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Very High Risk, Very Low Reward: This Voice Referendum Deserves to Be Defeated
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Abstract

This author was invited by the editor of this journal to make the "No" case to the upcoming Voice referendum while replying to former Chief Justice French's address arguing the "Yes" case. The author makes both political, legal and moral arguments for voting "No".

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I begin by explicitly thanking the editor of the *Australian Law Journal* for having invited me to make the "No" case as regards the proposed amendment to the *Constitution* to provide for an Aboriginal and Torres Strait Islander Voice to Parliament and the Executive. [1] In fact, the invitation was in the form of an offer loosely to respond to the address by Robert French in favour of the Voice – that piece also appearing in this issue as I understand it – while also writing more broadly on why I support the "No" case. To be clear to all readers, then, I have had the advantage of reading Mr French's position while he has not had that same reciprocal opportunity before drafting his address. As a result, I will largely (but not exclusively) confine myself to making the "No" case rather than undertaking a careful, or point-by-point, response to Mr French's address. [2]

However, before I leave my introductory remarks and my thanks to the editor for the opportunity to make a negative case against this Voice proposal, let me make plain that in today's Australian university world this desire to set out both sides of a debate is nothing like as common as it once was. To give readers just a taste of what the intellectual climate can be like (at least for political conservatives), and in peer-reviewed, long-established law reviews to boot (in this instance with the issue of the Voice looming in the background), I will here simply refer to a very recently published response of mine to what passes for supposedly scholarly, peer-reviewed academic writing in this country and leave any readers who are so inclined to look for themselves. [3] The old John Stuart Mill ideal of better approaching truth via the cauldron of strongly held competing ideas, where both (or all) sides have practical as well as legal opportunities to make their cases and thereby expose the strengths and weaknesses of what is at stake, is not one to which all editors subscribe as strongly as the editor of this journal. And that commitment is all the more to be welcomed given that in a recent issue of this journal the editor and editorial board made clear the *ALJ*'s support for the "Yes" case and its hope that the upcoming s 128 constitutional referendum be successful. [4]

Now I have no idea how this sort of decision on behalf of the journal is made. What I will say here is that I disagree with most everything that is asserted in that short editorial. For instance, I think the claim that "Australians should not fear the prospect

of the High Court having to construe the meaning of the constitutional amendment and adjudicate on consequential matters" [5] is one that is markedly more attractive to the lawyerly and judicial castes than to the voters at large.

Across the anglosphere these past few decades we have been witnessing the rise of ever greater judicial power and to a big extent. Ran Hirschl has written on this phenomenon. [6] I have written a couple of books

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about it. [7] So have various others. We have seen this trend in India, Israel, Canada, Britain, New Zealand, the United States (US) and, yes, here. In one variant constitutional interpretation has veered away from old-fashioned intentionalist (or in US parlance, originalist) approaches that were simply taken for granted 70 plus years ago towards "living tree" or moral readings or Dworkinian best fit approaches which, in my view, allow far more scope at the point-of-application to impose the first-order moral and political druthers of the judges while on their face still undertaking the task of telling all of us citizens what the constitution (plausibly or not) is said to require or demand. [8]

I am a native born Canadian who finished Canadian law school in 1985 just as the *Charter of Rights* was being entrenched into the Canadian *Constitution*. Back then every proponent of this constitutional innovation promised that this instrument would barely affect what were at the time possibly the most interpretively conservative top judges in the common law world. That prediction proved to be completely, and indeed laughably, false. Canada's Supreme Court today surpasses the US Supreme Court in what it is prepared to do in the way of gainsaying the elected legislature (call that "judicial activism" or "judicial usurpation" or whatever you wish). And this is despite a s 33 notwithstanding clause (explicitly inserted to help enable passage of the constitutional amendment) that gives the elected Canadian Parliament great scope, in theory, to override these judicial inroads into social policy-making. What inroads? Well, over the last four decades the Canadian judges have had the last word on same-sex marriage, [9] euthanasia, [10] the scope of free speech, [11] the treatment of those claiming to be refugees, [12] whether prisoners can vote, [13] whether Parliament can prevent inroads into the scope of the one-size-fits-all nationalised health care system, [14] abortion, [15] the list goes on and on. So what of the s 33 override? Well, that legal and constitutional power vested in Parliament has never once been used at the federal level in 40 years. Not one single time! You see it proved to be near on impossible to use politically. [16]

In my view, a core question that Australian voters must answer in this Voice referendum is one about future political realities, not just legal realities. All the myriad assurances that Parliament will retain a legal and/or constitutional power to ignore or gainsay the Voice body (which I turn to below because I do not agree) are anyway neither here nor there if, in practice, that power will prove to be virtually unusable.

Put differently, the claims of "Yes" proponents about the post-referendum legal and constitutional position are pretty hollow (assuming they are true) if in practice, as analogously has been the case in Canada for 40 years, the elected Parliament will virtually always defer to this new body. Perhaps, as in

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Canada, that might be because the left-side of politics nearly always agrees with the outcomes imposed by the judges (or here, will do with this new Voice body) while the right-side of politics simply does not have the political courage or wherewithal to stand up to the Aboriginal activists, judges, lawyers and their media allies.

Whatever the causal explanation, it is cold comfort to be told as a mere voter "well, parliament has retained this legal power, it is just not using it". Why, exactly, should those who prefer final calls to be made by the elected Parliament – in practice, not just in some legal, theoretical realm – vote for that kind of future state-of-affairs? Voters are not MPs. If voters have good grounds to predict that far, far more often than not this Voice body is likely to be deferred to on a host of wide-ranging issues (not just

on a narrow band of issues directly affecting Aboriginals note), and that prospect leaves the voters cold, then the sensible thing for them to do is to vote "No" to stop it coming to pass.

And while we are on the topic of judicial adventurism I would say that any voter who read the High Court of Australia's 2020 *Love* decision [17] would have very good grounds indeed to fear what virtually the same High Court might do with this constitutional amendment. [18] I will return to this below, but remember, if successful this new constitutional Voice provision will become its own new chapter in our *Constitution*. And some of the least plausible High Court constitutional interpretations – from those giving us the Separation of Powers doctrine used by judges to invalidate statutes in a way unknown in Canada to, less directly, the implied freedom jurisprudence discovered (or, I would say, made up) [19] by the High Court to give those same judges a power to invalidate statutes on a pseudo rights-related ground [20] – are linked to the structure and the we-have-separate-chapters-for-different-topics nature of our *Constitution*. No one can know for certain what this Voice provision will trigger in 20 or 30 years if successful. But when you are talking about inroads into democracy and democratic decision-making then caution and wariness is anything but misplaced or unwarranted, at least in my view.

So I think that the *ALJ*'s exhortation not to fear how the High Court might use, or interpret, this Voice provision is simply unconvincing. With respect, the fear has nothing at all do with "the vitality of the rule of law". [21] It has to do with inroads into democratic decision-making, as with the examples given above that all are arguably in conflict with what most of the drafters and ratifiers of our *Constitution* clearly intended – remembering that a US-style bill of rights was contemplated, debated and clearly rejected by the framers and ratifiers in favour of the strongest version of parliamentary sovereignty you can have that is compatible with federalism and a written constitution.

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I should also say that the *ALJ*'s apparent happiness [22] to go down some later road involving a treaty and truth-telling is not at all shared by me. The general claim (by the *ALJ* and by Mr French too) seems to be that this road will lead towards greater unity and social cohesion. I think that prediction or prophecy verges on the naive. It seems to me much more likely to lead to disunity and division, [23] and that this "give different legal positions to different groups, based on inherited traits, and do it in the *Constitution* itself" genie will be very difficult to put back in its bottle.

Hence it is plain that I have big disagreements with the *ALJ*'s position on this Voice proposal. That is all the more reason, let me say it one last time, to note how admirable it is that this journal not just welcomed, but it sought out and solicited, a different point of view on this major proposed constitutional amendment.

Before I shift to running through what I see as the major problems with the Voice proposal (some of which I have already foreshadowed), I think I should begin with a crucial, big-ticket issue. Do the potential benefits of this Voice body outweigh the potential costs? Mr French in an article in *The Australian* explicitly claimed that they do. [24] He makes the same claim in the address published in this issue. [25]

So let us start with the claimed benefits he lists in either of those places. What does Mr French say they are? In no particular order these "high return" benefits are claimed to be: (1) the very recognition itself of our First Peoples (a Canadian term I had never heard here in Australia till very recently) in our *Constitution*; (2) a constitutionally supported ability for this body representing Aboriginal peoples to communicate with Parliament; (3) this constitutional status, in turn, will deliver a certain moral authority to the claims advanced by this Voice body (not legal authority, Mr French stresses, but moral authority); and (4) that there is supposedly some "gaping hole in our *Constitution*" and this is a "once in a lifetime opportunity to fill it".

Those are the only benefits I could see listed. The rest of the French case is purely defensive in nature – that this special Aborigines-only ability to have a say in who serves in the Voice as well as in Parliament will not rest on race but on historical

status; that Parliament will have no legal or constitutional obligation to accept or be bound by the submissions and advice of the Voice body; that constitutional litigation (and the potential role and input of the courts) is not to be feared as its scope for trouble-making is very limited; that setting up this body as a creature of statute alone (which I doubt anyone much at all on the "No" side of this debate would contest) is insufficient (why? see the purported need for constitutional symbolism in (1) above and the additional claim that winning this s 128 referendum would give this sort of body a souped-up democratic legitimacy); and that the demand for more detail about this Voice body (how it will be selected and by whom; how much it will cost; will it get its own bureaucracy; the questions go on and on) is misguided and should be left to future Parliaments.

So let me put to one side for a moment all the defensive rebuttals and look at the claimed benefits. Go and read the four listed above again. With respect, they strike me as incredibly thin gruel indeed.

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The intangible symbolism of recognition in the Constitution itself is the first one Mr French offers up. But of course that sort of symbolism in no way at all requires *this particular* Voice body with its special status (for a select few Australians who qualify to have a say both in choosing it while they also retain their votes to select Members of Parliament) and its potential input into virtually all future statutes. If you simply want symbolism you could have it by rejigging the preamble with some sort of mention or other. Or you could play around with s 51 (xxvi).

Look, maybe it is me. Afterall, I did my doctorate in philosophy on the great Scottish sceptical philosopher David Hume [26] and so I have long had a deep scepticism about the worth of vague, amorphous genuflections in the direction of symbolism, including those made in the service of unmoored alleged moral requirements.

What, precisely, will the practical benefits be to this symbolic recognition? The implicit claim must be that having a body such as this Voice, one set out in the constitution itself, will at some point down the road make for better outcomes for Aboriginal people (which we all want). That the very fact of this now entrenched in the *Constitution* status will somehow (no member of the "Yes" case ever sets out how) make for these better outcomes in a way that the myriad non-constitutionalised bodies we have already have thus far failed to do.

Remember, in Australia right now we already have the Prime Minister's Indigenous Advisory Council, nearly three dozen odd Land Councils, a Council of Peaks representing some seventy Aboriginal organisations, I do not know how many thousands of Aboriginal corporations, and, of course, 11 MPs in Parliament who can very plausibly be seen as Aborigines (which means, for those who wallow in identity politics, that the representation in Parliament of this group – unlike many, many other groups in Australia – is higher than its share of the overall population). And we spend unknown billions on trying to improve the no doubt really bad social outcomes of Aboriginal people, especially those living outside the urban centres.

Hence, on the face of things, this claimed benefit of "constitutional recognition" is rather elusive when you ask for specifics. It boils down to some magical connection to being in the *Constitution* itself. That, or it follows on from the fact that in practice, once constitutionalised, Parliament as a political reality will find it near impossible to gainsay this Voice body. (I return to my view of the legal position below.) Because if that is the actual (but unspoken) claimed "benefit" behind constitutionalising this Voice body then I would at least agree about the likely pusillanimity of future Parliaments. I think they will overwhelmingly back down to or buy off this body (moving the Voice body into the rent-seeking game). I just happen to think that that sort of future will carry with it really awful long-term consequences for this country, not least in terms of social disunity and the difficulty of passing legislation in a country that is already one of only three in the democratic world with a strong upper house that makes passing laws far more difficult here than in Britain or Canada or New Zealand.

Mr French's second claimed benefit, (2), really just makes that last point explicitly. He sees it as a benefit. I see it as a pretty big cost. Our disagreement is one of likely future consequences.

As for supposed benefit (3) – that by giving this Voice body a constitutional status that will deliver it a certain moral authority for the claims it advances – I disagree with Mr French vociferously. If anything, he has it exactly backwards in my opinion. This Voice body will be political. It is designed to be political. (Remember, that is why I believe all the assurances as to the pristine legal and constitutional positions of future Parliaments are largely beside the point.)

Moral authority disappears very quickly indeed once a person or group of people descend into the political arena. [27] The Queen had moral authority because she was seen never to enter the political arena. All people, whatever their politics, could respect her moral position, even those wishing to move to a republic. By contrast, her son, the King, risks losing that moral authority with his seeming inability to keep quiet and stay out of the political arena as regards topics near and dear to his heart. Because once you start making political claims and demands the many people with different political views will

not afford you some special moral status or authority; they will not think "gee, those people warrant a higher moral authority than I and so I should give extra special weight to their political claims". No, they will soon treat the Voice as the highly political body it is patently designed to be. Any claims to moral authority, in my view, will not last a decade.

Again, it is analogous to former top judges. Once retired if they say very little or nothing at all about political and legal affairs of the day then they do retain a certain moral authority. But enter the fray more than once a Transit of Venus, take sides on highly contested issues in society (including ones related to whether a constitutional amendment is desirable), and they soon lose any and all moral authority. They become political actors like the rest of us. [28] That is, of course, fine if they wish to be political actors. You just cannot plausibly thereafter dress yourself up with any moral authority. How many current politicians can you name who can be said to have moral authority? Winston Churchill never had it till the War effort became apolitical and bipartisan. Accordingly, my view is that the future footing on which this Voice body will stand will be political, not moral. It will be a political body through and through. Voters who disagree with its positions and demands will quickly afford it no moral authority at all.

Then there is Mr French's final claimed benefit, (4) above, that there is some gaping hole in our *Constitution* needing to be filled. For me this sort of claimed benefit rather begs the question (in the old-fashioned meaning of that phrase). It assumes the answer to what is in fact in dispute, namely whether there is some major deficiency in our 120+ year-old *Constitution*, the world's fourth or fifth oldest written constitution and on any comparison of like-with-like one of the modern world's most successful. When I did my undergraduate degree the logic professor called this the *petitio principii* fallacy. So let me be clear. I do not agree there is any "gaping hole" in our *Constitution* in any big-ticket sense (leave aside the desire to tinker with the preamble, say, and inject a bit of non-substantive symbolism), patently one of the democratic world's oldest and most successful.

I will stop now as regards the size and likelihood of concomitant benefits should this Voice referendum pass. My overall position should now be exceedingly clear. The claimed benefits made on behalf of this Voice body are meagre and exiguous. To the extent they exist at all they deal in vague, amorphous symbolism. On the ground, in practice, this Voice body is more likely to lead to bad outcomes not good ones – for Aborigines as well as the rest of us. It seems likely to me to create a highly political body that deals in rent-seeking, that soon will be seen as a political body by the rest of us, that splits even the Aboriginal community, that soaks up huge amounts of money and demands a purpose-built bureaucracy of its own, that makes passing laws in this country even harder than it already is, and that makes considerably more likely than not judicial adventurism somewhere down the road. And if I am being totally frank I would also predict that the positions taken by this Voice body will be those of the activist class, far more often than not positions in accord with the political left in this country not the right. That might be a benefit to some small section of Australian society. But it will be a pretty big cost to more of us. That said, there is a fair likelihood that the lawyerly caste will be net winners should this pass.

The Costs and the Problems

I turn now to outline the major potential problems or costs of this constitutional proposal. Some of them I have mentioned above. I will set them out in barebones fashion in no particular order:

(1) Thus far I have simply assumed for the sake of argument that Mr French's assertions about the likely future legal position were correct – namely, that Parliament will have no legal or constitutional obligation to accept or be bound by the submissions and advice of the Voice body and that constitutional litigation (and the potential role and input of the courts) is not to be feared as its scope for trouble-making is very limited. In fact, I think those claims are likely wrong. Here is the proposed wording:

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The question

A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?

The alteration

Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples 129. Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia: 1 There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice; 2 The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples; 3 The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

(a) The third sentence of the proposed amendment is unambiguous. The powers of Parliament in this field will be "subject to this Constitution". The second sentence of the proposed alteration will be part of the *Constitution*. I do not see how that does not open the door to myriad legal and constitutional challenges. Parliament's powers will be subject to the Constitution which means (should the "Yes" vote prevail) that they will be subject to the representations the Voice makes to Parliament. Will "may make representations" be read by a future High Court as a constitutional right to be consulted? I will say it again. If our High Court in the nominally federalism-related case of *Love* can ground their ratio – when it came to whether a non-citizen person claiming Aboriginal status could be deported – on concepts such as "otherness", "deeper truth", "connection [to Australia that] is spiritual or metaphysical" and more of the same, combining all of those together to claim that judge-made law that purports to speak in the name of the *Constitution* now recognises "that Indigenous peoples can and do possess certain rights and duties that are not possessed by, and cannot be possessed by, the non-Indigenous peoples of Australia" and that "different considerations apply … to … a person of Aboriginal descent" then it hardly seems a stretch to me to think that "may make representations" will be read as including "must be consulted".

A decade or two down the road that need for consultation might then, in turn, be deemed to be a basis for invalidating statutes. Sure, if Canada is anything to go by the judicial adventurism will not happen immediately. I give it seven or eight years. But even if it takes a dozen or a score the odds are in favour of judicial adventurism in my opinion. Strongly in favour. Just look at the apparent first-order druthers on this general topic of the preponderance of those in the lawyerly and judicial caste. And let me assure readers that the way law schools are today the views of the preponderance of future lawyers will make those of today seem constitutionally conservative in comparison.

(2) How about the scope for trouble-making, by which Mr French means legal trouble-making? That depends on how one reads the second sentence of the proposed wording, in particular "may make representations to the Parliament and the Executive Government of the Commonwealth *on matters relating to Aboriginal and Torres Strait Islander peoples*".

So here is a question for all the lawyers reading this. What draft Bills do you think would fall under the aegis or general rubric of "matters relating to Aboriginal and Torres Strait Islanders peoples"? Does the Bill have to be one that directly affects them? Or not? Because one plain reading is that virtually every single Bill passed by Parliament will in some way or other affect Aboriginal and Torres Strait Islander peoples (as they will the rest of us Australians). Will this new Voice body with the big bureaucracy it will put around itself have a power – perhaps one the judges down the road deem to be a constitutional right – to make representations on just about every policy and every decision that affects Aboriginal people in any way at all? If not, why not?

The negative answer can only be along the lines of "well, our top judges just wouldn't do that". Yes, and that is precisely the assurance I heard repeatedly back before Canada amended its constitution in 1982. "No chance it would happen", Canadians were told (including by retired top judges, senior lawyers and a good few politicians as it happens). Yet it did happen. Within a half-dozen years the Canadian judges were even saying that the intentions of those who drafted and ratified the new constitution were, effectively, irrelevant.[29] I doubt very much that future judges will take into account any assurances by Mr Albanese today when construing this new s 129 of our *Constitution*.

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Remember, we are living through a time when judicial inroads into democratic decision-making have never been greater. No one can know for sure how this will play out but I would bet big money that the judicial adventurism will be significantly greater than Mr French anticipates. Just think of the implied freedom jurisprudence that I mentioned above and the incredibly slender (near on invisible I would say) textual reed on which it rests (not to mention its having no purchase whatsoever in the actual intentions of those who drafted and ratified our *Constitution*). Hence this raises a sort of burden of proof issue. In the face of uncertainty ought those who live in a country with one of the world's most successful written constitutions throw caution to the wind and take their chances on this amendment for its symbolic value, ignoring the attendant risks of potential future judicial adventurism, identity politics, sclerotic law-making, inroads into the practical ease with which Parliament may act, and the rest? I am a big supporter of democratic decision-making, maybe the biggest in any law school in Australia today. The potential costs here alone, in terms of undercutting democratic decision-making, are very large indeed. Meanwhile the benefits are, well, pretty hard to put your finger on once you leave the realm of nebulous symbolism. Let me here just note, for what it is worth, that Professor Greg Craven who is one of the nine members of the Constitutional Expert Group came out in late March of this year and made some pretty significant criticisms of the Albanese proposal wording (though one might wonder why he had not hinted at these earlier).[30]

(2) Here is a legal aspect that Mr. French does not mention but that I alluded to above. This amendment is to have its own chapter, a new chapter IX, in the *Constitution*. As I mentioned above, putting the amendment in its own chapter – rather than opting *not* put it in a separate one – assuredly does not lessen the chances of future judicial activism. It increases the odds and does so noticeably.

The Separation of Powers jurisprudence and the implied freedom jurisprudence, directly and indirectly, were founded on the structure and separate-chapters-for-separate-matters nature of our *Constitution*. I do not see how anyone can confidently predict that this will not be picked up on and used to deliver unknowable innovations

in the future. To elaborate on this point, never before in any of this country's previous 44 s 128 referenda has it been proposed to add a whole new chapter to our *Constitution*. If I were a future top judge "discovering" or creating some future analogue to the implied freedom jurisprudence I would be sure to make use of this fact.

(3) Some in the "Yes" camp argue that this amendment will not be a recognition of race but rather of historical status. Mr French is one such. With respect, I think that assurance misses the underlying gravamen of many in the "No" camp.

The grievance is that this amendment will create special rights based on group status. It does not really matter if those special group rights are linked to race (which as I said above is pretty much a scientifically dubious concept, humans having far less genetic diversity than chimpanzees even) or to some other feature such as "historical status". Affording entitlements by group status is simply not in keeping with the bedrock commitments of a liberal democracy and doing so in a country's written constitution entrenches this illiberalism. Indeed, it flirts with wholesale identity politics. Put differently, unequal citizenship is antithetical to liberal democracy and this Voice proposal takes us some way down that path.

Now I know that the Constitutional Expert Group (chaired by the Attorney-General and comprised of nine legal experts, not a single one of whom is a sceptic of this proposed constitutional change) claims that the Voice will not give Aboriginal people special rights. That, however, is false on its face. A person will have to be within the Aboriginal or Indigenous constituency to have a say on the membership of this Voice body and, in turn, only that body will have this constitutional power (perhaps in future judicially transmogrified into a right) to influence Parliament, the Executive government and the public service.

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No other Australian will have that constitutional power. No other lobby groups; no NGOs; no statutory bodies. Nor will this Voice body be accountable to the vast preponderance of Australians but only to a narrow slice of them, that slice to be determined based solely on characteristics with which they were born. On any Hohfeldian understanding those features amount to a right and as only some Australians will be able to claim it that makes it special. Hence, it most definitely is a special right that this mooted amendment will afford. Moreover, where some see this differentiating of Australians based on group membership (again, saying it will not be linked to race but to historical status is here a distinction without a difference) as a good thing, I most definitely see it as a bad thing. Very bad.

(4) How easy will it be to pass laws in this country once this mooted Voice body is in place? Remember what I pointed out above. Australia is one of only three democracies which has a powerful upper house, the others being Italy and of course the United States (since the drafters of our *Constitution* in many ways copied the American model just without a bill of rights and with a better, Swiss-style amending procedure). Canada and Britain, right now in the year 2023, have unelected upper houses that virtually never veto any Bills the elected lower houses wish to push through. So win an election in Canada or Britain and you can set about implementing your election manifesto. If it is budget repair (I use a laughably implausible hypothetical for effect) you just do it. In Australia winning an election is nowhere near sufficient. You must also win over the Senate which in practice can mean a handful of Independents or perhaps the Greens. [31] And it will be from that starting point, that in Australia it is already significantly harder for elected governments to implement their manifesto pledges, that the effects of this Voice body will be felt. Because no one thinks democratically elected governments will more easily be able to pass laws once the Voice is in place. The question is simply how much harder, and after how much consultation and cajoling and after how much compromising, will the process be. [32]

I will be frank here too. I believe that the benefits of bicameralism are generally oversold. (Not so those of federalism by the way, which makes what the High Court has done to our version of federalism this past century all the more tragic.) [33] My point here, though, is simply that the more this Voice body looks and acts as a sort of de facto fourth arm of government the harder it will be to enact laws. That may also cash itself out in a calculation that it is better simply to buy off the Voice with more money, to tempt it with rent-seeking, rather than to pick a political fight. Again, the potential risks and costs here strike me as far higher than any perceived benefits.

I can now finish with a few concluding remarks. What is being proposed is in no way at all a modest change. It will go to the heart of our current governing arrangements, both in practical and in legal terms. Proponents say it will lead to unity and reconciliation. I think it far more likely to lead to disunity, bitterness and a sense that some groups in Australian life get special treatment solely based on birth. We have already seen the ease with which a very senior member of the Bar was prepared to throw around allegations that suggested those in the "No" camp might be motivated by racism. [34] He has hardly been alone in making such intimations. Still, a constitution is fundamentally about locking things in and making them harder to change. Otherwise, you would opt to live in a parliamentary sovereignty jurisdiction with an unwritten constitution as in the United Kingdom and New Zealand where each generation is left to make whatever calls it wishes and nothing is locked

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in. [35] It is not as though the British unwritten constitutional model has not been one of the world's most successful ever. And in those countries they would not be having this debate because any change would be via statute. We are having it because proponents of the "Yes" case want to lock this in and make it near impossible to rescind. [36]

For all the reasons given above I believe that would be a very bad idea indeed. I say that well aware that the Law Council has come out in favour of the Voice [37] and that the vast preponderance of the lawyerly caste (and near on all of Australia's legal academics) has too. [38] It is likely that most of the corporate and NGO class will as well. I think, however, that they will all be in for something of a surprise come the morning after the referendum.

Footnotes

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1 For ease of reference I will henceforth just call this "the Voice".

2 General Editor's note: The reader is referred to Current Issues on p 373 of this issue for the background as to how the two articles came to appear in this issue.

3 See James Allan, "Attacking the New Right, Australian Law Reviews and the Peer Review Process" (2023) 42(1) University of Queensland Law Journal (forthcoming) responding to Harry Hobbs, "The New Right and Aboriginal Rights in the High Court of Australia" [2022] Federal Law Review (forthcoming).

4 See Francois Kunc, "As the Debate Continues, Some Observations about the Voice to Parliament" (2023) 97 ALJ 1.

5 Kunc, n 4, 1.

6 See, eg, Ran Hirschl, "The New Constitutionalism and the Judicialization of Pure Politics Worldwide" (2006) 75(2) Fordham Law Review 721; Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts" (2008) 11(1) Annual Review of Political Science 93.

7 See James Allan, Democracy in Decline (McGill-Queen's University Press, 2014) and only last year *The Age of Foolishness: A Doubter's Guide to Constitutionalism in a Modern Democracy* (Academica Press, 2022).

8 Allan, *Age of Foolishness*, n 6. and, to pick just one article on the topic, James Allan, "In Honor of a Simple-minded Originalist" (2019) 34 Constitutional Commentary 401.

9 *Halpern v Canada (Attorney-General)* [2003] OJ No 2268 (Can Ont CA).

10 *Carter v Canada (Attorney-General)* [2015] SCC 5.

11 In *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 it was held that restrictions on tobacco advertising were inconsistent with the freedom of expression, but the Court reversed itself a dozen years later in *Canada (Attorney-General) v JTI-Macdonald Corp* [2007] 2 SCR 610.

12 *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177.

13 *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

14 *Chaoulli v Quebec (Attorney-General)* [2005] 1 SCR 791.

15 *R v Morgentaler* [1988] 1 SCR 30.

16 Jeremy Waldron, Jeff Goldsworthy and I have argued that this is because it is structured so that the judges (despite often 5-4 decisions and despite these being issues of where to draw lines over highly contestable rights-related issues) tell all of us what our rights are and then the elected Parliament is left with a power to take away these rights. In my view that structure grossly mischaracterises what is in fact happening – that reasonable people are coming to reasonable, but different, views as to where to draw some rights-related line and always in circumstances where judges (and a law degree) give the point-of-application interpreter no more expertise than a plumber, teacher or social worker.

17 *Love v Commonwealth* (2020) 270 CLR 152.

18 In James Allan, "Wokery and High Court Otherness" (2021–2) 12 The Western Australian Jurist 31 I argued the High Court majority Justices in *Love v Commonwealth* (2020) 270 CLR 152 (*Love*) seemed to ground their ratio – when it came to whether a non-citizen person claiming Aboriginal status could be deported – on concepts such as "otherness", "deeper truth", "connection [to Australia that] is spiritual or metaphysical" and more of the same, which were then combined together to claim that judge-made law that purported to speak in the name of the Constitution now recognises "that Indigenous peoples can and do possess certain rights and duties that are not possessed by, and cannot be possessed by, the non-Indigenous peoples of Australia" and that "different considerations apply … to … a person of Aboriginal descent". And all that was said in the context of a case that on its face looks to be a federalism-related one somehow transmogrified into a rights-related one with, to my way of thinking, no warrant whatsoever in the constitution for such a judicial transmogrification. Put bluntly, my view is that that *Love* majority decision is one of the worst reasoned top-court cases I have ever read, from anywhere in the Anglosphere, in more than a quarter century of slogging through myriad constitutional law cases from Canada, the United States, Britain, New Zealand and here in Australia. Insouciance about our High Court's adventurism should be made of sterner stuff! At least for all of us non-judges in the country.

19 For just a sample of my criticisms of the implied freedom jurisprudence see James Allan, "Constitutional Interpretation Wholly Unmoored from Constitutional Text: Can the HCA Fix Its Own Mess?" (2020) 48(1) Federal Law Review 30, in particular 33–34; James Allan, "Implied Rights and Federalism: Inventing Intentions While Ignoring Them" (2009) 34(2) University of Western Australia Law Review 228, 230–233; and James Allan, "Australian Originalism without a Bill of Rights: Going Down the Drain with a Different Spin" (2015) 6 The Western Australian Jurist 1, 24.

20 In the *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 that was decided but four years after Australia's voters rejected a bill of rights in a s 128 referendum, both nationally and in every State. And note that some judges had clearly hoped this referendum would pass.

21 Kunc, n 4, 1.

22 Kunc, n 4, 2.

23 If readers are looking for rough-and-ready comparisons they could do worse than consider New Zealand where my family and I lived for eleven wonderful years from 1993 to 2004. Last year I was commissioned by a think tank Democracy Action to go across the Tasman and write a report on recent government legislative moves there as regards Maori that give different legal entitlements to citizens based on race – or if you think that the concept of "race" is scientifically suspect, as it is, then based on characteristics people are born with. I doubt many across the Tasman would today say these New Zealand government initiatives have led to more social harmony and unity but readers can judge that for themselves. My report is: James Allan, "The Report of Professor James Allan on He Puapua: The Radical Prescription for Undermining Democracy and the Rule of Law" (20 May 2022) – available online or from Democracy Action.

24 Robert French, "Benefits of Indigenous voice to parliament far outweigh risks", *The Australian*, 17 March 2023.

25 The Hon Robert French AC, "The Voice – A Step Forward for Australian Nationhood" (Paper presented at the Exchanging Ideas Symposium, Sydney, 4 February 2023) [40] onwards, under the subheading, "The Voice – High Return, Low Risk". Please note the author is referring to Robert French's speech as it was delivered, whereas the version published in this Journal has been updated to take account of the wording of the referendum now being known. The relevant passage is in this issue at (2023) 97 ALJ 400, 406.

26 Long ago I turned this into a book: James Allan, A Sceptical Theory of Morality and Law (Peter Lang, 1998).

27 This point I saw first made by Ms Louise Clegg. She is wholly correct in my view.

28 I would likewise say that the same goes for pontificating big corporations in today's world whose boards and top managers cannot seem to resist indulging in virtue-signalling on contested political issues in society and do so with shareholders' (ie other people's) money.

29 A broadly similar sentiment has been voiced by Mr French himself when he was Chief Justice: "Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted." French CJ and Hayne J in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, [25]. There are other similar such expressions, including in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [31].

30 Greg Craven, "Radicals Land Fatal Blow to Hopes of Yes Campaign", The Australian, 24 March 2023.

31 I here merely note the plausible argument that left-of-centre policies involving more spending and big government programs have a higher chance of winning over Independents than any ones that cut spending, reducing the public service or other measures. Given the STV voting system in the Senate, in other words, there may be an asymmetry at work in terms of how easily the two main parties can negotiate their core beliefs through the upper house.

32 And again, given the basic small government v. big government comparative commitments of the two main parties – I speak in general terms you understand, well aware that over the last few years the Liberal party has outspent just about any government going – one can wonder if there will be an asymmetry as regards the ease with which left-of-centre and right-of-centre parties will be able to walk this new constraining tightrope.

33 See James Allan and Nicholas Aroney, "An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism" (2008) 30 Sydney Law Review 245.

34 See Janet Albrechtsen, "Legal Eagles at War over Voice", The Australian, 13 March 2023; James Allan, "Dismissing Voice Sceptics as Racist Demeans Debate", The Australian, 22 March 2023.

35 Nor is this an undesirable state of affairs. See James Allan, "Against Written Constitutionalism" (2015) 14 Otago Law Review 191. The best single book on the theory of constitutionalism is, in my opinion, Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP, 1998). Contributors include Joseph Raz, Jeremy Waldron, Richard Kay and Alexander himself.

36 Not least because in practice who thinks a future Coalition government would ever propose a s 128 referendum to undo it?

37 Law Council of Australia, "Law Council Unwaveringly Supports Constitutional Recognition of First Nations Peoples" (Media Release, 23 March 2023).

38 Though I say again that as regards artificial legal entities or bodies it is unclear to me the basis on which the leadership of these bodies purports to speak on behalf of their members. I am unaware of any of them conducting proper polls to gauge the actual views of the real-life lawyer members.

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