which promote and allow differential treatment of citizens on arbitrary, unfair and uncertain racial grounds.

Second, in response to the uncertainty objection, I weigh up other alternatives to a racial non-discrimination clause to argue that given the fact of racial discrimination in the *Constitution*, the proposed racial non-discrimination clause may provide the most certain way of correcting the ‘race error’.

Third, responding to the political unviability objection, I make the political argument that a stable and cohesive society requires a sense of national unity on the basis of equal citizenship free from racial differentiations. This is an argument which I believe is capable of gaining bipartisan and popular support.

## II THE EXPERT PANEL’S RACIAL NON-DISCRIMINATION RECOMMENDATIONS

The Expert Panel’s final report recommended the removal of racially discriminatory provisions from the *Constitution*<sup>2</sup> including s 25 which contemplates barring races from voting, and s 51(xxvi), (the ‘Race Power’), which enables the Commonwealth to pass racially discriminatory laws.<sup>3</sup> The Expert Panel further recommended that a prohibition on racial discrimination, s 116A, be inserted into the *Constitution* to prevent governments from being able to discriminate on the basis of race.<sup>4</sup> The Expert Panel’s s 116A recommendation was as follows:

### **Section 116A Prohibition of racial discrimination**

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group

The Expert Panel recommended these racial non-discrimination reforms because the problem of racial discrimination is central to the question of Indigenous constitutional recognition. It is inextricably related to the history of Indigenous peoples in Australia, and Indigenous relationships with Australian governments under the *Constitution*, which have been characterised by racial discrimination, exclusion and non-recognition of Indigenous peoples.<sup>5</sup>

2 Ibid.

3 *Australian Constitution* s 51(xxvi) gives the Commonwealth the power to pass laws with respect to ‘the people of any race for whom it is deemed necessary to make special laws’. In *Kartinyeri v Commonwealth* (1998) 195 CLR 337, two justices found that this power can probably be used to pass laws for the benefit of any race, or laws to the detriment of any race.

4 *Expert Panel Report*, above n 1, xviii.

5 Ibid 167. See also Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Interim Report* (2014) 19: ‘The committee is mindful of the Expert Panel’s view “that recognition of Aboriginal and Torres Strait Islander peoples will be incomplete without a constitutional prohibition of laws that discriminate on the basis of race.”’

Indigenous Australians were excluded from the drafting of the *Constitution*. They had no say in its design or content. Racially discriminatory policies of the time meant that Indigenous Australians in some states were not allowed to vote when the *Constitution* was drafted.<sup>6</sup>

Initially, Indigenous people were explicitly excluded from the *Constitution*. Section 127 excluded Indigenous people from being counted in the official Census. They were also excluded from the operation of s 51(xxvi), the Race Power, either because it was widely believed that Indigenous people were a ‘dying race whose future was unimportant’,<sup>7</sup> or because their welfare was considered the responsibility of the states.<sup>8</sup>

Historical evidence indicates that the Race Power ‘was deliberately inserted into the *Constitution* to allow the Commonwealth to discriminate against sections of the community on account of their race’.<sup>9</sup> The Race Power was initially intended by the drafters to enable the Commonwealth to pass discriminatory laws against the ‘alien races’,<sup>10</sup> particularly to exclude the ‘inferior’ and ‘coloured’<sup>11</sup> peoples such as ‘Asiatic or African alien[s]’ from the goldfields,<sup>12</sup> and to more easily control ‘undesirable immigrants’<sup>13</sup> such as Chinese, Indian, Afghan and Japanese settlers and workers.<sup>14</sup> The racism apparent in the colonial attitudes of the time was not restricted to Indigenous people.<sup>15</sup>

While the 1967 referendum reversed the explicit exclusion of Indigenous people from the *Constitution* by repealing s 127 and amending s 51(xxvi), it did not fix everything. Racial discrimination still remained. Today, the *Constitution* still contains two explicitly racially discriminatory provisions. One is s 25, a ‘[p]rovision as to races disqualified from voting’. While historically intended as a disincentive to discourage the states disqualifying particular races from voting,<sup>16</sup>

6 *Expert Panel Report*, above n 1, 14.

7 Justin Malbon, ‘The Race Power under the *Australian Constitution*: Altered Meanings’ (1999) 21 *Sydney Law Review* 80, 91, quoting Geoffrey Sawer, ‘The *Australian Constitution* and the Australian Aborigine’ (1966) 2 *Federal Law Review* 17, 18. See also Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2<sup>nd</sup> ed, 2007) 1.

8 Michael Kirby, ‘Constitutional Law and Indigenous Australians: Challenge for a Parched Continent’ (Paper presented at Constitutional Change: Recognition or Substantive Rights?, Law Council of Australia, Canberra, 22 July 2011) 19.

9 George Williams, ‘The Races Power and the 1967 Referendum’ (2007) 11(4) *Australian Indigenous Law Review* 8, 8. Michael Kirby also argues that the race power ‘reflects nineteenth century concepts of racial superiority and paternalistic interventions for “the natives”’ and ‘is a relic of colonial thinking’: *ibid* 20. See also *Expert Panel Report*, above n 1, 13–42.

10 See Attwood and Markus, above n 7, 2.

11 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 229 (Edmund Barton).

12 *Ibid* 240–1 (Sir John Forrest).

13 *Ibid* 241.

14 Constitutional Commission, *Final Report of the Constitutional Commission: Summary* (Australian Government Publishing Service, 1988) 54 (‘*Constitutional Commission Report*’). See also Law Council of Australia, ‘Constitutional Recognition of Indigenous Australians’ (Discussion Paper, 19 March 2011) 20.

15 Malbon, above n 7, 93.

16 Anne Twomey, ‘An Obituary for s 25 of the *Constitution*’ (2012) 23 *Public Law Review* 125, 125–9.

the provision nonetheless contemplates barring Australian citizens from the democratic right to vote on account of race.<sup>17</sup>

Similarly, s 51(xxvi), the Race Power, provides the Commonwealth with the power to make laws relating to ‘the people of any race for whom it is deemed necessary to make special laws’. Today, this power is only used for laws relating to Indigenous people. The provision contains no requirement that these laws be beneficial or non-discriminatory. In fact, though the judgments were split, the High Court has indicated that the Race Power can probably be used for beneficial or adverse use against particular races.<sup>18</sup>

While the explicit exclusion of Indigenous people has, since 1967, been eliminated, the continued existence of s 25 and the Race Power in the *Constitution*, without any protection against adverse discrimination on racial grounds, is arguably incompatible with our international obligations to eliminate racial discrimination under the *International Convention on the Elimination of All Forms of Racial Discrimination* (‘CERD’),<sup>19</sup> to which Australia is a party. As the 1988 *Constitutional Commission Report* stated

It is inappropriate to retain section 51(xxvi) because the purposes for which, historically, it was inserted no longer apply in this country. Australia has joined the many nations which have rejected race as a legitimate criterion on which legislation can be based.<sup>20</sup>

In 2010, the Committee on the Elimination of Racial Discrimination also expressed its concern that Australia’s *Constitution* retained ss 25 and 51(xxvi) and recommended that Australia adopt ‘entrenched protection[s] against racial discrimination’.<sup>21</sup>

In reforming the *Constitution* to amend the discriminatory non-recognition of Indigenous peoples, the Expert Panel therefore had to contend with the problem that our *Constitution* falls short of international standards regarding racial non-discrimination, and Australia’s commitment to those standards as demonstrated by ratification of the relevant human rights treaties.<sup>22</sup>

17 Section 25 provides: ‘For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted’.

18 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 378–81 [82]–[89] (Gummow and Hayne JJ); cf: at 367–8 [44]–[45] (Gaudron J), 410–11 [152] (Kirby J). Williams explains that the court was ‘split on whether the races power can still be used to discriminate against Indigenous or other peoples. This fundamental question remains unresolved’: George Williams, ‘Thawing the Frozen Continent’ (2008) 19 *Griffith Review* 11, 27.

19 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) (‘CERD’)

20 *Constitutional Commission Report*, above n 14, 54.

21 *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 76<sup>th</sup>–77<sup>th</sup> sess, Supp No 18, UN Doc A/65/18 (27 August 2010) 18.

22 *Expert Panel Report*, above n 1, 160–4.

Similarly, the Expert Panel had to deal with the problem posed by the race clauses in the context of Australia's democratic system, and by reference to certain liberal democratic values and public expectations with respect to individual equality before the law. The Expert Panel's polling indicated that the majority of Australians (around 80–90 per cent), across political persuasions, supported the idea of a racial non-discrimination clause in the *Constitution*.<sup>23</sup> Many of the submissions to the Expert Panel strongly advocated the value of individual equality, and highlighted the problematic nature of the race provisions for a democracy like Australia.<sup>24</sup> Similarly, the importance of a protection against racial discrimination was strongly advocated by Indigenous people, and has been passionately promoted by Indigenous leaders.<sup>25</sup>

Public views, both Indigenous and non-Indigenous, on the matter of the racial discrimination present in the *Constitution* are unsurprising. The race provisions in the *Constitution* can be said to represent an undemocratic anomaly in an otherwise fair and democratic *Constitution*. In other regards the *Constitution* is a neutral document, written in mostly neutral language. It operates as a minimalistic document that sets out the procedures of government and democracy. In doing so, it imposes some important limitations on government power, and therefore protects some basic democratic freedoms. For example, s 116 of the *Constitution* prohibits the Commonwealth from imposing a religion, thus protecting the democratic value of freedom of worship and belief. With respect to race, however, the *Constitution* arguably abandons basic democratic principles. It refers to overriding the right to vote — one of democracy's most important rights — on the basis of race. It also talks about passing different laws for different so-called races, explicitly undermining the democratic value of equality before the law.

But the particular importance of the racial non-discrimination aspect of the proposed reforms for Indigenous spokespeople arises from the fact that the democratic exclusion and differential treatment on the basis of race, allowed under and promoted in the *Constitution*, has been mostly directed at Indigenous Australians. The Expert Panel therefore concluded that Indigenous recognition and removal of racial discrimination from the *Constitution* were intimately linked. As Noel Pearson argued:

The racial discrimination allowed by our *Constitution* is inextricably linked to the Indigenous history we want recognised. So extreme was the discrimination against Indigenous people, it initially even denied that we

23 Ibid 91, 157; Patricia Karvelas, 'Most Want Race Discrimination Removed from *Constitution*', *The Australian* (Sydney), 11 November 2011, 9.

24 *Expert Panel Report*, above n 1, 120.

25 See Marcia Langton, 'Indigenous Exceptionalism and the Constitutional "Race Power"' (Speech delivered at the Melbourne Writers' Festival, Melbourne, 26 August 2012); Marcia Langton, 'Get Rid of Race to Stop Racism', *The Australian* (Sydney), 31 August 2012, 12; Patrick Dodson, 'Too Tolerant of Ugly Racism', *The Age* (Melbourne), 31 January 2012, 13; Dan Harrison, 'Dodson Shows Support for Constitutional Ban on Racial Discrimination', *Sydney Morning Herald* (Sydney), 12 July 2012, 6; Patricia Karvelas, 'Pearson Puts Case for Race Clauses to Be Cut', *The Australian* (Sydney), 10 December 2011, 7; Noel Pearson, 'A Letter to the Australian People', Submission No 3619 to Expert Panel on the Constitutional Recognition of Indigenous Australians; Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003).

existed. This is what Indigenous recognition is all about — overturning the fallacies of non-existence and racial inequality.<sup>26</sup>

Pearson makes the point that Indigenous non-recognition — whether in the *Constitution* or in the English or Australian law under the doctrine of terra nullius, which justified the non-recognition of Indigenous polities, property rights, and indeed human rights — is a product of past racially discriminatory attitudes and beliefs. The belief that Indigenous people were an inferior race justified Indigenous non-recognition and, in essence, the denial of Indigenous equal humanity.<sup>27</sup>

Professor Megan Davis has similarly argued that the racial discrimination in and Indigenous exclusion from the *Constitution* sanctioned Indigenous marginalisation:

beginning with their exclusion from the constitutional drafting process in the late 19th century, Aboriginal and Torres Strait Islander people have on the whole been marginalised by both the terms and effect of the *Constitution* <sup>28</sup>

From a domestic democratic perspective, therefore, the *Constitution* cannot be said to have set up conditions such that each Australian is treated equally before the law with respect to race. Indigenous Australians especially have suffered as a result. For these reasons, the Expert Panel recommended that ss 25 and 51(xxvi) be removed and a new racial non-discrimination clause be adopted.

As will be explained later, simple removal of the Race Power was not considered by the Expert Panel to be a sufficient solution. Section 51(xxvi) would need to be replaced by a new power to ensure that the Commonwealth can continue to pass necessary laws with respect to Indigenous affairs, currently supported by the Race Power, such as native title and Indigenous heritage protection laws.<sup>29</sup> But this new power should not be able to be used for adverse racial discrimination, or discriminatory interference into Indigenous people's lives. Similarly, simple removal of the race clauses would not prevent the Commonwealth using its other powers in a racially discriminatory way. In contending with these issues, the Expert Panel therefore recommended that a racial non-discrimination clause be adopted to ensure that governments cannot adversely discriminate on the basis of race.<sup>30</sup>

26 Noel Pearson, 'The Reward for Public Life Is Public Progress: An Appreciation of the Public Life of the Hon E G Whitlam AC QC Prime Minister 1972–1975' (Speech delivered at the 2013 Whitlam Oratorion, Whitlam Institute, University of Western Sydney, 13 November 2013).

27 Ibid. See also Shireen Morris, 'Indigenous Constitutional Recognition, Non-Discrimination and Equality before the Law: Why Reform is Necessary' (2011) 7(26) *Indigenous Law Bulletin* 7, 7.

28 Megan Davis and Dylan Lino, 'Constitutional Reform and Indigenous Peoples' (2010) 7(19) *Indigenous Law Bulletin* 3, 3.

29 *Expert Panel Report*, above n 1, 138; Sarah Pritchard, 'The "Race" Power in Section 51(xxvi) of the *Constitution*' (2011) 15(2) *Australian Indigenous Law Review* 44, 52.

30 *Expert Panel Report*, above n 1, 167–73.

### III UNDERSTANDING OBJECTIONS TO A RACIAL NON-DISCRIMINATION CLAUSE

When the Expert Panel's report was published, there were objections to the racial non-discrimination clause proposal. The proposed clause was described by some constitutional scholars and politicians as a 'one clause bill of rights'<sup>31</sup> that would give the High Court a 'blank cheque to decide that something is a problem'.<sup>32</sup> First, there were concerns that such a clause would be undemocratic, because it would need to be interpreted by the unelected judiciary.<sup>33</sup> Secondly, there were related concerns about the legal uncertainty of such a provision; some argued that the clause was ambiguously worded and would likely lead to unintended consequences when being interpreted by the judiciary.<sup>34</sup> And third, there were concerns that the proposal was politically unviable, and would fail at a referendum.<sup>35</sup>

#### A *The Undemocratic and Uncertainty Objections*

The first two objections are closely related and are entwined with a long-established opposition in Australia to constitutional rights and bills of rights in general. The debates surrounding the recognition of Indigenous peoples and the removal of racial discrimination from the *Constitution* have therefore highlighted a tension between a human rights focussed approach, and the majoritarian approach that is intent on protecting parliamentary sovereignty. The human rights focussed approach is usually not averse to entrenched rights and their interpretation by the judiciary — this is not seen as a contradiction to democracy. The majoritarian view objects to judicial review of what are often contentious moral questions on the basis that these types of decisions should be left to elected representatives.

This paper questions whether these common objections to a racial non-discrimination clause are sufficient in the Australian context, given that Australia's *Constitution* currently contains two explicitly racially discriminatory

31 Harrison, above n 25, 6; Greg Craven, 'Keep the Constitutional Change Simple', *Australian Financial Review* (Sydney), 6 February 2012, 55; Greg Craven, 'The Con-Cons' Constitutional Conundrum', *The Australian* (Sydney), 19 February 2014, 12.

32 Patricia Karvelas 'Historic Vote Facing Hurdles: "The Right Time" For Indigenous Recognition in the *Constitution*, Says Gillard', *The Australian* (Sydney), 20 January 2012, 1. See also James Allan, 'Constitutional Fiddling Brings Inherent Danger', *The Australian* (Sydney), 9 December 2011, 14; Craven, 'Keep the Constitutional Change Simple', above n 31, 55.

33 See, eg, Allan, 'Constitutional Fiddling Brings Inherent Danger', above n 32, 14. See also Greg Sheridan, 'Constitutional Change Will Divide Not Unite the Nation', *The Australian* (online), 20 September 2014 <<http://www.theaustralian.com.au/opinion/columnists/constitutional-change-will-divide-not-unite-the-nation/story-e6frg76f-1227064539257>>.

34 See, eg, Anne Twomey, 'Indigenous Constitutional Recognition Explained — The Issues, Risks and Options' (Constitutional Reform Unit, University of Sydney Law School, 26 January 2012) 7–9.

35 See, eg, Craven, 'The Con-Cons' Constitutional Conundrum', above n 31, 12; Craven, 'Keep the Constitutional Change Simple', above n 31, 55; Stuart Rintoul, 'Race Power Opens Pandora's Box', *The Australian* (Sydney), 22 December 2011, 9, quoting Warren Mundine and George Brandis; Patricia Karvelas, 'Laws "May Take Race Relations Backwards"', *The Australian* (Sydney), 17 December 2011, 1, quoting Nigel Scullion.

provisions. Arguably, with respect to race, our *Constitution* cannot be said to be democratically neutral. This is the problem to which constitutional experts should try to find the most certain and democratic solution.

### ***Australia's Constitution Is Not a Vehicle for Rights or Values?***

The undemocratic and uncertainty objections to the proposed racial non-discrimination clause are founded in a common view of Australia's *Constitution* as a structural rather than rights or values laden document. As Professor Jeffrey Goldsworthy has described:

The whole idea of the *Constitution* as an object of quasi-religious veneration, inspiration, and redemption is alien to Australians, although an increasing number would like to amend the *Constitution* so that it could play a more 'educative' role in spreading a 'human rights culture'. ... I concede that formally declaring the nation's commitment to abstract moral principles might serve to educate and inspire, as Abraham Lincoln suggested. But Australians seem to get by without constitutional prompting. For them, basic values and commitments are up for grabs along with everything else in politics.<sup>36</sup>

Further, the undemocratic objections to the proposed racial non-discrimination clause arise from a broad belief that the *Constitution* is *sensibly* structural rather than rights-laden. This view sees the *Constitution* as successful because it is a basic charter of government, rather than an aspirational or moral document. The view opposes entrenchment of rights into the *Constitution*, because it is believed that matters of morality and values should be argued out by elected representatives, not embedded in a *Constitution* where they must be interpreted, probably unpredictably, by unelected judges.<sup>37</sup>

Goldsworthy explains that unlike the USA, the *Australian Constitution* is not a basic law, not a 'higher law'. According to Goldsworthy, the *Australian Constitution* perhaps cannot even be considered a 'people's law', because many Australians do not even know we have a *Constitution*.<sup>38</sup> The *Constitution* sets up the structures in which moral debates and matters of justice can be argued out in the political realm, but it enumerates no morals or values itself. So, unlike in the USA, most Australians do not appeal to the *Constitution* when arguing matters of justice. The *Constitution* is considered a dull, 'prosaic document expressed in

36 Jeffrey Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles' [2012] *University of Illinois Law Review* 683, 687–8 (citations omitted).

37 See Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004) 38–42.

38 Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles', above n 36, 685.

lawyer's language'.<sup>39</sup> And this is how those who object to entrenchment of rights or values would prefer it stay.

The undemocratic and uncertainty objections are founded in the belief that the absence of rights and values in the *Constitution* is one of the *Constitution's* greatest democratic strengths, and that the *Constitution* is overwhelmingly successful; it works well as it is, and should not be fundamentally changed. For those who oppose its fundamental alteration, the *Constitution* often represents our forefathers' collective wisdom; it is a treasured link with history and the past. It also represents Australia's continuous and successful democracy. As James Allan wrote:

Australia is one of the oldest democracies. Yes, our young nation has been a democracy, a successful democracy, longer than all but a half-dozen or so other countries. And that is in part because the *Constitution* we have is the best written *Constitution*.<sup>40</sup>

A continuous, stable *Constitution* presiding over a continuous, stable democracy is regarded as a great source of pride.

The influence of this mindset goes some extent to explaining resistance to the entrenchment of notions such as 'equality' or 'non-discrimination' into the *Constitution*, for it may be unclear what such ideals mean in day-to-day practice, particularly when interpreted by the judiciary. Because constitutional stability, continuity and certainty are seen as all-important, constitutional imperfection seems to be more readily tolerated in order to avoid unpredictable consequences. Rather, such imperfections, in this line of thinking, are best addressed by sovereign Parliaments through democratic processes, not by inserting ambiguous words into the *Constitution* which must then be interpreted by unelected judges.

## **2 A 'Thin' View of Democracy**

Majoritarian objections to the proposed racial non-discrimination clause and entrenched rights in general stem from a 'thin' view of democracy, under which majoritarian decision-making is all-important and ideas about the existence of any democratic values or rights are less important.

Allan has described what he calls a more progressive characterisation of the term 'democracy' as one that is 'morally pregnant':<sup>41</sup> something more than just majoritarian decision-making. Allan argues that progressives incorrectly ascribe the outcomes of decisions as either democratic or undemocratic. According to Allan, it is only a decision-making process that can be democratic or undemocratic.<sup>42</sup>

39 Ibid, quoting Sir Anthony Mason, 'The *Australian Constitution* in Retrospect and Prospect' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 7, 8. See also Craven, *Conversations with the Constitution*, above n 37, 9–10.

40 James Allan, 'The Document We Have Sure Ain't Broken, so Why Change It?' *The Australian* (Sydney), 30 January 2014, 10.

41 James Allan, 'Intimations of the Decline of Democracy' (2010) 54(5) *Quadrant* 20, 20.

42 Ibid.

Hence the assertion that judicial decision-making is undemocratic, because judges are not elected. For Allan, therefore, the existence of written constitutions that must be interpreted and applied by judges, or entrenched bills of rights also subject to judicial review, are in themselves undemocratic because the decision-makers are unelected judges.<sup>43</sup>

Jeremy Waldron, a chief proponent of the majority-rule view of democracy, wrote of the democratic process that: ‘according equal weight or equal potential decisiveness to individual votes is a way of respecting persons. In this sense, majority-decision is a respectful procedure — not just an admirable technical device for securing action-in-concert in the circumstances of politics’.<sup>44</sup> Waldron therefore argues that decision-making over moral matters, over which reasonable people are likely to disagree, needs to be left to popularly elected Parliament rather than the judiciary, because this is the only way for individuals to have a say in matters affecting them.<sup>45</sup>

So, because bills of rights deal in ‘moral abstractions ... at a level of indeterminacy that finesses disagreement’,<sup>46</sup> bills of rights leave it up to judges to decide the extent and practical application of such morality-laden rights. Thus, Allan concludes, ‘[b]ills of rights hand power to judges at the expense of the elected legislature. They diminish democracy’.<sup>47</sup> Australia, mainly because of its absence of a bill of rights, according to Allan, is ‘remarkably democratic’.<sup>48</sup>

The proposal to entrench a racial non-discrimination clause into the *Constitution* has therefore been regarded by objectors like Allan as one that would erode and disrupt Australia’s remarkably successful democracy.

### **3 A Belief That Entrenched Rights Do Not Necessarily Protect Rights**

Scepticism regarding the efficacy of bills of rights in Australia began with the conception of the *Constitution* itself. When the *Constitution* was being developed, the prevailing argument, particularly potent in the British and Australian legal traditions, was that the English rule of law system provided better protection for individual rights than any declared general rights that can be written down in a

43 Ibid 21. See also James Allan, ‘Oh That I Were Made Judge in the Land’ (2002) 30 *Federal Law Review* 561, 573–6; James Allan, ‘Why Australia Does Not Have, and Does Not Need, a National Bill of Rights’ (2012) 24 *Journal of Constitutional History* 35, 42.

44 Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 114–15.

45 Ibid. See also Jeremy Waldron, ‘A Right-Based Critique of Constitutional Rights’ (1993) 13 *Oxford Journal of Legal Studies* 18, 45; Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 *Yale Law Journal* 1346

46 Allan, ‘Intimations of the Decline of Democracy’, above n 41, 22.

47 Ibid. See also James Allan, ‘The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism’ (2006) 30 *Melbourne University Law Review* 906, in which Allan criticises the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) for handing too much interpretative power to the judiciary.

48 Allan, ‘Why Australia Does Not Have, and Does Not Need, a National Bill of Rights’, above n 43, 36.

constitution.<sup>49</sup> The suspicion of entrenched rights carried significant weight in Australia. Goldsworthy explains:

The founders of Australia's *Constitution* ... deemed it both unnecessary and unwise to impose substantive fetters on their parliaments' powers. One of their reasons was that judicial interpretations of abstract rights could have unpredictable and undesirable consequences.<sup>50</sup>

Goldsworthy argues that Australia's human rights record, while 'far from perfect, ... [is] at least as meritorious as that of the United States', where a constitutional bill of rights has been in operation.<sup>51</sup> Professor Suri Ratnapala similarly notes that '[o]ver 130 countries have a bill of rights in one form or another but only a minority of them can truly claim a reasonable record of respect for human rights'.<sup>52</sup>

Supporting this assertion, a widely held view in Australia propounded by influential early writers such as Quick and Garran, themselves original drafters of Australia's *Constitution*, was that entrenched rights were not necessarily effective in protecting individual freedoms in general — the common law and democratic process was a far more effective method of rights protection. Democracy, by giving individuals an equal as possible share of power to citizens, enabling all to influence the laws affecting them, is adequate to protect individual rights.<sup>53</sup>

Today there is also scepticism towards 'universal' or international human rights declarations and their practical efficacy. As a result, Australian High Court judges have often been criticised when they have turned to international law as an aid to constitutional interpretation.<sup>54</sup>

#### 4 *Uncertain Words*

A common, related objection is that there is uncertainty in the meaning of the words proposed by the Expert Panel's racial non-discrimination clause, and that

49 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8<sup>th</sup> ed, 1915) 196–9. See also Haig Patapan, 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 *Federal Law Review* 211, 219–20. As Greg Craven explains:

The Founders, rightly or wrongly, believed wholeheartedly in that mythical beast the 'British Constitutional Genius', operating via a concept of parliamentary and responsible government, as the very best means by which to protect (and indeed to define) human rights. Consequently, such rights were to be protected by the elected Parliaments and not by the courts.

Greg Craven, 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22 *University of New South Wales Law Journal* 216, 222.

50 Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles', above n 36, 687. See also Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia', in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (Melbourne University Press, 1992) 151, 151–7.

51 Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles', above n 36, 687.

52 Suri Ratnapala, 'Bills of Rights in Functioning Parliamentary Democracies: Kantian, Consequentialist and Institutional Scepticisms' (2010) 34 *Melbourne University Law Review* 592, 609.

53 Waldron, *Law and Disagreement*, above n 44, 114–15; Patapan, above n 49, 219–20.

54 See Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 424.

this may lead to unintended consequences and unwise risks.<sup>55</sup> For example, Jess Natoli has highlighted the potential practical uncertainty around the wording of the special measures sub-clause, which allows positive measures to address disadvantage or create equal opportunities similar to that currently provided by s 8 of the *Racial Discrimination Act 1975* (Cth) ('RDA'):

The Expert Panel has recommended inserting an anti-racial discrimination provision into the federal constitution. The goal is to ensure more robust protection against discrimination for Indigenous people and members of all cultural backgrounds. While most Australians would agree with this sentiment, entrenching such a provision in the *Constitution* is not without its risks. ... It is by no means certain that the High Court would interpret proposed constitutional provision 116A(2) in the same way as the existing 'special measures' exemptions, particularly as the language used is not identical to section 8 of the *Racial Discrimination Act* (Cth) ...<sup>56</sup>

Uncertainty in wording, it is argued, is likely to lead to unpredictable exercise of judicial power in interpreting the provision. This would give the judiciary too much power and scope in interpreting such a clause and deciding its practical operation.

This objection is again underpinned by a concern to maintain parliamentary sovereignty, and an opposition to judicial review of parliamentary action concerning largely moral questions. As Allan explained, he opposes the proposed racial non-discrimination clause

Because no one has the slightest idea ... how it will be interpreted. ... Anything beyond the minimalist repeal option is basically an anti-democratic proposal. It is a proposal that carries with it the potential for much greater judicial power in terms of invalidating and striking down parliament's statutes, meaning the majority of voters' statutes. ... No one should sensibly be asked to buy something whose contents are in reality unknown and unknowable.<sup>57</sup>

As will be discussed later, Allan's view is perhaps rhetorically overstated: there is a significant body of racial non-discrimination case law in Australia, interpreting the *RDA*, that can help us rationally predict how a racial non-discrimination clause in the *Constitution* would probably be applied and interpreted by the courts. Similarly, we can look to judicial interpretation of other existing constitutional rights, such as s 116, which prevents governments from imposing a religion, to predict how courts would likely interpret this kind of restraint on legislative power

55 See Twomey, 'Indigenous Constitutional Recognition Explained', above n 34, 7–8; Allan, 'Constitutional Fiddling Brings Inherent Danger', above n 32, 14; Craven, 'Keep the Constitutional Change Simple', above n 31, 55.

56 Jess Natoli, 'Entrenching Racial Discrimination? The Proposed Constitutionalisation of Not so "Special Measures"' on Anne Twomey, *Constitutional Critique — Critical Constitutional Analysis by the CRU* (16 May 2012) <[http://blogs.usyd.edu.au/cru/2012/05/entrenching\\_racial\\_discriminat.html](http://blogs.usyd.edu.au/cru/2012/05/entrenching_racial_discriminat.html)>.

57 Allan, 'Constitutional Fiddling Brings Inherent Danger', above n 32, 14.

Nonetheless, Allan's point about the risk of unintended consequences in relation to the proposed clause warrants discussion. Allan's view is not only that uncertainty would be created by inserting a racial non-discrimination clause into the *Constitution*, but that problematic uncertainty would be created by putting anything new in there, because the words would then be subject to judicial interpretation, and could mean that laws enacted by elected representatives are struck down at judicial discretion. Allan also, therefore, opposes symbolic recognition of Indigenous peoples in the *Constitution*.<sup>58</sup> His view in this respect differs from many other commentators, who oppose the racial non-discrimination proposal, but nonetheless support Indigenous recognition in a preamble.<sup>59</sup>

## **5 The Perceived Untrustworthiness of the High Court**

Greg Sheridan has argued:

it is virtually impossible to stop activist judges reading things into any part of the *Constitution*. Any grandiloquent word in any constitution becomes in time a licence for judges to make law. That is profoundly anti-democratic.<sup>60</sup>

Anxiety about potential judicial activism, and the perceived undemocratic nature of judicial decision making, exacerbates concerns about constitutional reform.

Constitutional experts like Nicholas Aroney, Jeffrey Goldsworthy and James Allan have criticised the High Court of Australia for the method some judges have taken in constitutional interpretation, and this increases the concern regarding uncertainty associated with the proposed constitutional amendment.<sup>61</sup> In particular, these critics tend to disagree with the 'living tree' approach to constitutional interpretation, which sees the *Constitution* as a document whose meaning evolves in accordance with the developing values of society. These objectors tend to prefer an originalist or 'locked in' approach.<sup>62</sup>

The major criticism of the 'living tree' approach to constitutional interpretation relates closely to a majoritarian understanding of democracy, in which the democratic legitimacy of decision-makers depends on whether or not they are elected. Allan and Aroney argue that the originalist approach to constitutional interpretation constrains judges, and does not give them power elevated above ordinary citizens. The 'living tree' approach gives judges an exclusive power and privilege: they can interpret and impose their personal understanding of changing

58 Ibid.

59 Craven, 'Keep the Constitutional Change Simple', above n 31, 55.

60 Sheridan, above n 33.

61 See, eg. Allan, 'Constitutional Fiddling Brings Inherent Danger', above n 32, 14; James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245; Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 *University of Queensland Law Journal* 9; Jeffrey Goldsworthy, 'The High Court, Implied Rights and Constitutional Change' (1995) 39(3) *Quadrant* 46

62 Allan and Aroney, above n 61, 247–9. See also the discussion of the importance of the intentions of the original drafters of the *Constitution* in Craven, 'The High Court of Australia: A Study in the Abuse of Power', above n 49, 220–2.

societal values into the *Constitution*, in a way that ordinary citizens cannot. This, they argue, is undemocratic.<sup>63</sup>

Even when judges purport to use a literalist approach to interpreting the text, Allan and Aroney contend that this often:

collapses into the second [‘living tree’] view of constitutions and constitutionalism sketched above, one where 99.99 percent of the population is locked-in but where judges sitting at the zenith of the court hierarchy are left free to upgrade or change or alter it as they think best or right. Insisting on ‘the authoritativeness of the text and nothing but the text’ when it comes to constitutionalised rights guarantees is akin to handing the judges a blank cheque.<sup>64</sup>

The implied rights cases<sup>65</sup> were criticised on this basis, for involving judicial arguments which read in rights that some argue are not present in the constitutional text.<sup>66</sup> Goldsworthy explained his own reaction to this perceived usurpation of the people’s democratic power:

It seemed obvious to me that the Court had changed the system of government established by our *Constitution* in a substantial way, without asking me or my fellow Australians whether we approved of the change, as required by s 128.<sup>67</sup>

More recently, cases such as *Roach*<sup>68</sup> and *Rowe*<sup>69</sup> have been criticised as demonstrating a ‘fast-and-loose’ approach by majority judges to the task of constitutional interpretation,<sup>70</sup> or for finding ‘spurious constitutional implications’ that would not necessarily have been found had better interpretative methods been employed.<sup>71</sup> The overall worry is that High Court judges are tending to be unduly activist and are usurping democratic power from the people, as represented by Parliament.<sup>72</sup>

Allan in this vein argues that if the aim is to have a legal system which keeps up to date with evolving social values, then it is better not to have a written *Constitution* at all

63 Allan and Aroney, above n 61, 249–50.

64 Ibid 254 (citations omitted), quoting Waldron, *Law and Disagreement*, above n 44, 145.

65 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (‘*Australian Capital Television*’); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (‘*Nationwide News*’).

66 See Craven, ‘The High Court of Australia: A Study in the Abuse of Power’, above n 49, 224.

67 Jeffrey Goldsworthy, ‘Constitutional Implications Revisited’ (2011) 30 *University of Queensland Law Journal* 9, 9. See also Jeffrey Goldsworthy, ‘The High Court, Implied Rights and Constitutional Change’ (1995) 39(3) *Quadrant* 46

68 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

69 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

70 James Allan, ‘The Three “Rs” of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No)Riginalism’, (2012) 36 *Melbourne University Law Review* 743, 747.

71 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, 147

72 See also Craven, ‘The High Court of Australia: A Study in the Abuse of Power’, above n 49; Justice Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2004) 10 *Otago Law Review* 493

By all means, if you want to keep pace with society and you don't want to lock yourself into anything, then don't have a written constitution. ... But if you are going to have a constitution, it seems to me that the whole point of a written constitution is to lock in certain outcomes. ... Everyone knows that judges make law. ... I don't think anyone believes that there are no constraints on the judge. We differ on the extent of constraints and their desirability.<sup>73</sup>

For this reason, Allan and others prefer originalism as an approach to judicial constitutional interpretation. The sense of opposition between the two approaches may, however, be exaggerated. Goldsworthy has questioned the dichotomy between the 'living tree' approach and originalism on this basis:

I agree that the supposed dichotomy between originalism and living constitutionalism is a false one; that originalism is concerned with a constitution's original meaning rather than its founders' application intentions; and that if a constitution requires judges to apply abstract moral principles, then they must do so according to their own best judgment of what those principles require — not according to the founders' possibly partial and imperfect understanding of them.<sup>74</sup>

Nonetheless, Goldsworthy notes that Australia's *Constitution* is not one with a moral or rights content. The *Constitution* provides the framework in which moral debates can go on in the political sphere, but it does not generally inform their content.<sup>75</sup> Therefore, Goldsworthy believes that departure from originalism in judicial decision-making, in the Australian context at least, is undemocratic.<sup>76</sup>

Because some of these critics believe that the High Court is wayward in its approach to constitutional interpretation, the risks seen as being associated with entrenching a racial non-discrimination clause in the *Constitution* are being given greater weight. That is why objectors argue that the proposed amendments would be like handing unelected judges a 'blank cheque' to do what they want.<sup>77</sup> A racial non-discrimination clause, it is argued, would entail much uncertainty and risk. It would undermine parliamentary sovereignty and the preferred 'thin' view of democracy.

## **B The Political Unviability Objection**

The weakest, but most common, objections to the racial non-discrimination clause proposal were the political unviability objections. These were actually political

73 James Allan and Michael Kirby, 'A Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Hon Michael Kirby AC CMG' (2009) 33 *Melbourne University Law Review* 1032, 1038–9.

74 Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles', above n 36, 684 (citations omitted).

75 Ibid 685.

76 Ibid 690.

77 Allan and Aroney, above n 61, 254.

predictions or assessments as to the likely success of the proposal, rather than substantive objections to the ideas being proposed. These objections tend to turn the objectors into political predictors with their fingers on the pulse of Australian public opinion, but while doing so often fail to acknowledge that the speakers themselves, as political leaders with a privileged position and strong voices in the media, would play and were playing a crucial role in leading, shaping and influencing that public opinion.

Some of these initial political viability assessments have since changed. For example, Minister for Indigenous Affairs, Nigel Scullion, initially criticised the proposed racial non-discrimination provision on the basis that ‘clauses about discrimination will lead to a much wider debate about multiculturalism and I think the debate will really ambush the process’.<sup>78</sup> Scullion since seems to have shifted his view, arguing that Australia should amend the *Constitution* to show that racial discrimination is unacceptable.<sup>79</sup> George Brandis also appears to have shifted his views to some extent.<sup>80</sup>

The political unviability objection will be countered towards the end of this paper.

## IV RESPONDING TO THE OBJECTIONS

### A *Responding to the Undemocratic Objection*

#### *The Judicial Activism Concern Is Probably Overstated*

The criticism of the proposed prohibition on racial discrimination on the basis of parliamentary supremacy is generally not based on the presupposition that Parliament should be able to pass race-based laws, but that it should not be left up to the courts to decide which laws and policies breach the new racial non-discrimination provision. The concern is that a racial non-discrimination clause in the *Constitution* would encourage undemocratic judicial activism. In deciding what is discriminatory and what is not, it is argued, judges would be required to apply social values to their decisions. Such assessment of values, it is said, is better left to elected politicians who are more in touch with the people, not to judges, who as Goldsworthy describes, are essentially unelected ‘aristocrats’.<sup>81</sup> Judicial activism in this context is the criticism that a judge has inappropriately exceeded his or her adjudicatory function in breach of the doctrines of parliamentary

78 Karvelas, ‘Laws “May Take Race Relations Backwards”’, above n 35, 1.

79 Commonwealth, *Parliamentary Debates*, Senate, 26 February 2013, 877–9 (Nigel Scullion).

80 Compare George Brandis’ comments in Rintoul, above n 35, 9, to his comments in Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Parliament of Australia*, Sydney, 30 April 2013, 19, 22.

81 See Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 10–12.

supremacy and the separation of powers — ‘betraying its own constitutional role’<sup>82</sup> — and that this is undemocratic.<sup>83</sup>

First, the concern about the undemocratic nature of judicial decision-making in general is perhaps exaggerated. A judge’s power is not unlimited. An Australian judge’s authority is bestowed via democratic processes: judges are appointed by elected governments. Similarly, Kirby’s argument is that judicial decision-making does not take power from the people, because in fact it is the people who choose which laws they want to dispute and bring them to court — judges do not choose which decisions they resolve.<sup>84</sup>

Second, the concern about the wayward activism of the High Court of Australia is perhaps also overstated, and there is probably an element of political bias inherent in the claim. As many commentators have pointed out, judges in Australia are usually criticised for being activist when their decision, usually one upholding the rights of a minority, displeases conservatives.<sup>85</sup> Professor George Williams has argued:

The label is normally only applied when someone disagrees with a High Court decision that is viewed as liberal or progressive, perhaps because it protects the rights of someone like an asylum seeker or prisoner. By contrast, decisions that uphold strong, even draconian, government action against the same people tend to attract little comment.<sup>86</sup>

Others have argued that the term ‘judicial activism’ is not particularly useful as an analytical tool in discussing different approaches to judicial interpretation.<sup>87</sup>

In my view, the argument as to how entrenching a racial non-discrimination clause into the *Constitution* would *increase* inappropriate judicial activism has not been successfully made. Indeed, Ratnapala has argued that given Australia’s

82 Craven, ‘The High Court of Australia: A Study in the Abuse of Power’, above n 49, 218.

83 See also Heydon, above n 72, 495: ‘judicial activism’ is explained as: using judicial power for a purpose other than that for which it was granted, namely doing justice according to law in the particular case. It means serving some function other than what is necessary for the decision of the particular dispute between the parties. Often the illegitimate function is the furthering of some political, moral or social programme: the law is seen not as the touchstone by which the case in hand is to be decided, but as a possible starting point or catalyst for developing a new system to solve a range of other cases. Even more commonly the function is a discursive and indecisive meander through various fields of learning for its own sake.

84 Allan and Kirby, above n 73, 1047.

85 For this trend as it manifests in the United States of America, see Ernest A Young, ‘Judicial Activism and Conservative Politics’ (2002) 73 *University of Colorado Law Review* 1139; Darren Lenard Hutchinson, ‘Judicial Activism and Conservative Hypocrisy’ on Darren Lenard Hutchinson, *Dissenting Justice* (3 April 2012) <<http://dissentingjustice.blogspot.com.au/2012/04/judicial-activism-and-conservative.html>>; Cartoonist Group, ‘Double Standards on Judicial Activism’ on *One Wisconsin Now* (2 July 2007) <<http://www.onewisconsinnow.org/blog/2007/07/C2dy.html>>.

86 George Williams, ‘When the Umpire Takes a Stand’, *Sydney Morning Herald* (Sydney), 12 November 2011, 22. See also Justice Michael Kirby, ‘Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty’ (2006) 30 *Melbourne University Law Review* 576, who suggests that ‘judicial activism’ has become code language for denouncing important judicial decisions with which conservative critics disagree.

87 Michael Coper, ‘Concern about Judicial Method’ (2006) 30 *Melbourne University Law Review* 554

institutional and political stability, the risks associated with entrenching some ‘narrowly-focused’ rights into the *Constitution* would be relatively few.<sup>88</sup>

In addressing the ‘unelected judges’ criticism of implied rights, Chief Justice Robert French has asked us to:

reflect upon what it is that courts already do in applying the common law which has been developed by the unelected judges of England and Australia. ... [M]any of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms.<sup>89</sup>

Further, French CJ argues that:

The common law interpretive principle protective of rights and freedoms ... has a significant role to play in the protection of rights and freedoms in contemporary society, while operating in a way that is entirely consistent with the principle of parliamentary supremacy.<sup>90</sup>

As noted, courts have gone even further than the principle of non-abrogation of individual rights, to imply a specific right to freedom of political communication, imputed from the structure of the *Constitution* and the representative democracy it establishes.<sup>91</sup> But equally, courts have implied non-explicit powers in favour of the Commonwealth, such as the implied ‘nationhood power’,<sup>92</sup> and by interpreting the scope of the s 51 powers broadly.<sup>93</sup>

Professor Adrienne Stone argues that democracy-based objections to judicial interpretation of constitutionalised rights should apply equally to judicial interpretation of structural elements of the *Constitution* and the scope of Commonwealth power, which also allow judges to decide ‘matters of moral or political significance in the face of reasonable disagreement’ and that ‘those who

88 Ratnapala, above n 52, 616–17.

89 Chief Justice R S French, ‘The Common Law and the Protection of Human Rights’ (Speech delivered at the Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 1–2 [3] <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf>>. Chief Justice French has explained that the term ‘unelected judges’ ‘has been used to suggest that a kind of democratic deficit would result if judges were to be required to make decisions involving the weighing up of important but competing societal values — the kind of judgments not unusual in human rights jurisprudence’: at 1 [1].

90 Chief Justice R S French, ‘Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons’ (Speech delivered at the Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association, London, 5 July 2012) 23 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf>>.

91 *Australian Capital Television* (1992) 177 CLR 106; *Nationwide News* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559–62; *Coleman v Power* (2004) 220 CLR 1

92 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; *R v Sharkey* (1949) 79 CLR 121.

93 See, eg, the broad scope given to the external affairs power in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (‘*Koowarta*’); *Commonwealth v Tasmania* (1983) 158 CLR 1 (‘*Tasmanian Dam Case*’).

object to constitutional rights should also object to structural judicial review'.<sup>94</sup> Indeed, in construing the s 51 powers, the court had to decide on the scope of the s 51(xxvi) Race Power, a decision which was the subject of extensive moral disagreement,<sup>95</sup> and the High Court found that the Parliament did possess the power to racially discriminate. Judges already decide moral matters in interpreting the *Constitution*

In this vein, Kirby argues that Allan's argument about the inappropriateness of judicial references to values is flawed:

The contradiction lies in his statement that we all know judges make law. Yet, on the other hand, he adheres to a 'fairly tale' view that there can be no moral input by the judge at the point of the decision. Well now, how then do the judges make the law? They make it by reference to values.<sup>96</sup>

In some respects, therefore, the argument about whether it is right that judges should be interpreting moral matters in Australia is exaggerated — because they already do. Judges already play a role in developing the common law and interpreting the *Constitution*. Supposedly 'activist' judges are already interpreting constitutional clauses to do with race. Arguably, the parliamentary sovereignty objection to a prohibition on racial discrimination in the *Constitution* is therefore weak. The judicial activism concern regarding a new racial non-discrimination clause is probably overstated.

## **2 Parliamentary Sovereignty Is Already Limited by the Constitution as Interpreted by the Courts**

Allan's preferred state of affairs is not the reality in Australia. We have a written *Constitution*. In Australia therefore, Parliament is not strictly sovereign. Rather, the status of the Australian Parliament is better described as parliamentary supremacy. This is because the Australian Parliament, unlike in the UK, is already limited in its lawmaking powers by the existence of our written *Constitution*<sup>97</sup> which binds Parliament to the rule of law as set out, or implied, by our *Constitution*

94 Adrienne Stone, 'Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law' (2010) 60 *University of Toronto Law Journal* 109, 110. Note that Goldsworthy and Aroney have criticised Stone's argument on the basis that the undemocratic objection can only apply to judicial review of rights. They draw on Waldron, who proceeds from the starting point that judicial review of constitutional rights is wrong because it is individuals themselves, as moral beings (as represented by Parliament), who are the best protectors of their own rights. Because human beings have rights, they should be trusted to protect them through self-government. Aroney therefore argues that democracy should be preferred for resolving political disputes to do with individual rights, but not necessarily other types of disputes. See Jeffrey Goldsworthy, 'Structural Judicial Review and the Objection from Democracy' (2010) 60 *University of Toronto Law Journal* 137; Nicholas Aroney, 'Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism' (2008) 27(1) *University of Queensland Law Journal* 129; Waldron, *Law and Disagreement*, above n 44, 223.

95 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

96 Allan and Kirby, above n 73, 1039–40 (citations omitted).

97 See Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32 *Federal Law Review* 57, 60.

Since its inception, the *Constitution* has had to be interpreted by judges. Judges have engaged in structural interpretation, figuring out the nature of our system of federal government, and how our democracy works. Part of a judge's job is to draw implications from the constitutional text. The idea of the separation of powers is itself one such constitutional implication, drawn from s 71.<sup>98</sup>

Courts have also had to interpret the scope of the Commonwealth's s 51 powers and what they mean. As noted, over time, courts have interpreted the scope the s 51 powers broadly, so as to maximise federal Parliament's legislative freedom and power.<sup>99</sup> Judges have also over the years interpreted the *Constitution* in a way that implies the protection of certain human rights and fundamental freedoms. In Australia, this important principle of statutory interpretation began with *Potter v Minahan* in 1908, and developed such that common law rights and freedoms could not be impinged upon by legislation, except by 'plain words' or necessary implication.<sup>100</sup> Later, the language shifted from 'common law' rights, to a presumption that 'individual rights and fundamental freedoms' of a more universal nature must not be abrogated unless there is a clear and unambiguous legislative intention to do so.<sup>101</sup>

While Stone has argued that those who object to judicial review of constitutional rights should also object to judicial review of other elements of the *Constitution*<sup>102</sup> objectors usually have a special problem with broader rights being inserted into the *Constitution*, because they leave largely moral matters to an unelected judiciary, and therefore are likely, it is argued, to encourage judicial activism.<sup>103</sup> This, they argue, diminishes parliamentary supremacy.

On one hand, objectors to the racial non-discrimination proposal are correct. The Expert Panel's proposed s 116A would obviously restrict Parliament's lawmaking power: it would limit parliamentary supremacy with respect to being able to pass race-based laws. The question is: why would this be a bad thing?

The judiciary already interprets the *Constitution*. Judges already draw implications from it. They already interpret the existing race provisions, laden with controversial and highly political questions of morality as they are. And judicial activism is already a concern for many commentators, even though we

98 Patrick Emerton, 'Political Freedoms and Entitlements in the *Australian Constitution* — An Example of Referential Intentions Yielding Unintended Legal Consequences' (2010) 38 *Federal Law Review* 169, 172, citing Jeffrey Goldsworthy, 'Implications in Language, Law and the *Constitution*' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150, 164–5.

99 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 368 (O'Connor J); *Koowarta* (1982) 153 CLR 168; *Tasmanian Dam Case* (1983) 158 CLR 1. See also Stone, 'Democratic Objections to Structural Judicial Review', above n 94, 118–19.

100 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); *Re Cuno*; *Mansfield v Mansfield* (1889) 43 Ch D 12, 17; *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206. See also French, 'The Common Law and the Protection of Human Rights', above n 89, 8–9 [13]–[15].

101 *Bropho v Western Australia* (1990) 171 CLR 1; *Coco v The Queen* (1994) 179 CLR 427; French, 'The Common Law and the Protection of Human Rights', above n 89, 9 [16].

102 Stone, 'Democratic Objections to Structural Judicial Review', above n 94, 110.

103 Goldsworthy, 'Structural Judicial Review and the Objection from Democracy', above n 94; Aroney, above n 94.

have no bill of rights. How would removal of the race clauses and insertion of a racial non-discrimination clause make the situation worse than it is now?

Yes, it would change the text of the *Constitution*. It would change the situation from one in which race-based laws are explicitly allowed, to one where race-based laws are generally not allowed. But in my view this would be an improvement on the current situation. It would be correcting an injustice.

It would not, however, change the structure of our system, or give judges more power than they currently have. What it would do is impose a judicially adjudicated restraint on Parliament's power to pass race-based laws. While this would certainly allow judges some scope in interpreting the restraint, it would not be a radical departure from the current situation, in which judges already determine the scope of Parliament's power to pass race based and racially discriminatory laws.

After all, analogous restraints already exist. The drafters of the *Constitution* thought it prudent to incorporate various judicially adjudicated restraints on parliamentary power, including many restraints to prevent discrimination against the states.<sup>104</sup> However, because of the discriminatory attitudes of the time, the drafters did not include a restraint with respect to racial discrimination — in fact they included clauses to actively discriminate against Indigenous people.

If the Australian people voted to rectify this, by embedding a judicially adjudicated restraint on race-based laws and policies, this would not be a radical change. It would simply add to the array of judicially adjudicated limitations which are already a part of our constitutional arrangements.

### **3 The Undemocratic Objection Is Somewhat Circular**

There is something circular about the reasoning which favours the 'thin' view of democracy, and therefore opposes changing the *Constitution* to entrench a racial non-discrimination clause on majoritarian grounds.

Allan on one hand argues that so-called progressives are wrong to ascribe a 'morally pregnant' democratic or undemocratic quality to the outcome of democratic decisions.<sup>105</sup> Allan says all that matters is whether the decision was made via a democratic procedure. Yet on the other hand, Allan contends that the outcome of a referendum to entrench a racial non-discrimination clause would be undemocratic, even though a referendum is clearly a democratic procedure — and arguably a superior democratic procedure than the parliamentary process in terms of allowing individuals a direct say (and certainly a more democratic process than that undertaken by the drafters of the *Constitution*, given that Indigenous people

104 See for example s 116 of the *Constitution* as well as the variety of express limitations on Commonwealth powers: the 'just terms' qualification in 51(xxxi), the state non-discrimination requirements in s 51(ii), the prevention of discrimination against State residents in s 117, as well as State consent or concurrence requirements in ss 51(xxxiii), 51(xxxiv) and 51(xxxviii).

105 Allan, 'Intimations of the Decline of Democracy', above n 41, 20.

and women were not given a fair say or vote).<sup>106</sup> That is, Allan contends that if the people were to exercise their democratic will under s 128 to insert a judicially adjudicated racial non-discrimination clause, which constrains majoritarian decision-making found to be in breach of the clause, then this outcome would be undemocratic. But what of the fact that, if it succeeds at referendum, then that means that the Australian people want this to be the case?

My objection could of course be taken to the point of absurdity: does my argument mean that we cannot criticise as undemocratic a successful referendum that abolished the voting rights of all citizens and established a dictatorship instead? As Waldron has argued, '[i]f the people voted to experiment with dictatorship, democratic principles might give us a reason to allow them to do so. But it would not follow that dictatorship is democratic'.<sup>107</sup> Drawing on this analysis, Stone observes that 'a democratic procedure for adopting some institution of government does not in itself make that institution democratic'.<sup>108</sup> While in one sense, this observation weakens my argument that a racial non-discrimination clause inserted into the *Constitution* via a popular referendum would not be undemocratic because the people voted for it, in another sense, it further illustrates my point. For Allan, a judicially adjudicated constraint on majoritarianism, like that presented by a racial non-discrimination clause, must be undemocratic. But the irony of democracy — that an unconstrained majority might vote to subject itself to a dictator — demonstrates that certain constraints on majoritarian decision-making, such as constraints that *prevent* the majority from eroding certain basic aspects of democracy, are not necessarily undemocratic. This is arguably why the basic elements of the democratic process are enshrined in the *Constitution* as our basic charter of government, and protected from ordinary legislative amendment. Allan is therefore incorrect to contend that a racial non-discrimination clause in the *Constitution* would be undemocratic simply because it is judicially enforced

106 See also Greg Craven's comments in Craven, 'The High Court of Australia: A Study in the Abuse of Power', above n 49, 220–1, 226 which characterise the referendum process as *r* democratic than the democratic process undertaken by the founders of the *Constitution*, which excluded Indigenous people and women

[T]he Founders comprised a group of mercifully deceased, white, male Anglo-Saxons, whose racist, sexist and dietarily unacceptable assumptions should have no controlling force over the *Constitution*

However, the conclusive answer to such essays in anachronistic constitutional correctness lies in the democratic origins of the *Constitution* and the processes by which it was adopted. Put simply, from 1897, the delegates to the Conventions (except for those from Western Australia) were popularly elected. They framed their *Constitution* pursuant to mandates from the peoples of their respective colonies, under intense public scrutiny and surrounded by community debate. That document, which was in every sense the embodiment of their collective intentions, was in turn voted upon in a series of popular referenda and ratified. This is a formidable, indeed an unbeatable, democratic pedigree for the *Australian Constitution*

Of course, there is one process that clearly will produce a superior democratic will to those which originally underlay the formulation and adoption of the *Constitution*, and that is an amendment of the *Constitution* under s 128.

107 Waldron, *Law and Disagreement*, above n 44, 255.

108 Adrienne Stone, 'Disagreement and an Australian Bill of Rights' (2002) 26 *Melbourne University Law Review* 478, 485.

and capable of blocking some majoritarian decisions.<sup>109</sup> The relevant question is: is equality before the law with respect to race a democratic essential that should be enshrined in the *Constitution*? Given the racial discrimination currently present in Australia's *Constitution*, I argue that it is. There is a need to explicitly correct the undemocratic 'race error'.

Further, the fact that Allan describes the proposed racial non-discrimination clause as undemocratic demonstrates that elements of the *Constitution* can be undemocratic, even if they have been inserted by the people via referendum. I agree with Allan on this point. The decision by the drafters of the *Constitution* to insert ss 25 and 51(xxvi) was one such example of a democratic process (albeit one that largely excluded Indigenous people) embedding undemocratic provisions into the *Constitution*. However, I do not agree that the proposed racial non-discrimination clause would be undemocratic. Certainly it would be a clause that, like the rest of the existing *Constitution*, would be interpreted by the unelected judiciary. But this would be a democratic improvement on the current situation, which promotes differential treatment of Australian citizens on the basis of race, through clauses which are also currently interpreted by the unelected judiciary.

The difference lies in the meaning being ascribed to the 'democratic' description. If Australia is, or is supposed to be a liberal democracy, and a liberal democracy means a system of governance in which citizens are free and equal, in that they have an equal say through their equal vote, and have free and equal participation in the democratic system,<sup>110</sup> then the *Constitution* as it currently stands poses some serious problems with respect to its treatment of citizens on the grounds of race. The race provisions in the *Constitution* arguably undermine the 'free and equal' nature of Australian citizens and their democratic participation under the *Constitution*. These race provisions could be described as undemocratic.

#### **4 The Race Clauses in the Constitution Are Themselves Undemocratic**

Let us agree, as Goldsworthy describes, that our minimalist *Constitution* provides the structures within which political arguments about moral matters and matters of justice take place.<sup>111</sup> Can it be said that our *Constitution* sets up structures whereby Australian citizens are free and equal, enjoy a fair and equal cooperation and participation in the democratic process,<sup>112</sup> and whereby each person is shown equal respect through their equal vote,<sup>113</sup> with respect to race? This is not a question about how Australian democracy works in practice, who votes and how, nor about substantive outcomes. It is a question about the text of the *Constitution*

109 Thank you to Professor Patrick Emerton for his guidance in articulating this argument. For further explorations of the paradoxes of democracy, see Waldron *Law and Disagreement*, above n 44; Jeffrey Goldsworthy, 'Abdicating and Limiting Parliament's Sovereignty' (2006) 17 *King's College Law Journal* 255

110 John Rawls, *Political Liberalism* (Columbia University Press, 2005) 4.

111 Goldsworthy, 'Constitutional Cultures, Democracy and Unwritten Principles', above n 36, 685.

112 John Rawls, *Political Liberalism* (Columbia University Press, 2005) 4.

113 Waldron, *Law and Disagreement*, above n 44, 114–15.

The view that prefers the democratic process alone to protect individual liberty presupposes first that every section of the population will have a vote, and second, that every section of the population will have a proper say in matters affecting them — that is, they will not be unfairly hindered from participating in the democratic process. Accepting the view that the democratic process alone is good enough to ensure that Australians are not racially discriminated against by governments presumes the neutrality and fairness, with respect to race, of the democratic process, or structure, itself.

Waldron has conceded that majority rule may not be the best option where there are disparate views about the democratic decision procedure itself.<sup>114</sup> Similarly, Eisgruber has argued that ‘Waldron cannot successfully defend “majority rule” on the ground that it is neutral among, or abstracts from, competing conceptions of equal respect’.<sup>115</sup> Rather, Eisgruber points out that ‘[i]n circumstances of deep and durable disagreement, it is a mistake to suppose that unrestricted majority rule, or any other procedure for resolving the disagreement, can count as neutral’.<sup>116</sup>

The point about neutrality and fairness in the democratic decision-making process itself is important when considering the strength of Waldron’s argument with respect to the *Constitution*. Arguably, it is only correct to say that the democratic procedures alone are adequate to protect rights in Australia if:

- (1) there exists a free and equal citizenship in Australia; and
- (2) citizens participate fairly in that democratic procedure.

How are we to know, firstly, if citizens are free and equal in Australia, under the *Constitution*? It should be noted here that the *Constitution* itself does not refer to ‘citizens’ or ‘citizenship’. Some High Court judges have, however, established a notion of ‘constitutional citizenship’<sup>117</sup> implied from terms such as ‘the people’, ‘the electors’, and as the opposite of ‘aliens’.<sup>118</sup> However, not using the word ‘citizen’ was a deliberate choice by the constitutional drafters.<sup>119</sup> There is therefore dispute about whether constitutional citizenship exists under the *Australian Constitution*<sup>120</sup> as the idea of citizenship ‘connotes a rights-bearing status’ where words like ‘people’ and ‘electors’ do not.<sup>121</sup> For our present purposes, given that

114 Ibid 299–300.

115 Christopher L Eisgruber, ‘Democracy and Disagreement: A Comment on Jeremy Waldron’s *Law and Disagreement*’ (2002) 6 *New York University Journal of Legislation and Public Policy* 35, 38.

116 Ibid.

117 *Singh v Commonwealth* (2004) 222 CLR 322, 378–9 [134]–[135] (McHugh J) (‘*Singh*’). Cf *Koroitamana v Commonwealth* (2006) 227 CLR 31, 37 [9] (Gleeson CJ and Heydon J), 42 [31], 46 [48] (Gummow, Hayne and Crennan JJ), 49 [61] (Kirby J).

118 In *Hwang v Commonwealth* (2005) 222 ALR 83, McHugh J described the notion of ‘constitutional citizenship’ as being the opposite of the constitutional term ‘alien’: at 89 [18]. See also Christopher Tran, ‘New Perspectives on Australian Constitutional Citizenship and Constitutional Identity’ (2012) 33 *Adelaide Law Review* 199, 201.

119 Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002) 29–30; Tran, above n 118, 201.

120 See Greg Taylor, ‘Citizenship Rights and the *Australian Constitution*’ (2001) 12 *Public Law Review* 205, 209–10.

121 Tran, above n 118, 203.

Australia is known as being a liberal democracy, and given that the notion of Australian citizenship is a term widely used and given an everyday meaning in the Australian national and political discourse, I use the term ‘citizenship’ on the understanding that some form of common citizenship, national membership or Australian peoplehood is implied by the *Constitution*. The pertinent question is whether the individuals within this citizenship or Australian peoplehood are free and equal with respect to race, under the *Constitution*. If we limit the discussion to the constitutional text itself, rather than history or substantive outcomes, then the relevant equality of citizenship is equality before the law, as ascertained from the constitutional text. Does the *Constitution* demonstrate that we have free and equal citizenship in Australia with respect to race? And, does the *Constitution* demonstrate fair participation in democracy with respect to race?

I argue, with respect to race only, that our *Constitution* does not establish a free and equal citizenship nor does it establish a structure for fair participation in democracy by all Australian citizens. This is undemocratic. Therefore, the concept of race should be removed as a basis for discrimination in the *Constitution*

## **5 A Liberal Democracy Requires Free and Equal Citizenship with Respect to Race**

As Goldsworthy describes, our *Constitution* is a structural document. It sets up our political and democratic processes.<sup>122</sup> If the *Australian Constitution* sets up how democratic decision-making in Australia functions, then democratic decision-making in Australia will only be fair and democratic if the *Constitution* itself is fair and democratic. Arguably, the *Constitution* is not fair and democratic with respect to its treatment of citizens on the basis of race.

The existence of the Race Power and the historical evidence informing its intended purpose does not support the existence of a free and equal citizenship in Australia with respect to race. While equal citizenship, post-1967, may have developed in practice, it is not set up nor guaranteed by the structure of the *Constitution*. This means the *Constitution* is democratically deficient; it contains an error or corruption with respect to race.

During the constitutional conventions, there was debate about whether, once admitted to the country, the ‘coloured or inferior’ races should be given equal citizenship. Sir Samuel Griffith was concerned about being ‘flooded’ by ‘eastern people’,<sup>123</sup> perhaps indicating that the power was meant to control immigrants on the basis of race, rather than citizens. But these comments were not decisive. They were part of an argument about whether discriminating against Australian citizens on the basis of race was acceptable. The existence of various other powers to deal with immigration and foreign affairs, including s 51(xix) the ‘naturalization and

122 Goldsworthy, ‘Constitutional Cultures, Democracy and Unwritten Principles’, above n 36, 685.

123 *Official Record of the Debates of the National Australasian Convention*, Sydney, 8 April 1891, 703 (Sir Samuel Griffith).

aliens' power, s 51(xxvii) the 'immigration and emigration' power, s 51(xxviii) the 'influx of criminals' power and s 51(xxix) the 'external affairs' power, would seem to support a contention that the Race Power was initially intended to discriminate both against foreign outsiders and those people who had become Australian citizens, but who were of different ethnic backgrounds.

James Howe argued that 'we should as far as possible make Australia home for Australians and the British race alone', and emphasised the importance of Parliament retaining power to control 'coloured persons' in various ways.<sup>124</sup> John Reid's comments at the time support this notion, but for more benevolent reasons. As the Expert Panel explained:

John Reid ... agreed with Forrest that it was 'certainly a very serious question whether the internal management of these coloured persons, once they have arrived in a state, should be taken away from the state'. He was prepared, however, to give that power to the Commonwealth because 'it might be desirable that there should be uniform laws in regard to those persons, who are more or less unfortunate persons when they arrive here'.<sup>125</sup>

As noted, the 1967 referendum removed the exclusion of Indigenous Australians from the ambit of the Race Power, but it did not confirm that the power could only be used for beneficial rather than discriminatory purposes.<sup>126</sup> Leaving to one side the policy argument that benevolent government action in a liberal democratic society should address demonstrable individual disadvantage and need, not race,<sup>127</sup> Reid's benevolent intentions must be read alongside the other malevolent purposes: the Race Power was inserted to control, exclude and subordinate those who were not white.

What does this mean about whether there is equal citizenship under the *Australian Constitution* with respect to race? In my view, the existence of s 51(xxvi) provides

124 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 251 (James Howe).

125 *Expert Panel Report*, above n 1, 16 (citations omitted), quoting *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 241 (John Reid).

126 Though judgments were split, in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 378–81 [82]–[89] two justices, Gummow and Hayne JJ, held that this power could be used to pass laws for the benefit of any race, or laws to the detriment of any race'. Similarly in *Koowarta* (1982) 153 CLR 168, Gibbs CJ held (at 186) (citations omitted):

It would be a mistake to suppose that s 51(xxvi) was included in the *Constitution* only for the purpose of enabling the Parliament to make laws for the special protection of people of particular races. Quick and Garran, in their *Annotated Constitution of the Australian Commonwealth*, correctly observed that by 'sub-sec xxvi the Federal Parliament will have power to pass special and discriminating laws relating to "the people of any race"'. Such laws might validly discriminate against, as well as in favour of, the people of a particular race.

127 Pearson, 'The Reward for Public Life Is Public Progress', above n 26; Noel Pearson, 'Next Step Is for the Nation to Leave Race Behind' *The Australian* (Sydney), 25 May 2013, 19; Shireen Morris, '2013 Reconciliation Week Blog — Why We Need Constitutional Reform: Recognition and Equality Before the Law' on *Castan Centre for Human Rights Law: The Official Blog* (29 May 2013) <<http://castancentre.com/2013/05/29/why-we-need-constitutional-reform-recognition-and-equality-before-the-law/>>.

evidence against it. The counter argument is that, because the Race Power applies in theory to everyone equally now that the exclusion of Indigenous peoples has been removed, the power is not discriminatory as it could in theory be used for or against any so-called race. But this does not refute the argument that the existence of such a power in the *Constitution* is undemocratic. While the power may in theory be used to target any section of the population on the basis of race, it is still a power to target on purely racial grounds. It means that Parliament is theoretically empowered to prevent Asian Australians from voting on account of supposed race, or to prevent Indigenous Australians from earning equal wages. The existence of the Race Power supports the contention that the *Constitution* does not establish free and equal citizenship with respect to race.

The existence of s 25, which talks about barring races from voting, also supports this contention. The High Court has pointed to s 25 to show that there is no equality before the law with respect to voting or citizenship under the *Constitution*.<sup>128</sup> Twomey, however, has challenged the assumption that s 25 is racially discriminatory, pointing to its anti-racist intent and its derivation from the US 14th Amendment,<sup>129</sup> a view supported by Kirby J, who saw it as a disincentive or deterrent to racial disqualification from voting.<sup>130</sup> Twomey nonetheless notes that s 25 'did not apply to discourage discrimination against Australian Aboriginal people with respect to voting rights in the States for as long as s 127 existed'.<sup>131</sup> Similarly:

the consequences of s 25 were easily avoided. Section 25 refers to State laws which disqualify 'all persons of any race', rather than the 'people of any race'. It was therefore relatively simple for a State to enact a law that had the consequence that most people of a particular race were disqualified, rather than all, with the effect that the application of s 25 was avoided.<sup>132</sup>

While it is correct that s 25 was inserted to operate as a disincentive to barring races from voting, it is nonetheless a provision that acknowledges that barring races from voting is allowed within the democratic system created by the *Constitution*, an assertion supported by the existence of the Race Power, allowing and promoting differential treatment of citizens on racial grounds.

The right to vote is a crucial right of citizenship, and demonstrates the 'equal respect', as Waldron puts it,<sup>133</sup> given to citizens' views in the democratic process. The fact that the *Constitution* contemplates taking this basic right of citizenship away on the basis of race demonstrates the way in which the 'race error' in our *Constitution* undermines the notion of any equal Australian citizenship.

128 *Singh* (2004) 222 CLR 322, 368 [107] (McHugh J); *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 20–1 (Barwick CJ), 44 (Gibbs J), 62 (Mason J). See also Twomey, 'An Obituary for s 25 of the *Constitution*', above n 16, 136–7.

129 Twomey, 'An Obituary for s 25 of the *Constitution*', above n 16, 126–9.

130 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 254–5 [213].

131 Twomey, 'An Obituary for s 25 of the *Constitution*', above n 16, 135.

132 *Ibid* 135–6 (citations omitted).

133 Waldron, *Law and Disagreement* above n 44, 115.

If we can agree, then, that the race clauses should be removed from the *Constitution* for the reasons given, because they are undemocratic and unjust, the next step is to deal with the problems that this removal creates, and to draft the most appropriate, certain and democratic solution.

## B Responding to the Uncertainty Objection

### How Do We Best Correct the Undemocratic ‘Race Error’?

Removal of references to ‘race’ is less disputed than putting new sections into the *Constitution*. Allan, for example, sees no problem with removing s 25, which is relatively uncontroversial, nor with removing the Race Power.<sup>134</sup> However, removing the Race Power gives rise to some complications. If it is removed, it would need to be replaced by a power that would still enable and support Commonwealth laws with respect to Indigenous affairs, such as native title<sup>135</sup> and Indigenous heritage laws.<sup>136</sup> The Race Power therefore needs to be replaced with something. The Expert Panel proposed it be replaced with a new s 51A, to provide the necessary Commonwealth power, but that would also contain a preamble style statement of Indigenous recognition.<sup>137</sup>

This proposal was criticised by some on the basis that a statement of Indigenous recognition should go in the Preamble to the *Constitution*, not into a substantive section.<sup>138</sup> The qualifying word ‘advancement’ was also objected to, on the basis that it would involve high levels of constitutional uncertainty.<sup>139</sup> Some objected

134 Allan, ‘Constitutional Fiddling Brings Inherent Danger’, above n 32, 14.

135 *Native Title Act 1993* (Cth).

136 *Expert Panel Report*, above n 1, 138; Pritchard, above n 29, 52. See also Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Interim Report* (2014) 9 [2.26]–[2.27].

137 The proposed s 51A would read:

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

*Expert Panel Report*, above n 1, xviii.

138 Craven, ‘Keep the Constitutional Change Simple’, above n 31, 55.

139 See for example Warren Mundine’s comments in Rintoul, above n 35, 9.

that using a word like ‘advancement’ was condescending, as it would define Indigenous people in terms of disadvantage.<sup>140</sup>

The qualifying word ‘advancement’ seems to have been included to ensure that the replacement power cannot be used to the detriment of Indigenous people — so it cannot be used in a discriminatory way. ‘Advancement’ appears to refer to the use of the word in *CERD*’s characterisation of special measures in art 1(4), as measures for the advancement of certain disadvantaged groups to ensure the equal enjoyment of fundamental rights and freedoms.<sup>141</sup>

If constitutional experts can agree that the *Constitution*’s ‘race’ provisions should be removed, then we need to resolve how best to replace the Race Power to enable laws with respect to Indigenous affairs, and how to ensure that this power, and other powers, cannot be used in a racially discriminatory way.

Currently, individuals, corporations and the states are prevented from racially discriminatory behaviour under the *RDA*. The only body within our system that is allowed to racially discriminate, and indeed has an explicit power to do so, is the Commonwealth. This anomaly should be rectified so that all levels of government and society are held to the same democratic standard with respect to racial non-discrimination — the question is, how?

## **2 Racial Non-Discrimination versus Qualifying a New Head of Power: What Is the Best Way to Minimise Uncertainty?**

The Joint Select Committee has expressed agreement with the Expert Panel about the need to remove references to ‘race’

the committee believes that the issue of racial discrimination goes to the heart of the broader question of constitutional recognition of Aboriginal and Torres Strait Islander peoples. Therefore, it is entirely appropriate and necessary that the removal of references to ‘race’ in the *Constitution* form part of a broader proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples.<sup>142</sup>

140 Evidence to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Sydney, 30 April 2013, 15 (Peter Dawson). For these reasons the Joint Select Committee says it will probably not use the word ‘advancement’: see Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report* (2014) 6–7.

141 *CERD* art 1(4) states:  
Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

142 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, ‘Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012’ (Report, 30 January 2013) 22. See also Melissa Castan, ‘Closing the Gap on the Constitutional Referendum’ (2013) 8(4) *Indigenous Law Bulletin* 12, 14.

It has also agreed that removing references to ‘race’ from the *Constitution* necessitates a Race Power replacement.<sup>143</sup> Given that, we must contend with whether to qualify the new head of power, or whether to insert a general prohibition on racial discrimination that applies equally to all Australians.

Arguably, if a racial non-discrimination clause was inserted into the *Constitution* there would be no need to qualify the replacement power with a word like ‘advancement’. There are also several reasons to prefer a racial non-discrimination clause that is equally applicable to all Australians, over a qualification to the new Indigenous affairs power.

Simply qualifying the new head of power would do little to quell concerns about past racial discrimination against Indigenous people, nor to support hopes that constitutional amendment might prevent similar discriminatory government action in the future, or at least render it legally challengeable. Without a racial non-discrimination clause, governments could use other heads of power to pass racially discriminatory laws. As Associate Professor Sean Brennan argued in his submission to the Expert Panel:

I am not convinced that the answer lies in conditioning the power in s 51(xxvi) by use of the word ‘benefit’ or ‘advancement’ and then carving out the laws enacted under this power as exceptions to the non-discrimination principle. There are two main reasons. The first is that such a change alone will not address the adverse use of other legislative and executive powers, such as the Territories power in section 122 of the *Constitution*, the corporations power, State legislative powers and so on. That, however, is more an argument which reinforces the need for a broad non-discrimination clause than a conclusive case against including ‘benefit’ or ‘advancement’ in a reworded s 51(xxvi).

The second and more specific reason is that I believe that moving beyond neutral wording in the power risks neutralising the impact of the non-discrimination clause in the ultimate judicial calculus. When confronted with a future challenge by Aboriginal or Torres Strait Islander people to an Indigenous-specific federal law, on the grounds that it breaches the non-discrimination clause, the High Court will ask first whether the law is supported by a power and then second whether it constitutes impermissible racial discrimination, ... The risk is that a full and clear-sighted analysis of the non-discrimination principle will be impeded by the prior legal finding of benefit. A neutral worded power may better clear the way for the discrimination analysis.<sup>144</sup>

From the point of view of addressing concerns regarding uncertainty, a racial non-discrimination clause may be a better option than a qualification of the

143 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report* (2014) 9–10; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report* (2014) 4–5.

144 Sean Brennan, Submission No 3351 to Expert Panel on Constitutional Recognition of Indigenous Australians, 30 September 2011, 7.

power. Attorney-General George Brandis, as Shadow Attorney-General and Chairman of the Joint Select Committee in 2013, expressed the view that a racial non-discrimination clause was a more attractive option than qualifying the new power, because it would be difficult to predict how courts would interpret a qualifying word like ‘advancement’.<sup>145</sup> Brandis described the proposed racial non-discrimination clause as ‘perfectly commonplace’, and ‘unexceptionable from a legal point of view’, though he did question its political viability.<sup>146</sup> The ‘advancement’ qualification of the replacement power, by contrast, was in Brandis’ view not a term of ‘received legal meaning’.<sup>147</sup> This view has also been supported by Brennan, who has noted that the lack of domestic precedent in Australia means that it would be difficult to predict how courts might interpret qualifying words like ‘advancement’.<sup>148</sup> As a result, the Joint Select Committee reported that they would reconsider using the word.<sup>149</sup>

Various other alternatives to qualify the replacement power have been suggested, including constructing it as a power to pass laws with respect to Indigenous people, ‘but not so as to discriminate adversely against them’.<sup>150</sup>

Williams and Dixon argue that because the High Court has held that ‘express qualifications’ to other powers are interpreted to apply to Commonwealth powers generally, the court may interpret such a qualification to the new Indigenous power in a similarly broad way to constrain Commonwealth powers generally.<sup>151</sup> This is an important argument, because powers other than the Race Power are often used to support laws with respect to Indigenous people, sometimes in a way that is considered discriminatory.<sup>152</sup> But while the case law indicates that the High

145 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Sydney, 30 April 2013 19, 22 (George Brandis).

146 *Ibid* 22.

147 *Ibid* 18.

148 Sean Brennan, ‘Constitutional Reform and its Relationship to Land Justice’ (*Land, Rights, Laws: Issues of Native Title* vol 5, Issues Paper No 2, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, October 2011) 6.

149 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report* (2014) 6–7.

150 Rosalind Dixon and George Williams, ‘Drafting a Replacement for the Races Power in the *Australian Constitution*’ (2014) 25 *Public Law Review* 83, 87.

151 Citing *Bourke v State Bank (NSW)* (1990) 170 CLR 276 with respect to the s 51(xiii) power; Rosalind Dixon and George Williams, ‘Drafting a Replacement to the Races Power in the *Australian Constitution*’ (2014) 25 *Public Law Review* 83, 87–8. As Dixon and Williams note, there is also contention about what an ‘express qualification’ is. See also *NSW v Commonwealth* (2006) 229 CLR 1 (*Workchoices Case*).

152 Pritchard explained that the current Race Power is generally ‘specifically applicable to Aboriginal and Torres Strait Islander Australians in the areas of cultural heritage, corporations and native title’: see also Sarah Pritchard, ‘The Race Power in Section 51(xxvi) of the *Constitution*’ (2011) 15(2) *Australian Indigenous Law Review*, 52. Other powers are therefore used to support other Indigenous specific laws. The Northern Territory Intervention was likely reliant on s 122 of the *Constitution Wurrldjal v Commonwealth* (2009) 252 ALR 232, 297 (Kirby J). See also Sean Brennan ‘*Wurrldjal v Commonwealth* the Northern Territory Intervention and Just Terms for the Acquisition of Property’ (2009) 35 *Melbourne University Law Review* 957; Brooke Greenwood, ‘The Commonwealth Government’s Northern Territory Emergency Response Act: Some Constitutional Issues’ (2009) V *Cross Sections* 21

Court would likely interpret this type of express limitation in a broad way,<sup>153</sup> it can never be a certain outcome because it relies on the Court to read into the power more than is explicitly stated. The only certain way to constrain Commonwealth powers generally would be to implement a racial non-discrimination clause along the lines suggested by the Expert Panel.

While the word ‘discriminate’ in this context would be useful in that it would import racial non-discrimination law in interpreting the new power, the Joint Select Committee has noted that the meaning of the term ‘discriminate’ ‘in the context of a constitutional legislative power could remain somewhat uncertain.’<sup>154</sup>

In addition to the legal uncertainty, there is the potential for political or public uncertainty that this type of qualification may create. There is perhaps something paradoxical about having a non-discrimination limitation on a power that applies only to Indigenous people and not to other Australians. While the solution may make legal sense as a way of ensuring the power cannot be used for adverse discrimination against Indigenous people, we should ask whether non-discrimination is the right concept to apply to a power intended for one group of the population. Or, is this going to be unnecessarily confusing for referendum voters, because an Indigenous-specific power could be described as discriminatory in itself? That said, the solution does address concerns that a broader racial non-discrimination clause is too general, and that it would constitute a ‘one clause bills of rights’.

In my view, a racial non-discrimination clause, carefully and narrowly drafted, would overall involve less uncertainty than qualifying a new head of power. Courts are accustomed to applying broad racial non-discrimination principles under the *RDA*, and there is a large body of case law to draw upon. It would be fairly predictable as to how courts would be likely to interpret such a clause. For example, it is likely that, since the *Maloney* decision, Alcohol Management Plans in alcohol-affected Indigenous communities will be held to be valid special measures under racial non-discrimination law principles.<sup>155</sup> Native Title and land rights laws would most likely be held to be valid special measures, as *Gerhardy v Brown* demonstrated.<sup>156</sup> Measures like ABSTUDY have also been held to be valid special measures under the *RDA*.<sup>157</sup> However, laws mandating lower wages for Indigenous people would likely be in breach of a racial non-discrimination clause, and would not be a valid special measure, as was demonstrated in the *Palm Island Wages Case*.<sup>158</sup>

153 Twomey agrees that qualifying the Indigenous power would in effect qualify the other Commonwealth powers, giving the qualification a broad scope: Anne Twomey, ‘A Revised Proposal for Indigenous Constitutional Recognition’ (2014) 36 *Sydney Law Review* 381, 409.

154 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report* (2014) 20.

155 *Maloney v The Queen* (2013) 298 ALR 308 (‘*Maloney*’).

156 (1985) 159 CLR 70.

157 *Bruch v Commonwealth* [2002] FMCA 29 (13 March 2002).

158 *Bligh v Queensland* [1996] HREOCA 28 (24 September 1996) (‘*Palm Island Wages Case*’).

Responding to Twomey's concern, it may help if the clause was drafted in a way that mimics the *RDA* to further enhance predictability. It may also help to make its operation narrower, by framing the provision as a restraint on lawmaking, more in line with the 'equality before the law' approach taken by the *RDA* in s 10.<sup>159</sup> The Expert Panel's proposed provision says that 'The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin'.<sup>160</sup> This is broad enough to potentially include administrative as well as legislative action.<sup>161</sup> A better approach may be to say 'no law shall discriminate on grounds of race' or to talk about 'equality before the law with respect to race'.

### **C Responding to the Political Unviability Objection**

The political unviability criticisms are difficult to respond to because they involve political predictions rather than substantive legal or political arguments in favour of or against the racial non-discrimination proposal. With respect, such contributions are unhelpful to the debate, because the people predicting a virulent 'no' case, divisive sentiment and subsequent failure, are sometimes the same people making and leading that 'no' case and divisive sentiment.

The political unviability objections are also somewhat odd, because they ignore polling which demonstrated the public popularity of the racial non-discrimination idea.<sup>162</sup>

### **A Politically Viable Argument on the Basis of National Unity and Social Cohesion**

While admittedly the Expert Panel's polls were conducted absent a 'no' campaign, in my view, the instinctive public popularity of the racial non-discrimination ideal arises from a fundamental belief in the importance of individualised, even-handed and colour blind justice, the strong sense of the Aussie 'fair go' for each person, and the arbitrariness and unfairness of treating Australian citizens differently on the basis of an outdated classification like 'race'. The strong underpinning values driving these sentiments are the ideals of individual equality and equality before the law, as well as the importance of national unity and social cohesion. Treating everyone equally, rising above racial divisions and creating a more unified

159 *RDA* s 10(1) states:

If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

160 *Expert Panel Report*, above n 1, xviii.

161 See Twomey, 'Indigenous Constitutional Recognition Explained', above n 34, 8.

162 *Expert Panel Report*, above n 1, 90–2, 157; Karvelas, 'Most Want Race Discrimination Removed from Constitution', above n 23, 9.

and cohesive nation and society are ideas that, if argued in a positive way, are politically viable and compatible with Australian democratic and liberal values.

This is probably why the national unity and national loyalty political angle featured strongly in the conservative push for constitutional reform for Indigenous recognition. Prime Minister Tony Abbott, at the time Leader of the Opposition, began his Second Reading Speech to the *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2013*<sup>163</sup> declaring: 'Australia is a blessed country. Our climate, our land, our people, our institutions rightly make us the envy of the earth, except for one thing — we have never fully made peace with the First Australians'.<sup>164</sup>

Our failure to make peace with Indigenous Australians, Abbott argued, was one of our only national blemishes. Abbott linked the constitutional recognition of Indigenous people to a potential achievement of national unity: a way to stop being an 'incomplete' and 'torn people', and to become 'one nation'.<sup>165</sup> In an uncharacteristic critique of our forefathers' collective wisdom, Abbott called upon the nation 'to atone for the omissions and for the hardness of heart of our forbears to enable us all to embrace the future as a united people'.<sup>166</sup> But the basic reasons he gives for the need for Indigenous constitutional recognition are based in national loyalty, national pride, and national unity. Abbott's thinking fits within the idea of national loyalty as a good basis for aiding reconciliation between religions, classes and backgrounds, with common citizenship as a uniting and equalising influence grounded in consensus, rather than force.<sup>167</sup>

However, because the idea of national loyalty often entails great reverence for the *Constitution* itself as a symbol of national pride and history, and also pride in the nation's British institutional history specifically, it can also entail resistance to proposals towards constitutional change. Calls for change, particularly to entrench rights, can be seen as a moral critique of our British constitutional history and heritage. Similarly, national loyalty and pride can entail denial that the race clauses in the *Constitution* pose a significant problem — essentially a denial that there was a discriminatory history with real, lived ramifications for Indigenous people.<sup>168</sup> Amplification of the significance of the race clauses or

163 This was an Act which set out parliamentary commitment to Indigenous constitutional recognition.

164 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2013, 1123 (Tony Abbott).

165 *Ibid.*

166 *Ibid.*

167 Roger Scruton, *A Political Philosophy: Arguments for Conservatism* (Continuum, 2006) 18.

168 Note for example, Sheridan, above n 33. On one hand Sheridan admits:

There is no doubt that throughout Australian history Aborigines suffered terrible injustice. Australian history, like that of all nations, contains plenty of good and plenty of bad. John Howard is right to hail the grandeur of the Australian achievement in nation building. Noel Pearson is right to draw our attention once more to the capricious cruelty and killings that occurred often in colonial times. I am not someone who denies historical injustice done to Aborigines.

Yet, Sheridan also argues that in removing 'the anachronistic clause that allows Canberra to make laws that help Aborigines ... we are remedying a problem that does not exist. The commonwealth parliament does not make laws designed to hurt Aborigines, just as it doesn't make laws designed to hurt Parsis or Irish Australians or the disabled or scientists.'

Indigenous non-recognition as a ‘blemish on our nationhood’<sup>169</sup> or a ‘stain on our soul’<sup>170</sup> can be seen as a threat to national pride and a criticism of national history. This can exacerbate resistance to the racial non-discrimination proposals. Because there is sometimes underlying denial that the allowances of race-based differential treatment in the *Constitution* had any real adverse practical effects, there is therefore denial that the clauses warrant any substantive constitutional reform.

Despite these factors, in my view, an argument on the basis of social cohesion, national unity and the importance of individualised justice and individual equality before the law perhaps provides the strongest justification for removal of race as a means of treating citizens differently. The political unviability objections tend to ignore or downplay the fact that those who might ordinarily oppose ideas of Indigenous constitutional recognition on the basis that recognising one group within Australian society is too separatist or divisive, and that it might entail different rules for different so-called races,<sup>171</sup> may be persuaded to support the proposals on the basis that we also enshrine the principle of equality before the law with respect to race, confirming that the same laws are to apply to all Australians.<sup>172</sup> Thus, a racial non-discrimination clause that applies equally to all Australian citizens, rather than a qualification of an Indigenous-specific power, could potentially be an easier political sell.

Creating an ‘equality before the law with respect to race’ style clause alongside symbolic Indigenous recognition could confirm or establish that all citizens are to be treated equally before the law, even though we would also formally recognise the nation’s Indigenous heritage and history. While a new Indigenous affairs power would be needed to enable the Commonwealth to deal with specific Indigenous

169 *Expert Panel Report*, above n 1, xii.

170 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2013, 1123 (Tony Abbott), citing Paul Keating, ‘Redfern Speech’ (Speech delivered at Redfern Park, Redfern, 10 December 1992).

171 See Gary Johns, ‘Equality at Risk on Recognition’, *The Australian* (Sydney), 25 March 2014, 10; Gary Johns, ‘History Yes, Culture No’, *The Australian* (Sydney), 8 October 2013, 12, in which Johns argues: ‘The *Constitution* is not a storybook, it is a rule book, and every Australian should play by the same rules.’ Note also Andrew Bolt’s comments against Indigenous constitutional recognition on the basis of wanting to maintain equality before the law and unity in national citizenship:

when I go before the courts I want to be judged as an individual. I do not want different rights according to my class, faith, ancestry, country of birth ... or ‘race’. I’m sure most Australians feel the same. We are Australians together, equal under the law and equal in our right as citizens to be here. That’s how we’ve been for generations.

Andrew Bolt, ‘I Am, You Are, We Are Australian’, *The Herald Sun* (Melbourne), 30 January 2014, 15. See also Sheridan, above n 33: ‘I don’t want the *Constitution*, or its preamble, to mention one group of Australians. In itself, this creates categories of Australians.’

172 Greg Sheridan for example opposes Indigenous recognition, but supports the idea of an equality before the law clause

Of course the US had terrible racism in its history. In the institution of slavery it had denied absolutely the humanity of African Americans. When it came to giving justice to African Americans, it didn’t make a special constitutional provision. It did the most important and effective thing it could. It made clear that all the provisions of the constitution, and all the rights, privileges and obligations of citizenship, applied equally to blacks as well as to everybody else. The mechanism of integration was common citizenship.

Sheridan, above n 33.

matters, a racial non-discrimination clause could establish that Indigenous people are, at the same time, confirmed as equal individuals and equal Australian citizens, and that no minority group should be subject to adverse differential treatment on racial grounds. Such an amendment would affirm that we are all equal citizens, all subject to the same law, with the special measures sub-clause being the only allowable exception, also equally applicable to all. As Noel Pearson argued in his 2013 Whitlam Oration, the racial non-discrimination clause would confirm that Indigenous recognition does not mean 'special treatment' or 'cultural relativism': it would confirm that 'the same rules should apply to all Australians'.<sup>173</sup>

For those who would ordinarily oppose such a proposal, the racial non-discrimination clause could operate as the unifying and justifying principle, balancing out any Indigenous recognition clauses, which alone may risk being looked upon as simple separatism. The racial non-discrimination clause could provide the 'equality before the law' rule, applicable to all Australians, that makes symbolic recognition of Indigenous history and heritage, and the practical necessity of an Indigenous affairs power, more widely acceptable.

## V CONCLUSION

It is true that on the one hand we have an overwhelmingly successful *Constitution* Australia is known for being a successful, stable and prosperous liberal democracy. On the other hand, the *Constitution* has failed, excluded and allowed discrimination against Indigenous people. So is Australia an inclusive, successful democracy, or not? Does Australia have a good human rights record, and a successful *Constitution*, or not? Depending on your politics and perspective, you will have different answers to these questions.

Goldsworthy has explained that the rule of law is primarily a political principle which may or may not be guaranteed by the law, and is often understood as being implicit within written constitutions.<sup>174</sup> If the rule of law is political, as those in favour of parliamentary sovereignty as the best way to ensure that laws reflect the evolving values and morals of the people should agree, then the content of the rule of law must be somewhat fluid and changing, like politics itself. As politics and values evolve, the content of the rule of law should evolve too. Indeed, our *Constitution*, through s 128, has a mechanism to evolve.

It is only through slow social and cultural evolution that the Australian population has moved on from the concept of race as a legitimate category justifying differential legal treatment and democratic exclusion. The race provisions in the *Constitution* are remnants of the racial divisions in Australia's history. They are

173 Pearson, 'The Reward for Public Life Is Public Progress', above n 26; Pearson, 'Next Step Is for the Nation to Leave Race Behind', above n 127, 19; Noel Pearson, 'Constitutional Recognition and Reform: What? Why? How?' (Speech delivered at the Cape York Institute Annual Seminar, Cairns, 18 July 2013).

174 Goldsworthy, *Parliamentary Sovereignty*, above n 81, 58.

the most undemocratic part of Australia's otherwise successful and democratic *Constitution*

This paper has questioned, therefore, whether the undemocratic and uncertainty objections to a racial non-discrimination clause are sufficient in the Australian context, given that Australia's *Constitution* currently contains two explicitly racially discriminatory provisions. Arguably, with respect to race, our *Constitution* cannot be said to be democratically neutral. This is the problem to which constitutional experts should try to find the most certain and democratic solution.

Those who agree that a liberal democracy requires free and equal citizenship and a free and equal participation in the democratic system, and who see the *Constitution* as a structural document which sets up the procedures of government and democracy, without supporting a broader bill of rights, should nonetheless support correcting the undemocratic 'race error' in our *Constitution*. This can be achieved by removing the race clauses, and by limiting Parliament's power to racially discriminate, by inserting a racial non-discrimination clause, or as a lesser option, by qualifying a new Indigenous head of power. Of these two options, a racial non-discrimination clause may be the most legally certain solution. It may also be the more politically viable and logically congruent constitutional expression of the 'equality before the law' democratic principle.

If, however, a racial non-discrimination clause is not considered an acceptable solution and cannot win bipartisan support, then constitutional experts should grapple wholeheartedly with the challenge at hand: how else might we ensure that the racial discrimination of the past, inflicted unfairly upon Indigenous people, does not occur again? This, after all, is why a racial non-discrimination clause is considered an important part of the reform by many Indigenous leaders. It represents the promise that past wrongs will not be repeated.<sup>175</sup> The Expert Panel responded to Indigenous leaders calling for racial discrimination to truly be a thing of the past, and to an overwhelming public view that race should no longer be a basis for differential treatment amongst Australian citizens. This popular view is one with which constitutional experts must now contend. As Noel Pearson has challenged, if 'a racial non-discrimination clause is not the answer, what is a better solution?'<sup>176</sup>

There may be other constitutional reform options which could also help prevent future discriminatory laws and policies directed at Indigenous people. This could be achieved through constitutional amendment to ensure better Indigenous participation in the democratic procedures of Parliament, guaranteeing that Indigenous views are better heard before Parliament enacts laws relating to Indigenous peoples. In this vein, some have suggested the establishment of reserved Indigenous senate seats to ensure that Indigenous citizens get more of

175 Pearson, 'Next Step Is for the Nation to Leave Race Behind', above n 127.

176 See Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay* 1, 65; Cape York Institute, Submission to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, October 2014.

a say in Parliament.<sup>177</sup> Alternatively, Pearson has suggested that the *Constitution* could be amended to create an Indigenous body that would be guaranteed a say in Parliament's law and policy making for Indigenous affairs.<sup>178</sup> These types of solutions represent political and procedural, rather than legal and judicial, solutions to the history of racial discrimination against Indigenous people under the *Constitution*.<sup>179</sup> Such solutions may be attractive because they avoid concerns about judicial activism and uncertain judicial interpretation of standalone rights clauses. In this way, procedural reform options of this nature may avert 'undemocratic' and uncertainty objections, as well as being attractive to Indigenous people, who for decades have advocated for better representation in the democratic process.<sup>180</sup> As the Cape York Institute submission to the Joint Select Committee argued:

Today there is a moral imperative to ensure that the relationship between Indigenous peoples and the Australian government, under the Constitution, is just and fair, rather than characterised by racial discrimination and exclusion as has historically been the case. If we accept that the *Constitution* is a practical rule book governing national power relationships, then we should also accept that there is one very important, national power relationship that is clearly not addressed in the *Constitution*

Arguably, the rule book should be amended to make provision for Indigenous people to be heard in Indigenous affairs. After all, if unelected judges should not decide what is in the interests of Indigenous people, then who should decide? Surely Indigenous people themselves should get a say.<sup>181</sup>

In assessing the merits of the various reform options, it is hoped that constitutional experts and political leaders will approach this conversation with Indigenous perspectives in mind. It is, after all, easy to minimise the significance of the racial discrimination present in our *Constitution* when such powers and references to 'race' will probably never be, and have never been, directed at you or your

177 See Chris Mitchell, 'Towards a National Settlement', *The Australian* (online), 17 September 2014 <<http://www.theaustralian.com.au/opinion/editorials/towards-a-national-settlement/story-e6frg71x-1227060703461>>; Rosie Lewis, 'Reserve Seats of Aboriginal MPs, says PUP Senator Jacqui Lambie', *The Australian* (online), 13 September 2014 <<http://www.theaustralian.com.au/national-affairs/indigenous/reserve-seats-for-aboriginal-mps-says-pup-senator-jacqui-lambie/story-fn9hm1pm-1227057107740>>; Mischa Schubert, 'Indigenous Want Seats Reserved', *Sydney Morning Herald* (online), 30 July 2011 <<http://www.smh.com.au/national/indigenous-want-seats-reserved-20110730-1i510.html>>.

178 See Pearson, 'A Rightful Place', above n 176, 65; Cape York Institute, Submission to Joint Select Committee, above n 176.

179 Cape York Institute, Supplementary Submission to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Establishing an Indigenous Body in the *Constitution* January 2015.

180 Alexander Reilly, 'Dedicated Seats in the Federal Parliament for Indigenous Australians: The Theoretical Case and its Practical Possibility' (2001) 2(1) *Balayi: Law, Culture and Colonialism* 73, 82-3; 'Recognition, Rights and Reform: a Report to Government on Native Title Social Justice Measures' (Report, Aboriginal and Torres Strait Islander Commission, 1995); Noel Pearson, 'A Structure for Empowerment', *The Australian* (online), 16 June 2007 <<http://www.theaustralian.com.au/opinion/columnists/a-structure-for-empowerment/story-e6frg786-111113758594>>.

181 Cape York Institute, Submission to Joint Select Committee, above n 176, 13.

ancestors. For Indigenous Australians, the problem cannot be so minimised. This conversation is one that therefore requires us all to ask, as Paul Keating urged in his Redfern speech: ‘how would I feel if this were done to me?’<sup>182</sup> If we can approach the challenge in this spirit, we will better be able to find a just solution.

182 Keating, above n 170, referring to the discriminatory practices of the past.