

THE CONSTITUTIONAL CONVENTIONS AND CONSTITUTIONAL CHANGE: MAKING SENSE OF MULTIPLE INTENTIONS

ABSTRACT

The delegates to the 1890s Constitutional Conventions were well aware that the amendment mechanism is the ‘most important part of a Constitution’, for on it ‘depends the question as to whether the state shall develop with peaceful continuity or shall suffer alternations of stagnation, retrogression, and revolution’.¹ However, with only 8 of 44 proposed amendments passed in the 116 years since Federation, many commentators have questioned whether the compromises struck by the delegates are working as intended, and others have offered proposals to amend the amending provision. This paper adds to this literature by examining in detail the evolution of s 128 of the *Constitution* — both during the drafting and beyond. This analysis illustrates that s 128 is caught between three competing ideologies: representative and responsible government, popular democracy, and federalism. Understanding these multiple intentions and the delicate compromises struck by the delegates reveals the origins of s 128, facilitates a broader understanding of colonial politics and federation history, and is relevant to understanding the history of referenda as well as considerations for the section’s reform.

I INTRODUCTION

Over the last several years, three major issues confronting Australia’s public law framework and a fourth significant issue concerning Australia’s commitment to liberalism and equality have been debated, but at an institutional level progress in all four has been blocked. The constitutionality of federal grants to local government remains unresolved, momentum for Indigenous recognition in the *Constitution* ebbs and flows, and the prospects for marriage equality and an

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¹ John Burgess, *Political Science and Comparative Constitutional Law* (Ginn & Company, 1890) 137, quoted in *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 719 (Isaac Isaacs).

Australian republic remain uncertain. In all four cases the prospect of a referendum has been raised.

Local government has come the closest to reform. In 2013, a proposed constitutional alteration to enable the Commonwealth to directly fund local councils was passed by both Houses of Parliament.² Despite bipartisan support, the referendum was discarded after the 7 September 2013 federal election, and has not been revisited.³ Prospects of an Australian republic also appear to be in a holding pattern; with grass roots support apparently lacking,⁴ many proponents are resigned to wait until the end of Queen Elizabeth II's reign — whether this proves an effective catalyst is uncertain.⁵ Indigenous recognition seems at once both nearer and farther off: despite the various reports by Parliamentary and expert bodies,⁶ recognition in state constitutions⁷ and by the Commonwealth Parliament,⁸ considerable public support,⁹ and

² Constitution Alteration (Local Government) Bill 2013 (Cth).

³ Phillip Hudson, 'Abbott Government Kills off Local Government Referendum', *Herald Sun* (online), 31 October 2013 <<http://www.heraldsun.com.au/news/abbott-government-kills-off-local-government-referendum/news-story/51bebe420855276c2b36f43933df14de>>.

⁴ Stephanie Peatling, 'Support for a Republic Flatlines as Public Continues its Royal Fascination', *Sydney Morning Herald* (online), 15 February 2016 <<http://www.smh.com.au/federal-politics/political-news/support-for-a-republic-flatlines-as-public-continues-its-royal-fascination-20160215-gmu4f0.html>>.

⁵ Luke Mansillo, 'Loyal to the Crown: Shifting Public Opinion Towards the Monarchy in Australia' (2016) 51 *Australian Journal of Political Science* 213.

⁶ Expert Panel on Constitutional Recognition of Indigenous Australians, Parliament of Australia, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Commonwealth of Australia, *Interim Report* (July 2014); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Commonwealth of Australia, *Final Report* (June 2015).

⁷ Victoria: *Constitution (Recognition of Aboriginal People) Act 2004* (Vic), inserting s 1A into the *Constitution Act 1975* (Vic); Queensland: *Constitution (Preamble) Amendment Act 2010* (Qld), inserting a new preamble and s 3A into the *Constitution of Queensland 2001* (Qld); New South Wales: *Constitution Amendment (Recognition of Aboriginal People) Act 2010* (NSW), inserting a new s 2 into the *Constitution Act 1902* (NSW); South Australia: *Constitution (Recognition of Aboriginal Peoples) Amendment Act 2013* (SA), inserting a new s 2 into the *Constitution Act 1934* (SA); Western Australia: *Constitution Amendment (Recognition of Aboriginal People) Act 2015* (WA), amending the preamble to the *Constitution Act 1889* (WA). Tasmania: *Constitution Amendment (Constitutional Recognition of Aboriginal People) Act 2016* (Tas), amending the preamble of the *Constitution Act 1934* (Tas).

⁸ *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) s 3.

⁹ See, eg, Anna Henderson, 'Indigenous Recognition in the Constitution Overwhelmingly Supported in New National Poll', *ABC News* (online), 27 March 2015 <<http://www.abc.net.au/news/2015-03-27/poll-surveys-australians-on-indigenous-disadvantage/6350098>>.

consensus among Aboriginal and Torres Strait Islander peoples,¹⁰ constitutional change appears distant. In December 2015 a Referendum Council was established to ‘advise ... on progress and next steps towards a referendum’.¹¹ Once tentatively scheduled for 2013, that vote is now unlikely to occur before 2018.¹²

The difficulty of success at a referendum has had two perverse effects. On the one hand, for those in favour of change (such as those supporting Indigenous recognition and republicanism), a referendum is not worth having unless its success is assured.¹³ On the other hand, the rigidity of the referendum process has encouraged those opposed to change to propose it as a mechanism in circumstances where it is plainly unnecessary. For example, it is now confirmed that the Commonwealth Parliament has the power to legislate with respect to same-sex marriage,¹⁴ but some politicians attracted to retaining the status quo once suggested that a referendum — rather than a plebiscite (or a vote in Parliament) — might be the appropriate mechanism for legal change.¹⁵

These developments call for closer analysis of the referendum mechanism under s 128 of the *Constitution*. In recent years, a number of scholars have examined why constitutional change has proved so difficult in Australia, and recommended ways to either successfully navigate through the shoals or amend the provision entirely.¹⁶

¹⁰ Referendum Council, *Uluru Statement From the Heart* (26 May 2017) <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF>.

¹¹ Malcolm Turnbull and Bill Shorten, ‘Referendum Council’ (Media Release, 7 December 2015) <<https://www.pm.gov.au/media/2015-12-07/referendum-council>>.

¹² Calla Wahlquist, ‘Indigenous Recognition Referendum Likely to be Delayed Until 2018’, *Guardian Australia* (online), 9 August 2016 <<https://www.theguardian.com/australia-news/2016/aug/09/indigenous-recognition-referendum-likely-to-be-delayed-until-2018>>.

¹³ See, eg, *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) s 4(2)(a): ‘Those undertaking the review must consider the readiness of the Australian public to support a referendum to amend the Constitution to recognise Aboriginal and Torres Strait Islander peoples’; Jared Owens, ‘Republic Referendum: Timing Has to be Right Warns Malcolm Turnbull’, *The Australian* (online), 26 January 2016 <<http://www.theaustralian.com.au/national-affairs/republic-referendum-timing-has-to-be-right-warns-malcolm-turnbull/news-story/e0d481cb4b87ad7a37933f1e75e0cf34>>.

¹⁴ *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

¹⁵ See Louise Yaxley and Anna Henderson, ‘Cabinet split over holding plebiscite or referendum for same-sex marriage public vote’, *ABC News* (online), 14 August 2015 <<http://www.abc.net.au/news/2015-08-14/same-sex-marriage-debate-exposing-rifts-in-government/6696532>>.

¹⁶ See, eg, Paul Kildea and A J Brown, ‘The Referendum That Wasn’t: Constitutional Recognition of Local Government and the Australian Federal Reform Dilemma’ (2016) 44 *Federal Law Review* 143; Anne Twomey, ‘A Revised Proposal for Indigenous Constitutional Recognition’ (2014) 36 *Sydney Law Review* 381; Paul Kildea, ‘A Little More Conversation? Assessing the Capacity of Citizens to Deliberate about Constitutional Reform in Australia’ (2013) 22 *Griffith Law Review* 291; Sarah

Other commentators have questioned whether reform can be undertaken without formal amendment.¹⁷ This article complements this substantial body of work by exploring in detail the evolution of s 128 from its first draft to its current form. We take this approach as we believe that a historical understanding of the motivations behind the genesis of this provision is relevant to understanding the history of referenda as well as considerations for the section's reform. Our analysis brings to light the competing ideologies and shifting power balances between conservative, liberal, and federalist camps during the drafting.¹⁸ Ultimately, the struggle between these camps has had significant consequences for the Australian federation.

Section 128, which determines the entities by whom and means by which the distribution of power between organs of the state may be altered, or the limitations on state power tightened or dispensed with, identifies the locus of internal sovereignty within the Australian Federation.¹⁹ It is unsurprising then that s 128 was fiercely debated. To understand the motivations of the drafters, however, is also to assess their continuing relevance and weight against contemporary norms and values. Such an assessment of the legitimacy of the amendment provision also has implications for the authority of the *Constitution* generally. On one view, the *Constitution*, like any law, derives authority from the ability of its subjects to reform it through legitimate means.²⁰ To the extent that the *Constitution* may be perceived as unduly difficult to

Murray, 'State Initiation of Section 128 Referenda' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation* (Federation Press, 2012) 332; Graeme Orr, 'Compulsory Voting: Elections, not Referendums' (2011) 18 *Pandora's Box* 19; Ron Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change' (2010) 34 *Melbourne University Law Review* 805; Alan Fenna, 'Constitutional Amendment and Policy-Making through the Citizen-Initiated Referendum' (2010) 5 *Public Policy* 65; George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010); George Williams, 'Thawing the Frozen Continent' (2008) 19 *Griffith Review* 11.

¹⁷ George Williams, 'Rewriting the Federation Through Referendum' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation* (Federation Press, 2012) 294, 296–9 (arguing that formal amendment is necessary to solve many of Australia's pressing problems); Brian Galligan, 'Processes for Reforming Australian Federalism' (2008) 31 *UNSW Law Journal* 617, 630 (arguing that formal amendment is unnecessary to reform federalism).

¹⁸ For an analysis of the significance of federalism in the drafting of s 128, see Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 229–334. For a précis of the drafting see John Williams, 'The Constitutional Amendment Process: Poetry for the Ages' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 1.

¹⁹ Though note considerations raised by Gummow J in *McGinty v Western Australia* (1996) 186 CLR 140, 274–5.

²⁰ Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967) ch 5. There are of course other views of the source of authority of law, including through the threat or application of force: Thomas Hobbes, *Leviathan*, ch 17 (Bk II, Chapter 17);

modify on the basis of considerations that are no longer relevant, that legitimacy is undermined. In aid of that debate, this study traverses the compromise ‘very deliberately’²¹ struck in s 128 to facilitate that understanding.

II A BACKGROUND TO SECTION 128

A significant portion of criticism targeted at the *Constitution* has focused on s 128. The amendment mechanism is ‘the most important part of a Constitution’, for in it ‘depends the question as to whether the state shall develop with peaceful continuity or shall suffer alternations of stagnation, retrogression, and revolution’.²² With only eight of the 44 proposed amendments since 1901 having succeeded, the last of which was some 40 years ago,²³ commentators have long labelled Australia — ‘[c]onstitutionally speaking’ — as the ‘frozen continent’,²⁴ and suggested that the provision has ‘failed to achieve much purpose’.²⁵ Others who have argued that the rigidity of the provision has created greater difficulty than might have been foreseen include High Court justices,²⁶ and prominent academics.²⁷ Conversely, other equally eminent

its inherent morality: Joseph Raz, ‘Authority, Law and Morality’ (1985) 68 *The Monist* 295; or the acceptance of a rule of recognition by the people, or at least the officials representing the people in government: H L A Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 94. For a discussion in the Australian context, see Aroney, above n 18, 345–55; Simon Evans, ‘Why is the Constitution Binding? Authority, Obligation and the Role of the People’ (2004) 25 *Adelaide Law Review* 103; Anthony Dillon, ‘A Turtle by Any Other Name: The Legal Basis of the Australian Constitution’ (2001) 29 *Federal Law Review* 241.

²¹ John Latham, ‘Changing the Constitution’ (1953) 1 *Sydney Law Review* 14, 18.

²² John Burgess, *Political Science and Comparative Constitutional Law* (Ginn & Company, 1890) 137, quoted in *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 719 (Isaac Isaacs).

²³ *Constitution Alteration (Referendums) Act 1977* (Cth).

²⁴ Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

²⁵ J E Richardson, ‘Patterns of Australian Federalism’ (Research Monograph No 1, Centre for Research on Federal Financial Relations, Australian National University, 1973) 105. See also George Williams and Hume, above n 16, 88.

²⁶ See, eg, Sir Anthony Mason, ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience’ (1986) 16 *Federal Law Review* 1, 22; *R v Hughes* (2000) 202 CLR 535, 562–3 (Kirby J).

²⁷ See, eg, John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 287; Richardson, above n 25, 105; Michael Coper, ‘The People and the Judges: Constitutional Referendums and Judicial Interpretation’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 73, 87; George Williams and Hume, above n 16, 88.

judges and leading academics acknowledge and consider the limited number of successful referenda to be a sign of the health of the federation.²⁸

Close examination of the development of s 128 is, post *Cole v Whitfield*,²⁹ potentially useful to contemporary constitutional interpretation, particularly in revealing the nature and objectives of the federation movement.³⁰ However, lawyers and historians turn to the past for different purposes,³¹ and care must be taken not to substitute the subjective intentions of the drafters for the meaning of the words eventually adopted. Originalism ‘sits uncomfortably’ within Australia’s constitutional traditions,³² but history will always remain an important dimension of legal methodology and constitutional interpretation.³³

Close examination of the drafting of s 128 can therefore serve an important goal. By contextualising a sparse text and the ‘fragmentary statements of individuals,’³⁴ it can facilitate a broader understanding of the amendment provision itself, as well as colonial politics and federation history. Such statements are only ever partial indicators of intention; alone they are either unhelpful or can potentially lead to mistaken views. Only by situating each statement within its environment, and tracing their evolution, can the multiple, ‘interlocking intentions’ be revealed.³⁵

²⁸ See, eg, *New South Wales v Commonwealth* (2006) 229 CLR 1, 300–1 [735] (Callinan J) (*WorkChoices*’); Paul de Jersey, ‘A Sketch of the Modern Australian Federation’ in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 66, 66; Gregory Craven, ‘The High Court of Australia: A Study in the Abuse of Power’ (1999) 22 *University of New South Wales Law Journal* 216, 232–3; Jeffrey Goldsworthy, ‘Interpreting the Constitution in its Second Century’ (2000) 24 *Melbourne University Law Review* 677, 683–4; Fenna, above n 16, 65; Brian Galligan, ‘Amending Constitutions Through the Referendum Device’ in Matthew Mendelsohn and Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Palgrave, 2000) 109.

²⁹ (1988) 165 CLR 360.

³⁰ Ibid 385.

³¹ Anne Carter, ‘The Definition and Discovery of Facts in Native Title: The Historian’s Contribution’ (2008) 36 *Federal Law Review* 299, 299.

³² Cheryl Saunders, ‘Interpreting the Constitution’ (2004) 15 *Public Law Review* 289, 291.

³³ See Susan Kenny, ‘The High Court of Australia and Modes of Constitutional Interpretation’ in Tom Gotsis (ed) *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of NSW, 2007) 45 for discussion of theories of constitutional interpretation adopted by the High Court.

³⁴ Michael Coper, ‘Law, History, and the Idea of the High Court’ (Speech delivered at the Australian Government Summer School for Teachers of Australian History, Canberra, 18 January 2000). See also Michael Coper, ‘The Place of History in Constitutional Interpretation’ in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Legal Books, 1986) 5.

³⁵ Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 220.

Historians find ‘multiple intentions and diverse experiences in federation, while lawyers usually strive to establish single meanings in order to support definitive judgments.’³⁶ The evolution of the referendum mechanism reveals the futility of searching for a single intention. Rather, close examination of the evolution of s 128 reveals a conflict between the political philosophies of conservatism and liberalism, waged through a battle between the principles of responsible and representative government on one side and popular democracy on the other; though federalism complicated the ‘apparently simple confrontations of liberals and conservatives’.³⁷ For example, the issues of women’s suffrage and a direct popular vote on proposed amendments — key liberal platforms — became proxies for arguments about states’ rights. The anxiety of the ‘small’ states that the ‘large’ states might use their power to overwhelm them forced compromises in the drafting of s 128.

The delegates to the Constitutional Conventions drew on the practice and experience of many nations — most notably the United States and Switzerland — from which to draw the final model.³⁸ Under the mechanism finally agreed upon, a referendum will only succeed if it obtains a double majority — that is, if it achieves a majority of votes across Australia, including the territories,³⁹ and a majority of votes in a majority of states. The two primary limbs are born of competing political theories: while the first requirement is steeped in direct popular democracy,⁴⁰ the second is a concession to federalism.⁴¹ In addition, any proposed amendment that seeks to diminish the proportionate representation or minimum number of representatives of a state, or alter the limits of a state will only be successful if a majority of voters in that particular state approve the proposed amendment. In those circumstances it is more appropriate to speak of the requirement for a triple majority. Finally, reflective of the critical importance the drafters placed on representative government, a proposed amendment will only be voted on by the people if it is either passed by an absolute

³⁶ John Waugh, ‘Lawyers, Historians and Federation History’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 25, 28.

³⁷ La Nauze, above n 27, 125. See also *Wong v Commonwealth* (2009) 236 CLR 573, 582 [18] (French CJ and Gummow J).

³⁸ See especially *Official Report of the National Australasian Convention Debates*, Sydney, 16 March 1891, 386 (Alfred Deakin):

‘an Australian constitution that was begun by setting aside the political experience of the civilised world would have a poor chance of doing any good. Any constitution that is built up must be built on the experience gained of other constitutions in other parts of the world.’

Alan Watson has argued that ‘borrowing (with adaption) has been the usual way of legal development’ in the western world: see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2nd ed, 1993) 7. The story is no different for s 128.

³⁹ *Constitution Alteration (Referendums) 1977* (Cth).

⁴⁰ See *WorkChoices* (2006) 229 CLR 1, 299–300 [732]–[735], 319–22 [772]–[779] (Callinan J).

⁴¹ *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 49–50 [102] (Kirby J).

majority of both Houses of Parliament, or passed by the same House of Parliament twice (after a period of three months) if the second House refuses to pass it.

III THE EVOLUTION OF SECTION 128

A mechanism for constitutional alteration was first proposed during the Australasian Federation Conference held in Melbourne between 6 and 14 February 1890. Alfred Deakin, the liberal Victorian delegate, appears to have been the first to propose that the people themselves be permitted to vote on any alteration or amendment. The suggestion seems to have been simply ignored — no other delegate discussed it, or proposed an alternative, and the two early drafts of the *Constitution*, one by Andrew Inglis Clark and the other by Charles Kingston, adopted different mechanisms.⁴²

Nevertheless, the early presence of an amendment mechanism indicated that the drafters always intended to vest the power of amendment, at least in part, directly in the people or indirectly via the states that comprised the federation, rather than in the institutions that preceded or were formed as a result of Federation. This was a departure from the Canadian approach, which left the power of amendment to the Imperial Parliament.⁴³ Such a model was never seriously considered for Australia and especially not by Inglis Clark or Kingston who would have considered it inconsistent with their ‘legal nationalism and republican inclination’.⁴⁴ Certainly, delegates considered that Canada had ‘made a mistake’.⁴⁵ Likewise, those who considered that power for constitutional change should be vested entirely in the federal Parliament were in a minority.

This section canvasses four factors which influenced the drafters of the *Constitution* and of s 128. In Part A, we explore the tension between stability and flexibility, before addressing the competing considerations of States’ rights and popular sovereignty in Part B. In Part C, the terrain shifts to the conflict between representative and responsible government on the one side, and popular sovereignty on the other. Finally, in Part D, federal concerns bubble up to the surface as the impact of competing polities in a federal system is addressed.

A Stability v Flexibility

As the mechanism for formal constitutional amendment,⁴⁶ an appropriate balance between stability and flexibility is essential to guarantee the Constitution’s sound

⁴² See below Part III.B.

⁴³ *British North America Act 1876* (Imp), 30 & 31 Vic, c. 3.

⁴⁴ John Williams, ‘The Constitutional Amendment Process: Poetry for the Ages’, above n 18, 7.

⁴⁵ *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 497 (Thomas Playford).

⁴⁶ As to other informal means of alteration, see James A Thomson, ‘Altering the Constitution: Some Aspects of Section 128’ (1983) 13 *Federal Law Review* 323, 323–4 n 4; Anne Twomey, ‘Constitutional Alteration and the Jurisprudence of Justice Callinan’

operation. An overly rigid provision would have the effect of stymieing constitutional change, while an excessively fluid referendum mechanism would allow it to be altered 'to every gust of wind that blows hither and thither.'⁴⁷ As Robert Garran explained in *The Coming Commonwealth*, the challenge 'is to find the golden mean which will adequately secure state rights whilst allowing fair scope for constitutional development.'⁴⁸

An examination of the Convention Debates indicates that there was broad agreement from the very beginning that the referendum mechanism should be strict.⁴⁹ Tasmanian Premier Edward Braddon argued that amendment 'should be made as difficult as possible',⁵⁰ while future High Court Justice Richard O'Connor considered the *Constitution* should 'not be lightly interfered with.'⁵¹ Although amendment should not be 'made absolutely impossible', it was viewed as essential that the *Constitution* not be subject to 'any fluctuation of public opinion, any change of feeling on the part of the people in some crisis of a temporary character'.⁵² Repeatedly emphasised was the need to 'provide all necessary safeguards against its being lightly amended'.⁵³ There was, of course, some opposition to such a sentiment from more liberal delegates, among them Isaac Isaacs, who, while noting that the *Constitution* 'should not be rudely touched or hastily altered', suggested that the interests of progress would demand that 'the political development of the Commonwealth shall keep pace with the social and commercial development of the people.'⁵⁴

The compromise ultimately sketched out lessons learnt from the experience of the United States. Amendments to the *United States Constitution* may be proposed by either a two-thirds majority of Congress, or a national convention assembled at the

(2008) 27 *University of Queensland Law Journal* 47, 48; Charles Sampford, 'Some Limitations on Constitutional Change' (1979) 12 *Melbourne University Law Review* 210, 211, 229–39.

⁴⁷ *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1023 (Simon Fraser).

⁴⁸ Robert Garran, *The Coming Commonwealth* (Simpkin, Marshall, Hamilton, Kent & Co, 1897) 182.

⁴⁹ See, eg, *Official Report of the National Australasian Convention Debates*, Sydney, 17 March 1891, 497 (William Russell); Sydney 8 April 1891, 887 (John Donaldson); Adelaide 20 April 1897, 1021 (Edmund Barton), 1023 (Simon Fraser); Melbourne 9 February 1898, 716 (William McMillan), 744 (Edward Braddon), 748 (John Forrest), 748–9 (Charles Kingston), 752 (Vaiben Solomon), 759 (Isaac Isaacs).

⁵⁰ *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1021.

⁵¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 745.

⁵² *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1021 (Edward Barron).

⁵³ *Ibid.*

⁵⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 759.

request of at least two-thirds of the States. The proposed amendment will only be successful if ratified by at least three-quarters of the states, either by legislatures or conventions.⁵⁵ The added complication of the Presidential system is avoided with the Executive being excluded from the process: the proposed amendment does not need to be signed by the President, and the President does not have the power to veto an amendment.⁵⁶

The ‘rigidity’ of the *United States Constitution* was at the front of the minds of many delegates at the Australian Convention Debates. In Adelaide in 1897, Isaacs twice noted that, in 1880, three million Americans could resist an amendment supported by 45 million, a fact he considered an ‘intolerable ... mistake we must not follow’⁵⁷ and a situation that arises ‘from the iron grasp of the dead hand.’⁵⁸ Former South Australian Premier Dr John Cockburn, ‘advanced liberal’ and ‘ardent Federationist’,⁵⁹ agreed, arguing that ‘an amendment of the Constitution should not be made too easy, but on the other hand it should not be made too difficult. In America it is too difficult’.⁶⁰ In Melbourne in 1898, William McMillan recorded his disapproval ‘of the rigidity of the American Constitution’,⁶¹ and Isaacs renewed his assault.⁶² Henry Higgins attempted to assuage Isaacs by noting that the amendment procedure then being debated would make it easier to amend the Australian Constitution than it is in America.⁶³ Patrick Glynn, Richard O’Connor, Edmund Barton, and James Howe sought a middle ground,⁶⁴ agreeing that the ‘American process’⁶⁵ was undesirable — in the words of Barton ‘not only a complicated process, but ... one of extreme difficulty’ and that that would not be the case in Australia.⁶⁶ Structurally this is true — s 128 offers a lower threshold than article V of the *United States Constitution*.

⁵⁵ *United States Constitution* art V.

⁵⁶ *Hollingsworth v Virginia*, 3 US 378 (1798).

⁵⁷ *Official Report of the National Australasian Convention Debates*, Adelaide, 26 March 1897, 181; *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1021.

⁵⁸ *Ibid* 1020.

⁵⁹ John Playford, ‘Cockburn, Sir John Alexander (1850-1929)’ in Bede Nairn and Geoffrey Searle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1981) vol 8, 42, 43.

⁶⁰ *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1022.

⁶¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 716.

⁶² *Ibid* 719–21.

⁶³ *Ibid* 720, 766–8.

⁶⁴ *Ibid* 736–7 (Patrick Glynn), 745 (Richard O’Connor), 750 (Edmund Barton), 754–55 (James Howe).

⁶⁵ *Ibid* 750 (Edmund Barton).

⁶⁶ *Ibid*. See also Garran, above n 48, 70: ‘though rigidity in a federal constitution is desirable, it seems that the rigidity of the American Constitution has been somewhat overdone.’

Between 1789 and 1898, the *United States Constitution* was amended 15 times.⁶⁷ However, this belies its true ‘rigidity’.⁶⁸ The first 10 amendments (the Bill of Rights) were ratified within the first two years, and are not, as Glynn argued, ‘strictly speaking, amendments at all’, as they were ‘alterations referring to the security of civil and religious liberty and such matters, which were proposed as conditions precedent to the adherence of several of the states to the Union’.⁶⁹ Further, the 13th, 14th and 15th amendments were adopted in the wake of the Civil War — a ‘most extraordinary circumstance’.⁷⁰

Nevertheless, as the requirements of s 128 have been met only eight times, it is true that in practice s 128 has proven to operate just as, or even more, restrictively than Article V. The compromise struck by the delegates at the Convention Debates with regard to the rigidity of the *Constitution* has proven false — the gauntlet of s 128 poses extreme difficulty. Of course, whether this is seen as positive or negative depends both upon one’s normative perspective and the particular proposals for alteration.

Measuring the stability or flexibility of constitutional amendment comparatively is a difficult task, but comparative constitutional scholars agree that Australia’s procedure is particularly difficult. In the leading large-scale comparative study, Donald Lutz has attempted to ascertain the difficulty of constitutional amendment by quantifying the difficulty of discrete steps in the process.⁷¹ Lutz identified 68 possible steps, such as initiation by citizens, the executive, or a specially constituted body, and aggregated the scores to provide an overall index of difficulty. According to Lutz, Australia’s *Constitution* is the fifth most difficult to amend in the world.⁷² George Williams and David Hume note, however, that Lutz did not take into account the full process that amendments to Australia’s *Constitution* must go through, failing to include the fact that amendments require bicameral absolute majority approval, executive approval, and approval by a majority of people in a majority of states. Including these features would mean that Australia’s *Constitution* ‘jumps to the top of the list as the most difficult in the world to change’.⁷³ Other studies paint a similar picture. Arend Lijphart places

⁶⁷ The 16th Amendment was ratified in 1913. As of June 2016, the United States Constitution has been amended 27 times, though in addition to the qualification noted above, the 21st Amendment (1933) simply repealed the 18th Amendment (1920).

⁶⁸ *Official Report of the National Australasian Convention Debates*, Adelaide, 26 March 1897, 181 (Isaac Isaacs); 29 March 1897, 248 (William Trenwith); 30 March 1897, 335 (William Trenwith).

⁶⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 737 (Patrick Glynn).

⁷⁰ *Ibid.* The 10 amendments that make up the Bill of Rights were conditions for ratification under the Massachusetts Compromise: Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (Oxford University Press, 2006) 58–9.

⁷¹ Donald S Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006).

⁷² *Ibid.* 170.

⁷³ George Williams and Hume, above n 16, 11.

Australia in the top group of amendment difficulty, alongside Canada, Japan, Switzerland and the United States.⁷⁴ Similarly, Astrid Lorenz ranks Australia in fifth position, behind only Belgium, the United States, the Netherlands and Bolivia.⁷⁵

The second limb of s 128 — the requirement that a majority of voters in a majority of states must approve of a proposed alteration — appears to create an onerous limitation on constitutional amendment. With six states, it has meant that no amendment can pass without four out of six voting in favour.⁷⁶ However, this requirement has only defeated 5 of 36 failed amendments. The marketing,⁷⁷ industrial employment,⁷⁸ and simultaneous elections⁷⁹ referenda all obtained a majority of votes nationally and carried three states, while aviation⁸⁰ and terms of senators⁸¹ referenda obtained a national majority but carried only two states. Although the result of the simultaneous elections referendum would have particularly displeased Isaacs — the ‘yes’ camp received 62.22 per cent of the national vote but the amendment was defeated by a mere 9 211 voters in Western Australia⁸² — the difficulty in adopting constitutional amendments has not, in general, been attributable in any real sense to this limb.

Simply counting the rate of successful amendments, however, paints a misleading picture. A better — though perhaps empirically impossible — indicator of the stability of the process under s 128 would include the number of proposals that did not reach the people.⁸³ That is, proposals (like those mentioned in the introduction) that were raised but never formally initiated — only 44 proposals for constitutional alteration have ever been put to the people. This relatively small number is a result of several factors, chief among them that amendment may only be initiated by bicameral absolute majority approval (and therefore on the instigation of the executive). As will

⁷⁴ Arend Lijphart, *Patterns of Democracy* (Yale University Press, 1999) 220.

⁷⁵ Astrid Lorenz, ‘How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives’ (2005) 17 *Journal of Theoretical Politics* 339, 358–9.

⁷⁶ Chapter VI of the Constitution allows for the establishment or admission of new states to the Federation, but until and unless this occurs these difficulties will continue. On Chapter VI see Anna Rienstra and George Williams ‘Redrawing the Federation: Creating New States from Australia’s Existing States’ (2015) 37 *Sydney Law Review* 357.

⁷⁷ Constitution Alteration (Organised Marketing of Primary Products) Bill 1946 (Cth).

⁷⁸ Constitution Alteration (Industrial Employment) Bill 1946 (Cth).

⁷⁹ Constitution Alteration (Simultaneous Elections) Bill 1977 (Cth).

⁸⁰ Constitution Alteration (Aviation) Bill 1936 (Cth).

⁸¹ Constitution Alteration (Terms of Senators) Bill 1984 (Cth).

⁸² Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Constitutional Change: Select Sources on Constitutional Change in Australia 1901–1997* (1997) 104.

⁸³ Kathleen Sullivan estimates that some 11 000 amendments have been proposed to the US Constitution. However, only 33 have attained the necessary Congressional super-majorities, and only 27 have been ratified by three-quarters of the states: Kathleen Sullivan, ‘Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever’ (1996) 17 *Cardozo Law Review* 691, 692.

be discussed below, some members of the Convention Debates recognised that expanding this requirement to permit the states or citizens themselves to initiate proposals would affect the stability/flexibility of the document they agreed to.

Certainly, the text of s 128 means that the *Constitution* cannot be ‘lightly amended’, however, broader cultural and institutional reasons — what Tom Ginsburg and James Melton refer to as a country’s ‘amendment culture’⁸⁴ — should not be ignored. In particular, constitutional illiteracy, state interests, government error, a committed opposition and status quo bias, amongst many other reasons, have all contributed to the low success rate.⁸⁵ Indeed, the High Court has also acknowledged the role of party politics in influencing the outcome of proposals,⁸⁶ though this influence likely stems from the necessity that the executive initiates a referendum. In addition, the mechanics of the referendum process itself — most particularly compulsory voting — has also been identified as a possible cause.⁸⁷ These factors suggest that rigidity is not tied solely to the text of s 128 — something proponents of an Australian republic may be all too aware of. They also suggest that any amendment to s 128 may have unintended consequences. For example, it is not clear that allowing citizens to introduce referendum proposals would axiomatically lead to a more flexible *Constitution*. As has proven the case in California, proposals may include stringent manner and form requirements that limit the potential for future amendment.⁸⁸

B States’ Rights v Popular Sovereignty

The ‘amending power’ is ‘the highest expression of the will of the sovereign people of the Nation and the sovereign people of the States’;⁸⁹ it is ‘the real legislative sovereign which presides directly over the constitution’.⁹⁰ An amendment mechanism therefore focuses attention on the location of ultimate lawful authority within a polity.⁹¹ A key

⁸⁴ Tom Ginsburg and James Melton, ‘Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty’ (2015) 13 *International Journal of Constitutional Law* 686–713.

⁸⁵ George Williams and Hume, above n 16, 199–237. See also Scott Bennett, ‘The Politics of Constitutional Amendment’ (Research Paper No 11, Parliamentary Library, Parliament of Australia, 2002–03). Ron Levy considers that declining trust in government is a critical reason for the failure of referenda: Levy, above n 16.

⁸⁶ *WorkChoices* (2006) 229 CLR 1, 101 [132] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁸⁷ Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 49; Orr, above n 16.

⁸⁸ See, eg, California Proposition 13 (1978); *California Constitution* art XIII A.

⁸⁹ Garran, above n 48, 182.

⁹⁰ *Ibid* 25.

⁹¹ Stephen Tierney, ‘Constitutional Referendums: A Theoretical Enquiry’ (2009) 72 *Modern Law Review* 360, 360–1. See also James Bryce, *Studies in History and Jurisprudence* (Clarendon Press, 1901) vol 2, 53: ‘in a country governed by a Rigid Constitution which limits the power of the legislature’, ultimate sovereignty resides with the authority ‘which made and can amend the Constitution.’

ideological conflict in the drafting of the *Constitution* was between states' rights on the one hand and popular sovereignty on the other. The different positions on whether a direct popular vote should be included in the referendum mechanism reveal divergent views on the extent of direct political sovereignty afforded to the people. Additionally, inter-state divisions over the breadth of popular sovereignty necessitated the curio that remains in paragraph four.

Delegates in favour of state sovereignty considered that the compromises struck between the states at Federation were fought for 'peg by peg, and word by word' and therefore should not be 'tampered with on the slightest provocation'.⁹² The clear implication is that the legal framework achieved by the people acting through their representatives at state level was to be preferred to that proposed or voted on by the people themselves. The interests of the states should be 'safeguarded',⁹³ in order to 'guarantee to every one of the states ... the permanence of the agreement they have made'.⁹⁴ By contrast, others, among them Isaacs, argued that the *Constitution*, governing as it did the institutions of the nation, was fundamentally a matter for the people, not the representatives they elect: 'after all, the Constitution is being made for the people, not the people for the Constitution'.⁹⁵ For these delegates, the referendum mechanism was seen as 'the next stage in the evolution of democracy, whatever its theoretical and practical difficulties in a system of government that otherwise relied on representation'.⁹⁶

As noted above, Deakin appears to have been the first to propose popular ratification of any constitutional amendment. In Melbourne in 1890, Deakin cited the 'innumerable precedents in the United States for the submission of constitutional amendments direct to the people' and asked whether the Australasian colonies 'may not prefer to adopt this method'.⁹⁷ The suggestion seems to have been simply ignored as two early drafts of the *Constitution* adopted different mechanisms. Inglis Clark's draft required a proposed amendment to be approved by two-thirds of the state legislatures, and left no room for a direct vote.⁹⁸ Kingston's draft *Constitution* maintained the state

⁹² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 752 (Vaiben Solomon).

⁹³ *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 887 (John Donaldson); See also *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1021 (Edward Braddon).

⁹⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 745 (Richard O'Connor).

⁹⁵ *Ibid* 759.

⁹⁶ Saunders, above n 87, 48. See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 758 (Isaac Isaacs).

⁹⁷ *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 13 February 1890, 96.

⁹⁸ Andrew Inglis Clark, *Inglis Clark's Bill for the Federation of the Australasian Colonies* (6 February 1891) s 93, cited in John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2004) 92.

legislatures' requirement, but added a two-thirds majority vote of the electors.⁹⁹ John Williams observes that in its entirety, Kingston's draft *Constitution* 'balanced both his democratic and "States' rights" tendencies',¹⁰⁰ but it is within this amendment provision in particular that this balance is achieved. While the first limb protects the rights of states, the second grants the people a direct vote on any proposed alteration — endorsing change with democratic authority. Kingston was certainly not averse to popular democracy. In '[perhaps] the most radical feature'¹⁰¹ of his draft, Kingston was prepared to permit a referendum on *any* Bill passed by Parliament.¹⁰²

Under Sir Samuel Griffith's first official draft,¹⁰³ the *Constitution* could be amended by two steps: one federal and one state but neither by direct vote. The amendment would have to achieve an absolute majority vote in both Houses of Parliament. It would then be submitted to conventions of elected officials of each state, and must pass in a majority of those conventions and, if the proportionate representation of a state was diminished, in that state's convention. Griffith's clause 75, with its deference to state conventions, clearly aligned with the former ideology, but the idea of a direct popular vote, canvassed as early as 1890, overtook it as the debates progressed. In this shift, the delegates moved decisively away from the United States model and towards the Swiss.¹⁰⁴

1 *Sydney, 1891*

The first proposal for direct popular involvement in the referendum mechanism was made by the Queensland delegate, Andrew Thynne in Sydney in 1891. Thynne argued that the mechanism would be 'much embellished and improved' if it preserved the right of amendment for the people.¹⁰⁵ He regarded such an approach as 'thoroughly democratic' and also 'guarded against hasty and ill-considered changes of the

⁹⁹ Charles Cameron Kingston, *Kingston's Draft of a Constitution Bill* (26 February 1891) Pt XVII, cited in John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2004), 133.

¹⁰⁰ John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2004) 114.

¹⁰¹ *Ibid.*

¹⁰² Kingston, *Kingston's Draft of a Constitution Bill*, above n 99, Pt IX. This is a feature of the 1874 Swiss Constitution: *Federal Constitution of the Swiss Confederation* (Switzerland) 19 April 1874, art 89.

¹⁰³ John Williams, *The Australian Constitution: A Documentary History*, above n 100, 134. Griffith's Draft combined aspects of Inglis Clark's and Kingston's work, as well as being influenced by discussions with other delegates. The proposed referenda mechanism is listed as clause 75 and is located under 'Chapter VIII: Amendment of Constitution'.

¹⁰⁴ Something that Garran considered the US would do, 'were they to recast their Federal Constitution at the present day': see Garran, above n 48, 137.

¹⁰⁵ *Official Report of the National Australasian Convention Debates*, Sydney, 6 March 1891, 107. See also *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 495.

Constitution'.¹⁰⁶ He made explicit¹⁰⁷ that his proposal was predicated on the constitutional theory of popular sovereignty, arguing:

Any constitution we draw will have to be adopted by the whole of the people; it will virtually be a constitution rising and coming from them ... the people will be much more satisfied if they find ... that they themselves must be again consulted before any change is made¹⁰⁸

His proposal was also supported by more practical arguments. It would remedy the possibility of gridlock between the Houses of Parliament,¹⁰⁹ entice the people of Australia into supporting federation,¹¹⁰ and encourage the delegates at the Convention Debate to vote in favour of the Bill.¹¹¹ Unfortunately Thynne's proposal was misunderstood as intending either to allow the people alone to propose an alteration, a concept labelled 'pernicious',¹¹² or that only the people (and not the states) should be consulted on a referendum question,¹¹³ and sparked rancorous debate forcing him to withdraw it. Nevertheless, the seed of popular democracy was sown and it would be raised again and again¹¹⁴ — and, eventually, form part of s 128.¹¹⁵

Indeed, the very next month, some delegates used the space opened up by Thynne to advocate for the abandonment of the state conventions on the same basis. On 8 April 1891, Liberal Victorian Premier James Munro proposed that the state conventions be replaced with a popular vote, because it was more appropriate for questions of amendment to be determined by the people directly than by elected representatives,

¹⁰⁶ *Official Report of the National Australasian Convention Debates*, Sydney, 6 March 1891, 107.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 495–6. See also *Official Report of the National Australasian Convention Debates*, Sydney, 17 March 1891, 441.

¹⁰⁹ *Official Report of the National Australasian Convention Debates*, Sydney, 17 March 1891, 441.

¹¹⁰ *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 495–6.

¹¹¹ *Ibid.* 496.

¹¹² *Ibid.* 497 (William Russell).

¹¹³ *Ibid.* 497 (Thomas Playford).

¹¹⁴ Including in Melbourne in 1898 in an ultimately unsuccessful motion of Isaacs: *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 717, 719.

¹¹⁵ Thynne was not mentioned and he did not attend the debate, having resigned from his Ministerial portfolio: Brian Stevenson, 'Thynne, Andrew Joseph (1847–1927)' in John Richie (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1990) vol 12, 228–9.

who ‘very often vote against their promises.’¹¹⁶ South Australian Premier Thomas Playford agreed, stating that unless the people were consulted as well as the state officials they elect, ‘you can never ascertain correctly the views of the people ... [but only] the views of the men who have been elected members of the convention.’¹¹⁷ He was also concerned to avoid a situation where a minority of electors might amend the constitution by virtue of their being part of a majority of state conventions, which ‘no one in his senses’ would consider fair.¹¹⁸ Accordingly, he took inspiration from the Swiss model, which he considered ‘has worked exceedingly well’.¹¹⁹ Dr Cockburn also opposed the conventions as ‘an error in theory, and useless in practice.’¹²⁰ The former South Australian Premier believed that in the United States the use of conventions were first proposed ‘as a barrier against’, and as a ‘check on the popular will’.¹²¹ For Dr Cockburn, ‘[o]n any question so vital as the amendment of the Constitution the people have a right to be consulted directly, without any conventions whatever.’¹²²

The argument revealed the tension between states’ rights and popular sovereignty: effectively, the reliance on state entities to effect constitutional change gave the power to the four smaller states to effect change without the significantly more populous Victoria and New South Wales; and perhaps more egregiously, to prevent constitutional change supported by all but three states. This was because the population of the continent was unevenly distributed. As of 30 June 1897, the estimated population of the colonies was as follows: New South Wales (1 311 440); Victoria (1 170 301); Queensland (480 000), South Australia, including the Northern Territory, (356 877); Western Australia (157 781); and Tasmania (167 062).¹²³ Stark distinctions among the population size of the colonies meant, in theory, constitutional change could be

¹¹⁶ *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 888.

¹¹⁷ *Ibid* 891.

¹¹⁸ *Ibid* 892.

¹¹⁹ *Ibid* 891–2 (Thomas Playford):

The Swiss Constitution, which has worked exceedingly well, provides that any alteration in it shall be effected only by an expression of the views of the majority of the states and also of a majority of the people. ... I think ... that the Swiss provision ought to be embodied in the clause, so that in addition to a majority of the states there might also be a majority of the people

¹²⁰ *Ibid*.

¹²¹ *Ibid* 892–3. This is incorrect. While the convention process is indirect, it is more democratic than the alternative allowed in the United States — ratification by state legislatures: William Fisch, ‘Constitutional Referendum in the United States of America’ (2006) 54 *American Journal of Comparative Law* 485, 490. This is because representatives in a state ratifying convention stand and are elected on a single issue, rather than a multitude of issues as in the state legislature.

¹²² *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 892–3.

¹²³ Sydney Morning Herald, ‘Population of the Australian Colonies’, *Sydney Morning Herald* (Sydney), 28 August 1897, 9 (population estimates prepared by the Acting

agreed to despite a substantial country-wide popular vote majority against. Nonetheless, the proposal to detract from states' rights was met with strong reactions from some of the states' delegates.

Conservative former Victorian Premier Duncan Gillies thought that any provision that requires direct popular approval would 'sacrifice' the smaller colonies.¹²⁴ Popular involvement was sufficiently catered for by the democratic elections of the Commonwealth Parliament and the state conventions.¹²⁵ The concern about amendments being made against the will of more populous states was hypothetical because they would block it in the Parliament.

In defence of the conventions, Griffith invoked notions of responsible and representative government. He noted that millions of people 'are not capable of discussing matters in detail', and so they elect their representatives to govern *for* them.¹²⁶ Further, by delegating sovereignty, the conventions would avoid expense and delay.¹²⁷ However, Deakin noted that the proposed conventions would not act as a deliberative body, amending the proposed constitutional amendment in slightly different ways; if their only function was to 'say aye or no', they would be in no better position than the people to make that determination.¹²⁸ Deakin argued that direct popular democracy was not foreign to representative government, 'but can be grafted upon it as an assistance to Parliament'.¹²⁹

Although Griffith predicated his position on practicality — the simple impossibility of direct democracy in modern states — it ran close to that of classical political theorists of his time who distrusted popular majorities. Perhaps most prominently, the *Federalist Papers* emphasised representative government's advantages as an institutional constraint on the tyranny of (an uneducated) majority.¹³⁰ It is unclear

Government Statist, Mr Fenton). These figures likely do not include Aboriginal and Torres Strait Islander peoples.

¹²⁴ *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 888.

¹²⁵ *Ibid* 888–9. But see Richard Baker, *A Manual of Reference to Authorities for the Use of the Members of The National Australasian Convention* (W. K. Thomas & Co, 1891) 43, in which Richard Baker questioned this view, arguing that elected representatives are often chosen on the basis of 'so many questions', such that elections are not the same as a referendum.

¹²⁶ *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 894.

¹²⁷ *Ibid*.

¹²⁸ *Ibid* 895.

¹²⁹ *Ibid* 896.

¹³⁰ James Madison, 'The Federalist No. 10' in Henry B Dawson (ed), *The Federalist* (Charles Scribner, 1863) vol 1, 62. While it is impossible to ascertain whether Griffith read The Federalist No. 10, in Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects: A Paper Presented to the Government of Queensland* (Edmund Gregory, 1896) he cited The Federalist Nos. 15 and 43. The Federalist

whether Griffith would have gone so far, but certainly he would have considered that ordinary citizens would not have had the qualities (education, time, expertise etc) required to make good decisions, whereas those elected to the state conventions would. Conversely, Deakin's understanding of limited direct democracy as an adjunct to representative government emphasised the importance of a popular mandate.

Ultimately, the amendment to strike out the conventions in favour of a popular vote was defeated by 19 votes to 9. However, something of a middle ground was achieved with a requirement, in addition to majorities both in the Houses of Parliament and at the state conventions, that those conventions voting in the affirmative represent a majority of the population.¹³¹ While this amended clause protected the two large states from being overwhelmed by the three smaller states, it did little to sate the appetite of committed democrats and liberals.

2 *Adelaide, 1897*

Despite the defeat in Sydney, the movement towards a popular vote was supported by liberals and radicals and 'gathered pace in the 1890s', though the prospect of federation itself was "'put by" for six years.¹³² Into this interregnum stepped committed democrats, who held two unofficial conferences in the period. The 1893 Corowa Conference and the 1896 People's Federal Convention¹³³ propelled the issue forward, helping to transform the legitimating force of federation from the states to the people.¹³⁴ Writing extra-curially, Justice Kirby notes that the popular movement 'came to affect the way in which the Adelaide Convention itself was constituted and the way in which the constitutional alteration provision was finally drawn'.¹³⁵ Unlike the 1891 Convention, the 1897 Convention in Adelaide comprised representatives

was also discussed at the 1890 Conference and 1891 Convention at which Griffith attended: See *Official Record of the Proceedings and Debates of the Australasian Federation Conference, Melbourne*, 11 February 1890, 44 (John Cockburn); *Official Report of the National Australasian Convention Debates*, Sydney 9 March 1891, 151 (Arthur Rutledge).

¹³¹ *Official Report of the National Australasian Convention Debates*, Sydney 8 April 1891, 884.

¹³² La Nauze, above n 27, 87.

¹³³ Commonwealth, *The People's Conventions: Corowa (1893) and Bathurst (1896)*, Parl Paper No 32 (1998).

¹³⁴ Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1997) 152.

¹³⁵ Michael D Kirby, 'Deakin: Popular Sovereignty and the True Foundations of the Australian Constitution' (1997) 4 *Deakin Law Review* 129, 135.

directly elected by the people.¹³⁶ No doubt this feature gave an ‘impetus and legitimacy’¹³⁷ to the movement towards a direct popular vote.

Before the Adelaide Convention in 1897, a ‘secret’ Constitutional Committee chaired by Barton examined 14 motions that centred on the extent of appropriate ‘democratic participation’.¹³⁸ Although only four were carried, they were significant, including, relevantly, the abandonment of conventions in favour of reference to electors.¹³⁹ That recommendation was accepted without a division and was included in the draft in Adelaide,¹⁴⁰ with little debate.

In light of the extensive debate in Sydney six years earlier, it is curious that state conventions were discarded so readily in Adelaide. Apart from new concerns in Australian society, two reasons can be put forward. First, as noted above, the popular election of delegates here, as well as in Corowa and Bathurst, helped to legitimise the movement towards a direct popular vote. Now representing the ‘people’ (or at least the electors), the delegates were no longer bound to accept amendments suggested by their state parliaments but were conscious of the fact that they were making a constitution that must be accepted by the people of Australia.¹⁴¹ And second, perhaps more instrumentally, Griffith, who ably defended state conventions in 1891, did not attend the 1897–98 Conventions. In fact, no Queensland delegate did, as disputes over the popular election of delegates (and the referendum) meant the enabling act failed to pass.¹⁴² Whether or not Griffith could have marshalled a majority against a direct popular vote — La Nauze considers the larger number of lawyers in 1897–98

¹³⁶ Except Western Australia, whose representatives were selected by the two Houses of Parliament in a joint sitting. See James Battye, *Western Australia: A History from its Discovery to the Inauguration of the Commonwealth* (University of Western Australia, 1978) 442. See also Charles Cameron Kingston, *The Democratic Element in Australian Federation* (L Bonython & Co, 1897) arguing in favour of this change.

¹³⁷ Kirby, above n 135, 135. A wealth of popular materials published at this time advocated that ‘the power of constitutional amendment should be reserved to the people subject to defined conditions’: John Quick, *A Digest of Federal Constitutions* (Bendigo Branch of the Australian Natives Association, 1896) 11. See also Lilian Tomn, ‘The Referendum in Australia and New Zealand’ (1897) 72 *Contemporary Review* 242; See generally Kingston, *The Democratic Element in Australian Federation*, above n 136. On Corowa see: *Official Report of the Federation Conference held in the Courthouse, Corowa 1893*, Corowa, 1 August 1893, app B.

¹³⁸ La Nauze, above n 27, 124.

¹³⁹ *Ibid.*

¹⁴⁰ John Williams, *The Australian Constitution: A Documentary History*, above n 100, 610.

¹⁴¹ La Nauze, above n 27, 115. See also GH George Reid, ‘The Outlook of Federation’ (1897) (January) *Review of Reviews* 33. On the advance of democracy in the 1890s and alterations to the draft Constitution see also Harry Evans, ‘The Other Metropolis: The Australian Founders’ Knowledge of America’, in Commonwealth, *Harry Evans: Selected Writings*, Parl Paper No 52 (2009) 72–3.

¹⁴² Irving, above n 134, 141; Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause 1880–1900* (Melbourne University Press, 1963) 59.

meant that it was unlikely the Convention would be ‘dominated by the abilities and presence of one man’¹⁴³ — his absence highlights that although s 128 was a careful compromise between federalism, conservatism and liberalism, a compromise is dependent on the parties’ starting positions.

The introduction of a direct popular vote was, however, not without difficulties, as it presented the question of how the new Commonwealth would deal with the problem of unequal voting rights.¹⁴⁴ Although nominally a clear liberal-conservative issue, it quickly became a federalist one as suffrage was understood to significantly affect state voting power, and South Australia was the only colony with female suffrage at the time. The conflict between liberalism and federalism was demonstrated by the schism between Kingston, the liberal Premier of South Australia and ‘radical federationist’,¹⁴⁵ and Higgins, the radical progressive (and eventually anti-federalist) delegate from Victoria.¹⁴⁶ Both men supported universal female suffrage, but Higgins considered it impossible or impractical to use the *Constitution* to require the states to legislate for it.¹⁴⁷

The question of female suffrage in South Australia raised practical issues. Barton saw ‘only one way out of this difficulty’, proposing that only male votes be counted until suffrage laws became uniform.¹⁴⁸ John Gordon helpfully noted it might not be so difficult as women’s votes ‘are known approximately now’,¹⁴⁹ though he did not explain why this was apparently the case. Deakin suggested ‘two separate ballot boxes, one for the male and one for the female votes’,¹⁵⁰ though Sir George Turner cautioned that the electoral staff ‘would be sure to make many mistakes’ and that different coloured papers was far more preferable.¹⁵¹ Isaacs did not like such a proposal as it ‘makes the women suffer because the other States have not given them the right to vote’.¹⁵² Deakin agreed, arguing that ‘we must allow women to have their

¹⁴³ La Nauze, above n 27, 115.

¹⁴⁴ *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1205 (Edmund Barton).

¹⁴⁵ The subtitle of L F Crisp’s biographical monograph on Kingston: *Charles Cameron Kingston: Radical Federationist* (Australian University Press, 1984).

¹⁴⁶ *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1208.

¹⁴⁷ See also *Official Report of the National Australasian Convention Debates*, Adelaide, 15 April 1897, 715–32 (James Howe, Patrick Glynn and William Trenwith); Cf *Official Report of the National Australasian Convention Debates*, Adelaide, 15 April 1897, 723 (Charles Kingston).

¹⁴⁸ *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1205.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid* 1206.

¹⁵¹ *Ibid.*

¹⁵² *Ibid* 1207.

vote to ascertain whether there is a majority in the state'.¹⁵³ Ultimately, a 'rough and ready'¹⁵⁴ approach suggested by Holder prevailed, whereby the South Australian votes would simply be divided by two.¹⁵⁵ An attempt by South Australia to omit this clause was defeated without debate in Melbourne.¹⁵⁶

The issue of women's suffrage, ostensibly a battle between liberalism and conservatism, served as a proxy for a battle over the federation. Federal concerns of an imbalanced compact led liberal supporters into a compromise position, supporting a transitory provision which nonetheless ensured that female voters would receive the same rights as male voters in each state where universal adult suffrage prevailed. This battle was not contained to s 128;¹⁵⁷ it raged into the early years of the new Commonwealth.¹⁵⁸ However, as adult suffrage (at least among non-Indigenous Australians) was quickly enacted in Australia, the rough and ready compromise agreed to by the drafters was never utilised, but sits uneasily and incongruously (not unlike s 25)¹⁵⁹ in the section's fourth paragraph.

¹⁵³ Ibid.

¹⁵⁴ Ibid (Isaac Isaacs).

¹⁵⁵ Ibid.

¹⁵⁶ *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 766.

¹⁵⁷ See the debate on s 41: *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 715–32, 1191–7; *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 3 March 1898, 1840–55.

¹⁵⁸ Non-Indigenous women were granted the right to vote in Commonwealth elections in 1902: *Commonwealth Franchise Act 1902* (Cth), but most Indigenous women did not enjoy that right until much later. Some Indigenous women voted in South Australia at the first Commonwealth election in 1901, and their right to vote was sustained by s 41 of the *Constitution*. However, the Commonwealth adopted a restrictive interpretation of s 41 which limited the right to vote to Indigenous peoples enfranchised prior to 1902. The right of Indigenous women to vote in Commonwealth elections was confirmed in 1949 for those who had the right to vote in State elections (New South Wales, Victoria, Tasmania and South Australia): *Commonwealth Electoral Act 1949* (Cth) s 3. Indigenous women in Western Australia, Queensland and the Northern Territory did not enjoy the right to vote in Commonwealth elections until 1962: *Commonwealth Franchise Act 1902* (Cth) s 2. See also Murray Goot, 'The Aboriginal Franchise and its Consequences' (2006) 52 *Australian Journal of Politics and History* 517, 522–3. Paradoxically, it was illegal to encourage Indigenous Australians to enrol to vote: *Commonwealth Electoral Act 1962* (Cth) s 4, amending *Commonwealth Electoral Act 1918-1961* (Cth) s 156. Indigenous voting was not compulsory until 1984: *Commonwealth Electoral Amendment Act 1984* (Cth).

¹⁵⁹ The deference towards the states concerning suffrage is also seen in s 25: see Dylan Lino and Megan Davis, 'Speaking Ill of the Dead: A Comment on s 25 of the Constitution' (2012) 23 *Public Law Review* 231, 232.

3 *Melbourne, 1898*

Despite success at Adelaide, the principle of popular democracy and the federal compromises already struck were not on entirely solid ground. In 1898 in Melbourne, the Legislative Council of New South Wales suggested reverting to amendment by state Parliaments rather than by direct vote, in a manner inspired by the *United States Constitution* which also required a two-thirds majority of members present in each House of the state legislature.¹⁶⁰ However, in an even greater deference to states' rights, the New South Wales proposal went further, requiring those majorities in each and every state. The proposal was apparently negated without debate.¹⁶¹

As we have noted, in devising s 128 the Australian delegates looked to both the United States and Switzerland. The absence of a direct popular vote in Article V of the *United States Constitution* may '[reflect] the Framers' idea that the democratic will was most appropriately expressed through intermediary, representative institutions rather than in a direct manner',¹⁶² but it served as the catalyst for many Australian delegates' insistence that a popular vote was desirable. The following discussion between Deakin and Symon at Melbourne in 1898 is apposite:

Mr Deakin: It appears to me that the extension of the power which my honourable and learned friend proposes is very desirable and equitable. If we lay to heart the experience of America, we shall find that men of all parties unite in agreeing that a cardinal defect of the American Constitution is the difficulty of having any amendment submitted to the electors of the republic ...

Mr Symon: Responsible government will cure that.

Mr Deakin: Responsible government will not wholly cure it. We should not be blind to the fact that the greatest Federal Constitution in the world has been confronted with serious difficulties and discords because its amendment can only be accomplished by a single iron-bound method.¹⁶³

If the Legislative Council of New South Wales's proposal had been adopted s 128 would have lost an important element of direct democracy, stymieing subsequent constitutional change. The 1910 state debts referendum is a good illustration of the impact of introducing popular sovereignty in preference to defence to state parliaments.¹⁶⁴ That referendum permitted the Commonwealth to take over state debts

¹⁶⁰ *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 765.

¹⁶¹ *Ibid* 766.

¹⁶² Stephen Markman, 'The Amendment Process of Article V: A Microcosm of the Constitution' (1989) 12 *Harvard Journal of Law & Public Policy* 113, 116.

¹⁶³ *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 731. The United States Supreme Court has held firm to the single iron-bound method of Article V: *Hawke v Smith* 253 US 221, 227 (1920).

¹⁶⁴ *Constitution Alteration (State Debts) Act 1909* (Cth).

arising at any time (and not only those that existed prior to Federation), passing with 54.95 per cent of the vote nationally.¹⁶⁵ Intended as it was as a relief to the smaller states, it passed notwithstanding a poor performance in New South Wales, where it failed by 318 412 votes to 159 275.¹⁶⁶

The shift from electoral conventions to a direct popular vote was significant in introducing the principle of popular sovereignty into the Australian constitutional framework.¹⁶⁷ Despite Griffith's protestations that the people would be unable to intelligently decipher any proposed constitutional amendment, the drafters eventually accepted the desirability and necessity of the authority that comes with a popular vote. As will be discussed below, Switzerland — a country with a heavy emphasis on direct democracy — was at the forefront of the minds of many delegates during these discussions.

4 *The 1970s Referenda*

The compromise struck in 1898 between states' rights and popular sovereignty was an uneasy one and two proposed amendments to s 128 concerning this balance were sent to a referendum during the 1970s. A proposed amendment in 1974¹⁶⁸ provided that voters in the territories, as well as the states would be counted towards the national majority,¹⁶⁹ although not towards any state total. It also proposed to reduce the requirement for a majority of states (four) to one with not less than half (three).¹⁷⁰ Under a s 128 in that form, the marketing,¹⁷¹ industrial employment,¹⁷² and simultaneous elections,¹⁷³ referenda would all have succeeded. However, the proposal was only carried in New South Wales and received 47.99 per cent of the vote nationally, although it seems that if the territories section had been separate, it would have carried.¹⁷⁴ That separate question was put in 1977.¹⁷⁵ This time, absent a corresponding proposal to alter the states-limb, the question 'was relatively uncontroversial'.¹⁷⁶

¹⁶⁵ Bennett, above n 85, 6.

¹⁶⁶ Standing Committee on Legal and Constitutional Affairs, above n 82, 63.

¹⁶⁷ Both Canada and India, former British colonies and now modern federations, do not permit a direct popular vote on proposed constitutional amendments: see *Constitution Act 1982*, Part V; *Constitution of India*, Art 368.

¹⁶⁸ Constitution Alteration (Mode of Altering the Constitution) Bill 1974 (Cth).

¹⁶⁹ *Ibid* s 2(a).

¹⁷⁰ *Ibid* s 2(c).

¹⁷¹ Constitution Alteration (Organised Marketing of Primary Products) Bill 1946 (Cth).

¹⁷² Constitution Alteration (Industrial Employment) Bill 1946 (Cth).

¹⁷³ Constitution Alteration (Simultaneous Elections) Bill 1977 (Cth).

¹⁷⁴ Bennett, above n 85, 13.

¹⁷⁵ Constitutional Alteration (Referendums) Bill 1977 (Cth) s 2(a).

¹⁷⁶ Bennett, above n 85, 14.

The proposal was carried in every state and received a national total of 77.7 per cent.¹⁷⁷

Interestingly, this is in line with the 1890s Convention debates: a central concern during the drafting of s 128 was the need to reach a compromise between federalism and popular democracy. With the passage of the territories question without amending state voting power, democratic elements were strengthened but not at the expense of a robust federalism.

C Responsible and Representative Government v Popular Sovereignty

There were two further proposals at the intersection of popular sovereignty and responsible and representative government. The referendum might be initiated either by petition of a certain number of citizens, or as a means of breaking a parliamentary deadlock. Both represent the promotion of the authority of the people over the authority of their elected government. In both cases, opposition to the referendum was strong, as many delegates considered its very existence an anathema; for example, Edmund Barton, who favoured strong parliamentary sovereignty, considered it a ‘means of eating away the very foundations of responsible government, and rendering responsible government a myth’.¹⁷⁸

1 *Citizen-Initiated Referenda* (‘CIR’)

A mechanism to empower electors to initiate proposals to alter the *Constitution* was a central part of Kingston’s initial draft *Constitution*.¹⁷⁹ It was not ultimately adopted and received little attention during the drafting stage. It has, however, been mooted on various occasions since Federation,¹⁸⁰ and forms a critical part of the Swiss Constitution. In examining the compromises struck in the 1890s, it is worthwhile exploring CIR, and efforts to introduce it since 1901.

Under article 121 of the 1874 Swiss Federal Constitution, an elector could propose a partial revision of the Constitution, upon the collection of 100 000 signatures within 18 months.¹⁸¹ Parliament had the power to supplement the proposed amendment with a counter-proposal, meaning that voters needed to indicate a preference in

¹⁷⁷ Standing Committee on Legal and Constitutional Affairs, above n 82, 105.

¹⁷⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 751.

¹⁷⁹ Kingston, *Kingston’s Draft of a Constitution Bill*, above n 99.

¹⁸⁰ See, eg, *Final Report of the Constitutional Commission 1988* (Australian Government Publishing Service, 1988) vol 2, 864–6 [13.60]–[13.66].

¹⁸¹ *Federal Constitution of the Swiss Confederation* (Switzerland) 19 April 1874, art 121(2). The current Swiss Constitution permits a complete revision on the collection of 100 000 signatures: *Federal Constitution of the Swiss Confederation* (Switzerland) 18 April 1999, art 138. The referendum mechanism is detailed in ch II, arts 138–42.

case both proposals were adopted.¹⁸² Article 123(1) established that any proposed amendment to the Constitution (either partial or complete) must obtain a majority of the people and of the Cantons — a double majority requirement.¹⁸³ In addition to constitutional referenda, under the 1874 Constitution, citizens in Switzerland could call for a referendum on any piece of legislation passed by the Federal government. This is a particularly robust form of direct democracy (reminiscent of Kingston's draft), requiring only 50 000 signatures of eligible voters, or the request of eight Cantons, within 100 days of the official publication of the enactment.¹⁸⁴ In a country of 8 million people and 26 Cantons, it is not surprising that there have been a considerable number of legislative and constitutional referenda throughout Swiss history: for example, between 1980 and 2008, Switzerland held 246 nationwide referenda.¹⁸⁵

Swiss direct democracy was frequently referred to during the Convention Debates — both in positive and negative terms. In Sydney in 1891, Playford critiqued the use of conventions elected by the people to vote on proposed amendments as not requiring both a majority of states and a majority of citizens, a method which he considered the Swiss Constitution illustrated 'worked exceedingly well'.¹⁸⁶ In contrast, in Melbourne in 1898, Howe questioned the reverence paid to the Swiss model, arguing that the referendum should be exercised 'only in times of great emergency, and as seldom as possible'.¹⁸⁷ In his opinion, its overuse in Switzerland and on matters as mundane as the salary of high officials was not a model to follow, particularly due to the cost involved in a country as large as Australia.¹⁸⁸ While Howe appeared concerned about the frequency of the popular initiative, in *The Coming Commonwealth*, Robert Garran gave voice to a more common complaint — the danger of demagoguery:

The dangerous nature of the Initiative in this form is admitted by Swiss statesmen. It amounts to this: that a law drafted by an irresponsible demagogue may be passed in the heat of a popular agitation without revision of any kind by the responsible representatives of the people.¹⁸⁹

¹⁸² *Federal Constitution of the Swiss Confederation* (Switzerland) 19 April 1874, arts 121(5), (6), 121bis.

¹⁸³ *Ibid* art 123(1).

¹⁸⁴ *Ibid* art 89. This remains the case today: See *Federal Constitution of the Swiss Confederation* (Switzerland) 18 April 1999, art 141.

¹⁸⁵ Laurence Morel, 'Referendum' in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 501, 513.

¹⁸⁶ *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 888. See also 891–2 (Thomas Playford).

¹⁸⁷ *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 755.

¹⁸⁸ *Ibid*.

¹⁸⁹ Garran, above n 48, 74.

Although responsible and representative government was Garran's touchstone, the nature of the federal compact served as an additional consideration.¹⁹⁰ As noted, Howe's position won the day and, reflecting representative and responsible government, the Commonwealth Parliament has the exclusive authority to propose referenda.

Nevertheless, since 1901, the concept of CIR has at various times been supported by parties in a minority.¹⁹¹ The Australian Labor Party ('ALP') first introduced CIR mechanisms in their federal platform in 1908,¹⁹² members of the Liberal Party have supported CIR (while in opposition),¹⁹³ and during their political life the Australian Democrats were consistent in their support.¹⁹⁴ Three Bills were presented by the Democrats in the 1980s to allow referenda, upon signature of 250 000 electors,¹⁹⁵ or on the support of five per cent of the electors.¹⁹⁶ The independent member for North Sydney, Ted Mack in 1990¹⁹⁷ and federal Liberal frontbencher Peter Reith in 1994¹⁹⁸ would have set the mark at three per cent. None of these proposals were put to a vote in Parliament. Most recently, Victorian Senator John Madigan of the Democratic Labour Party proposed an amendment which would require only one per cent of voters (147 128 in the 2013 federal election). However, unlike its predecessors, it retained the important role of Parliament, providing that while one per cent of voters could require an amendment to be considered by Parliament, it would only go to a referendum if passed in accordance with s 128.¹⁹⁹

CIR has been addressed and rejected by several commissions. It was raised by 'one witness' at the 1929 Royal Commission on the *Constitution*, and debated at the Brisbane session of the 1985 Australian Constitutional Convention, though

¹⁹⁰ Ibid 140. Garran considered that the initiative is 'specially undesirable in a federal constitution' at 140.

¹⁹¹ George Williams and Geraldine Chin, 'The Failure of Citizens' Initiated Referenda Proposals in Australia: New Directions for Popular Participation?' (2000) 35 *Australian Journal of Political Science* 27, 38–9.

¹⁹² LF Crisp, *The Australian Federal Labour Party, 1901–51* (Longmans, 1955) 209.

¹⁹³ See, eg, Peter Reith, *Direct Democracy: The Way Ahead* (1994).

¹⁹⁴ George Williams, 'Distrust of Representative Government: Australian Experiments with Direct Democracy' in Marian Sawer, Gianni Zappala (eds), *Speaking for the People: Representation in Australian Politics* (Melbourne University Press, 2001) 80, 85–6.

¹⁹⁵ Constitution Alteration (Electors' Initiative) Bill 1982 (Cth) cl 5.

¹⁹⁶ Constitution Alteration (Electors' Initiative) Bill 1989 (Cth) cl 3.

¹⁹⁷ Constitutional Alteration (Alterations of the Constitution on the Initiative of the Electors) Bill 1990 (Cth).

¹⁹⁸ Reith, above n 193, 1–2.

¹⁹⁹ Citizen Initiated Referendum Bill 2013 (Cth). The Senate Finance and Public Administration Legislation Committee recommended the Bill not be passed and the Bill lapsed at the end of Parliament on 12 November 2013.

overwhelmingly defeated.²⁰⁰ The Advisory Committee on Individual and Democratic Rights recommended to the 1988 Constitutional Commission that s 128 be amended to enable citizens to initiate proposals for altering the *Constitution* on motion of a petition signed by 500 000 electors.²⁰¹ By 3–2 the Commission decided against recommending this alteration.²⁰²

The common thread behind all of these proposals is the suggestion that representative democracy is failing, with the dominance of the two-party system leading to alienation, dissatisfaction, political apathy and cynicism.²⁰³ Indeed, the 18 year gap since the last constitutional referendum does not suggest an energised political culture. A more representative form of decision-making would, it is said, ‘re-awaken ... the participatory ethic’,²⁰⁴ and revitalise the political process.²⁰⁵ Certainly it appears that Australians are frustrated with their political system.²⁰⁶ The Third Biennial Constitutional Values Survey found that Australians’ satisfaction with democracy had fallen from 82.3 per cent in 2010 to 73.1 per cent in 2012. Further, trust and confidence in the federal tier of government had dropped precipitously from 81.6 per cent in 2008 to 55.6 per cent in 2012 and 52.5 per cent in 2014.²⁰⁷ Another recent survey by the Australian National University and the Social Research Centre recorded similar results: satisfaction in Australia’s democratic system slumped from 86 per cent in 2007 to 72 per cent in 2014, and only 43 per cent of respondents believed it made a difference whether the ALP or the Coalition held government (from 68 per cent in 2007).²⁰⁸ Reflecting this disengagement is the fact that in the 2016 federal election over 2.6 million Australians opted out, by either failing to enrol to vote, enrolling but failing to vote, or voting informally.²⁰⁹ Whether these polls accurately reflect the

²⁰⁰ *Final Report of the Constitutional Commission 1988*, above n 180, 864–6 [13.60]–[13.66].

²⁰¹ *Ibid* 866.

²⁰² *Ibid* 866–72.

²⁰³ George Williams and Chin, above n 191, 28; Levy, above n 16, 813; Kildea, above n 16, 292.

²⁰⁴ Margaret Cotton and Bob Bennett, ‘Citizen Initiated Referenda: Cure-All or Curate’s Egg?’ (Parliamentary Research Service, Current Issues Brief No 21, 1994) 2.

²⁰⁵ Helen Gregorczyk, ‘Citizen Initiated Referendums: Republican Innovation or Scourge of Representative Democracy?’ (1998) 7 *Griffith Law Review* 249, 256.

²⁰⁶ An oft-cited 1991 poll found that 49 per cent of respondents had ‘not much’ confidence in the political system, while only 36 per cent had a ‘fair amount’ or a ‘great deal’ of confidence: ‘The Sad Truth About Politics’, *The Sydney Morning Herald*, 8 July 1991, cited in George Williams and Chin, above n 191, 40.

²⁰⁷ Griffith University, *Australian Constitutional Values Survey 2014* (October 2014).

²⁰⁸ Ian McAllister, ‘ANU-SRC Poll: Changing Views of Governance: Results from the ANUpoll, 2008 and 2014’ (Report No. 17, August 2014) 6–7.

²⁰⁹ Australian Electoral Commission, *2016 Federal Election Key Facts and Figures* (11 August 2016) <http://www.aec.gov.au/Elections/Federal_Elections/2016/key-facts.htm>; Australian Electoral Commission, *Informal Votes by State* (3 May 2017) <<http://results.aec.gov.au/20499/Website/SenateInformalByState-20499.htm>>.

general feeling in the Australian community or not, the direct democracy offered by CIR is enticing.

The difficulty with CIR, however, is two-fold. At a practical level, it is not certain that CIR would rejuvenate Australia's political process and reduce any feelings of alienation.²¹⁰ In fact, some evidence suggests the contrary — as Garran warned, CIR may enhance feelings of alienation and vilification of minority groups, rather than provide a means to ensure greater participation.²¹¹ For example, in November 2009, a Swiss constitutional CIR banning the building of minarets was passed by 57.5 per cent to 42.5 per cent, securing a majority in 19.5 out of 23 Cantons.²¹² In California, proposals to ban gay people from teaching in public schools²¹³ and to quarantine AIDS patients²¹⁴ have been put to a constitutional referendum. Although both of these proposals were defeated, a recent proposal to enact a constitutional ban on gay marriage was carried.²¹⁵ Similar concerns have been raised in Australia on the prospect of a plebiscite (or referendum) on marriage equality.²¹⁶ Rather than allow the diverse views of citizens and minorities to be debated, CIR 'can be "hijacked" by well financed interests'.²¹⁷ Appreciation of this fact has led scholars to shift focus

²¹⁰ Lisa Hill, 'Democratic Deficit in the ACT: Is the Citizen Initiated Referendum a Solution?' (2003) 38 *Australian Journal of Social Issues* 495, 497–8; Cotton and Bennett, above n 204, 14–5.

²¹¹ Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Citizen Initiated Referendum Bill 2013* (2013) 10 [1.35]. See also: Shipra Chordia et al, 'Submission to the Senate Finance and Public Administration Legislation Committee — Inquiry into Citizen Initiated Referendum Bill 2013' (22 April 2013), UNSW Gilbert + Tobin Centre of Public Law, 1, 3.

²¹² Rainer Grote, *The Swiss Confederation: Introductory Note* (2013) Oxford Constitutional Law <<http://oxcon.ouplaw.com/view/10.1093/law-ocw/law-ocw-cm777.document.1/law-ocw-cm777>>.

²¹³ California Proposition 6 (1978).

²¹⁴ California Proposition 64 (1986).

²¹⁵ California Proposition 8 (2008). Same sex marriage in California resumed after the sponsors were found not to have standing: *Hollingsworth v Perry* (S Ct, No 12–144, 26 June 2013). In *Obergefell v Hodges* (S Ct, No 14–556, 26 June 2015) the Supreme Court held that same sex marriage is guaranteed by the due process and equal protection clauses of the 14th amendment.

²¹⁶ George Williams, 'Referendum Not the Way to Resolve our Impasse on Same-Sex Marriage', *The Sydney Morning Herald* (online), 16 May 2015 <<http://www.smh.com.au/comment/referendum-not-the-way-to-resolve-our-impasse-on-samesex-marriage-20150515-gh31f1.html>>.

²¹⁷ Cotton and Bennett, above n 204, 30; Anne Twomey, 'Dangerous Democracy: Citizens' Initiated Referenda in California' (2010) 21 *Public Law Review* 70, 72–4. For an empirical analysis see Daniel Bochsler and Simon Hug, 'How Minorities Fare Under Referendums: A Cross-National Study' (Paper presented at the ECPR General Conference, Potsdam, 10–12 September 2009).

to citizen-led deliberative forums,²¹⁸ which combine democratic engagement with some elite oversight, or — as in senator Madigan’s proposal — retain a decisive role for Parliament. This shift recognises that ‘Governments have a duty to guard against the persecution of an unpopular minority’,²¹⁹ and is a positive compromise between responsible and representative government and popular democracy.

Second, at a theoretical level, it may be that CIR mechanisms are incompatible with responsible government and representative democracy,²²⁰ a point that likely proved decisive during the constitutional debates. Indeed, as noted above, despite the value that the drafters placed on the Swiss Constitution, CIR was dismissed by all but Kingston. Although New Zealand utilises an advisory non-binding CIR mechanism as an augmentation rather than a replacement to its Westminster model of government, it is unclear whether such a model could be transplanted into Australia. An important element of responsible government in Australia is the notion of accountability that stems from free and fair elections between competing political parties with distinct policies. As the 1988 Constitutional Commission noted, the existing arrangements provide that proposals for alteration of the *Constitution* must first be deliberated in Parliament, ‘with due regard for the proposal’s consistency with the existing and foreshadowed legislation of the Government of the day’.²²¹ The concern is that CIR mechanisms may introduce proposals contrary to government policy, compromising its authority, de-legitimising its governance and weakening principles of accountability.²²² This is not to say that an adapted CIR-model with appropriate Parliamentary oversight, such as the deliberative forums examined by Paul Kildea, may not avoid the pitfalls of a pure CIR and enhance s 128. Additionally, if structured appropriately, it may not mark a dramatic shift from the current provision but could reflect the compromises struck in the 1890s.

2 A Referendum Where Parliament is Divided

The question of division between the Houses of Parliament is dealt with in two sections of the *Constitution*. Where the House of Representatives passes a proposed law but it is twice rejected by the Senate during a period of at least three months, two options arise: in the case of an ordinary law, dissolution of the entire Parliament,²²³ and in the case of a proposed law for the alteration of the *Constitution*,

²¹⁸ See, eg, Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012); Kildea, above n 16; Levy, above n 16.

²¹⁹ *Final Report of the Constitutional Commission 1988*, above n 180, 869 [13.81].

²²⁰ *Ibid* 868–9 [13.75]–[13.80], though cf 870–1 [13.91]–[13.92]. See also Elizabeth McLeay, ‘Democratic Experiments in New Zealand’ in Commonwealth, *Democratic Experiments*, *Parl Paper No 44* (2006) 91, 99–100.

²²¹ *Final Report of the Constitutional Commission 1988*, above n 180, 868 [13.76].

²²² Chordia et al, above n 211, 1, 2–3. Although clearest in the case of proposals to amend legislation, this could also occur with constitutional CIR.

²²³ *Constitution* s 57.

a referendum.²²⁴ These circuit breaker provisions provoked substantial debate, with delegates wary of the delicate balance between popular sovereignty and responsible and representative government.

In Melbourne in 1898, Isaacs proposed amending the alteration clause to permit a proposed amendment to be brought to the popular vote if there was a dispute between the House of Representatives and the Senate.²²⁵ Isaacs had in mind the difficulties encountered with the *United States Constitution* noted earlier, as well as those in the lived experience of the legislatures of the Australian colonies²²⁶ and, of course, democratic principles. He did not distrust elected representatives, but recognised that members of Parliament are elected on a variety of questions, some obscured, and in those circumstances it may on occasion be more appropriate to ask the people themselves.²²⁷ Interestingly, Isaacs predicated his support on two of Andrew Thynne's pragmatic justifications — as a way to deal with Parliamentary congestion²²⁸ and to entice the people of the colonies to support federation.²²⁹ However, opposing delegates questioned whether such a proposal was necessary,²³⁰ an infringement on states' rights,²³¹ or even congruent with representative and responsible government.²³²

George Reid and Higgins backed the proposal as 'a question of common sense'.²³³ John Quick and Robert Garran observe that the proposal would simply deny one House the ability to delay or obstruct 'the submission of a proposed amendment to the people'.²³⁴ While clearly a democratic and liberal initiative, by applying equally to both Houses it did not contain any covert anti-federalist implications. In fact, in allowing the people to vote on referenda initiated by the Senate, Isaacs' proposal had

²²⁴ Ibid s 128.

²²⁵ *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 717.

²²⁶ Jack Richardson, 'Resolving Deadlocks in the Australian Parliament' in Geoffrey Lindell and R Bennett (eds), *Parliament: The Vision in Hindsight* (Federation Press, 2001) 291, 296.

²²⁷ *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 722. See also Baker, above n 125, 43.

²²⁸ *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 717.

²²⁹ Ibid 719.

²³⁰ Ibid 717–2 (Josiah Symon, Patrick Glynn and Bernhard Wise), 757–63 (Edward Braddon and John Forrest).

²³¹ Ibid 736 (Patrick Glynn); 745 (Richard O'Connor); 747 (Henry Dobson); 752–4 (Vaiben Solomon and James Howe); 764 (Bernhard Wise).

²³² Ibid 725 (John Downer and Bernhard Wise); 740, 746–7 (Henry Dobson); 743–4 (William McMillan); 744 (Edward Braddon); 751 (Edmund Barton).

²³³ Ibid 736 (George Reid); 740 (Henry Higgins).

²³⁴ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Australian Book Company, 1901) 992.

important pro-federalist implications — a point recognised by John Downer.²³⁵ Additionally, Isaacs considered that ‘instead of being adverse to responsible government’, his proposal carried ‘responsible government to the very highest point’:²³⁶ where the Parliament is divided, and persists in its division, the people should be allowed to decide.

Conversely, Henry Dobson considered that Isaacs’ proposal struck ‘at the very root of our system of government’,²³⁷ for, as McMillan noted, it asked the people ‘to practically legislate for themselves’.²³⁸ Under a system of responsible and representative government, ‘the people’, as Dobson argued, ‘admit that they have not the experience, the intelligence, or the time to govern themselves, and, therefore, they depute representatives to do it for them’.²³⁹ It was sufficient, he argued, that the people return members ‘disposed to make [such] amendment[s]’ as they desire,²⁴⁰ and the expense of a referendum was unnecessary and undesirable.²⁴¹

While the motion was negatived in Melbourne,²⁴² it became part of the eventual text at the 11th hour, at the Premier’s Conference held in Melbourne over five days beginning on 29 January 1899.²⁴³ Following the failure of the Convention Bill to obtain the statutory quota of 80 000 votes required in New South Wales (although obtaining a majority vote in favour),²⁴⁴ both Houses asked that it be reconsidered.²⁴⁵ When it was inserted, a statutory majority was achieved.

Although not yet relied upon, this amendment permits a divided Parliament to seek the view of the Australian people in the event of persistent division. In so doing it operates as a circuit breaker, preventing one House of Parliament from blocking a proposal being put to the people. Because the Australian Senate is an elected body (whose members are elected under a different electoral system) this is an important and necessary provision. In contrast, appointed Upper Houses, such as the English House of Lords or the Canadian Senate, suffer from democratic deficits and thus rarely oppose, or are prevented by convention or legislation from opposing, certain

²³⁵ *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 725 (John Downer). See also Sarah Murray, ‘State Initiation of Section 128 Referenda’ in Kildea, Lynch and Williams (eds), above n 16, 332, 338.

²³⁶ *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 756.

²³⁷ *Ibid* 746.

²³⁸ *Ibid* 743.

²³⁹ *Ibid* 746.

²⁴⁰ *Ibid* 757 (Bernhard Wise).

²⁴¹ *Ibid* 755 (James Howe).

²⁴² By 31 votes to 14: *Ibid* 765.

²⁴³ Aroney, above n 18, 178. Deakin, above n 142, 102.

²⁴⁴ Quick and Garran, above n 234, 218.

²⁴⁵ *Ibid* 988.

types of Bills passed in their respective lower Houses.²⁴⁶ Although the Canadian Senate could block supply, a constitutional crisis the like of which occurred in Australia is unlikely to arise. Therefore, such jurisdictions do not have a ‘circuit-breaker’ double-dissolution provision.

D *Strengthening States’ Rights*

Two further issues at the crux of federalism were examined during the Convention Debates, both having significant consequences for the future federation. The first — whether there should be an extra hurdle requiring the consent of a state in order to alter or diminish its proportionate representation, was decided quickly. The second — whether the states themselves should be able to initiate a referendum proposal, was roundly ignored.

1 *The Triple-Majority Safeguard*

Section 128 provides that in order to alter or diminish the proportionate representation of a state, the electors of *that* state must vote in favour. This extra hurdle has its roots in federalism, satisfying the fears of the smaller states by preventing the larger states from abusing their size in order to reduce the representation and power of the small states in the central government.²⁴⁷

At Adelaide in 1897 Higgins wondered whether the extra hurdle was necessary. He suggested that it might unduly restrict the Commonwealth by tying it to contemporary circumstances, which may be entirely different in the future:

So it is possible for one colony, according to this proposal to be wiped out and become as bare as the plains of Babylon, but still to remain in possession of the same representation. I wish members to face the position which is the most absurd that any legislation can contemplate.²⁴⁸

Despite Higgins’ protestations, the clause was agreed to with minimal discussion. However, Higgins was not content, and in Melbourne he made a last-ditch effort to amend the triple majority provision. Higgins proposed that the triple majority be retained only ‘for a term of ten years from the establishment of the Constitution’, but offered to extend it to 20 in the spirit of ‘conciliatory compromise’.²⁴⁹ Perhaps underscoring the antagonism engendered by this proposed amendment, Braddon interjected ‘put in 100 years’.²⁵⁰

²⁴⁶ In the UK, see *Parliament Act 1911* 1 & 2 Geo 5, c 13.

²⁴⁷ *Official Report of the National Australasian Convention Debates*, Sydney, 8 April 1891, 885 (Duncan Gillies).

²⁴⁸ *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 1028.

²⁴⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 9 February 1898, 768.

²⁵⁰ *Ibid.*

Higgins' argument, based as it was on democratic legitimacy and popular sovereignty at the expense of the federal compact, was doomed to fail from the outset. Despite Higgins' exhortations that the people of the larger states may find eternal equal representation untenable and reject the draft *Constitution*, the smaller states were united in their refusal to budge.²⁵¹ The death-knell for Higgins' proposal came from George Reid, Premier of New South Wales, who, despite noting his support for the proposal, resigned to vote against it in order to secure federation.²⁵² Higgins' proposal failed 34 votes to two.

2 State-Initiated Referenda

One other suggestion, made by Deakin at Melbourne in 1898, was to enable state legislatures to initiate proposals to amend the Commonwealth *Constitution*.²⁵³ The ability of states to propose amendments is one of the significant features of Article V of the *United States Constitution*.²⁵⁴ In light of the heavy reliance that the delegates placed on the *United States Constitution*, it is surprising that Deakin never moved his mooted amendment, and it appears to have been forgotten during the rest of the discussion. This is even more evident as, opposed to CIR, providing state legislatures with this power would not have weakened representative and responsible government (though it would have strengthened federalism). The final text of s 128, and its form today, continue to deny a mechanism for the states to propose constitutional amendments — though proposals to amend this have been made from time to time.

On second thoughts, however, its absence may be unsurprising. Indeed, at the time Isaacs dismissed the suggestion by noting that his own proposal 'will give the states power to do that through their accredited representatives, the senators'.²⁵⁵ As Jeffrey Goldsworthy has stated, the Premiers who eventually agreed to the final wording of s 128 at the 1899 Conference 'seem to have believed, albeit erroneously, that they had achieved' that outcome, 'they relied on the Senate, but it has failed them'.²⁵⁶ Goldsworthy contends therefore that s 128 lacks the federal balance which it 'was originally intended to have'.²⁵⁷

²⁵¹ Frederick Holder considered it a breach of the federal compact. See *ibid.*

²⁵² *Ibid* 769–70. Of course, similar pacts were reached in the United States and Switzerland.

²⁵³ *Ibid* 730.

²⁵⁴ Although it has never been successfully invoked, it may have propelled the Congress to propose the 17th Amendment: Akhil Reed Amar, *America's Constitution: A Biography* (Random House, 2005) 290; James Kenneth Rogers, 'The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process' (2006) 30 *Harvard Journal of Law and Public Policy* 1005, 1008.

²⁵⁵ *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 730.

²⁵⁶ Jeffrey Goldsworthy, 'A Role for the States in Initiating Referendums' (Paper presented at the Eighth Conference of the Samuel Griffith Society, Canberra, 7–9 March 1997) 5; Sarah Murray makes the same point, above n 16, 332.

²⁵⁷ Goldsworthy, above n 256; Murray, above n 16, 339.

However, while it is true that s 128 does not operate as a proxy for states interests, as Commonwealth senators have largely failed to propose questions to alter the federal balance towards the states, significantly, not all framers believed that the Senate would operate this way. Indeed, Nicholas Aroney's study indicates that for many drafters, equal *representation* was considered a right of each state, whether or not their representatives would protect the interests of their state.²⁵⁸ For example, in Melbourne in 1898, Higgins cast his mind forward and perceptively considered how the Senate would operate: 'there will be no real line of cleavage between small states and large states as such; there will be the old lines of cleavage of conservative and liberal parties in the large and small states'.²⁵⁹ Despite a clear intent to include a strong notion of federalism within s 128, it is not at all clear that the federal balance was to lean as far as Goldsworthy suggests.

Nevertheless, a mechanism to enable state Parliaments to initiate referenda was advocated for at three Constitutional Conventions in 1973, 1975 and 1985, and was unanimously recommended by the 1988 Constitutional Convention.²⁶⁰ And at times, some states have advocated for particular questions to be posed.²⁶¹ However, no referendum has sought to provide this power to the states. Conversely, of the 44 referenda: 17 have sought to increase Commonwealth economic power; four have sought to increase non-economic Commonwealth power; and two (almost three) have sought Commonwealth involvement in local government. Interestingly, as Scott Bennett notes, the only successful referenda that have sought to increase Commonwealth power 'were not typical of such questions',²⁶² suggesting that leaving the initiation solely in the hands of the Commonwealth Parliament has contributed to the low success rate.

Ultimately, whether the drafters believed that future Commonwealth senators would protect their home states by posing referendum questions to tilt the federal balance away from the central government or not, the absence of a procedure for states to propose referendum questions has helped to continue the shift towards centralisation.²⁶³ In s 128's second limb the compromise the drafters struck imbued the

²⁵⁸ Aroney, above n 18, 359–60.

²⁵⁹ *Official Record of the Debates of the Australasian Federal Convention, Melbourne*, 9 February 1898, 768. See also *Official Record of the Debates of the Australasian Federal Convention, Sydney*, 9 September 1897, 263 (Henry Higgins); *Official Report of the National Australasian Convention Debates*, Sydney, 17 March 1891, 434 (John Macrossan).

²⁶⁰ *Final Report of the Constitutional Commission 1988: Summary* (Australian Government Publishing Service, 1988) vol 1, 75(i).

²⁶¹ See, eg, Western Australia's response to the *Mabo* decision: Richard Bartlett, 'Political and Legislative Responses to *Mabo*' (1993) 23 *University of Western Australia Law Review* 352, 353.

²⁶² Bennett, above n 85, 20.

²⁶³ Murray, above n 16, 334–5; David Solomon, 'Federalism, Impact of Court's Decisions on', in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 275, 275.

referendum mechanism with a strong federalist element; as this article as illuminated, however, federalism did not surpass all other concerns.

IV CONCLUDING REMARKS

Tracing the evolution of s 128 exposes the ideological conflicts that affected the convention delegates in and around the late nineteenth century. These conflicts clearly impacted the text eventually adopted. The first limb of s 128 — that a majority of voters must approve a proposed alteration to the *Constitution* — reflects democracy and its underpinning notion of popular sovereignty. The second limb — that a majority of states must also approve — reflects federalist concerns. Finally, that a proposed alteration can only be initiated by the Commonwealth Parliament reflects the essential framework of representative and responsible government.²⁶⁴ As Cheryl Saunders has noted, holistically, the design of s 128 is ‘consistent with the federal structure of the *Constitution*, the manner in which it was made and the generally progressive aspirations for it in 1901’ —²⁶⁵ it is a compromise, but a well struck one.

Although this exercise has demonstrated that no single intent animated the drafters, perhaps a narrow purpose can be found. Addressing Parliament in 1902, Alfred Deakin clarified the Convention’s thinking behind s 128. Deakin explained that the *Constitution* ‘was felt to be an instrument not to be lightly altered, and indeed incapable of being readily altered’.²⁶⁶ It is a view that reverberates with Quick and Garran:

These are safeguards necessary not only for the protection of the federal system, but in order to secure maturity of thought in the consideration and settlement of proposals leading to organic change. These safeguards have been provided, not in order to prevent or indefinitely resist change in any direction, but in order to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible, and inevitable.²⁶⁷

Debate will continue over the appropriateness of the compromise struck by the drafters.²⁶⁸ And certainly, as this paper has illustrated, many of the positions that

²⁶⁴ Susan Crennan, ‘Section 128 of the Commonwealth Constitution and Constitutional Change’ (Speech at La Trobe University Law Student’s Association, Melbourne, 22 August 2013) 14.

²⁶⁵ Saunders, above n 87, 48. Or, as Robert Garran framed it: The amendment mechanism must be ‘consistent alike with federalism, with state rights, and with progress’: Garran, above n 48, 183.

²⁶⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10965 (Alfred Deakin, Attorney-General).

²⁶⁷ Quick and Garran, above n 234, 988.

²⁶⁸ It is likely that debate never truly ceased. See, eg, discussion concerning suggested alterations of s 128 in the *Report of the Royal Commission on the Constitution* (1929), 234–9.

motivated the convention delegates no longer animate contemporary Australians, and many of the justifications offered to support their contentions are clearly anachronistic. However, as the success of the 1977 referendum demonstrated, the final text adopted by the delegates was only ever a temporary compromise. As Australians continue to debate constitutional change, the mechanism by which those changes are implemented as developed by the drafters should not go unquestioned. The political and historical context, including the resolution of competing ideologies in the current formulation of s 128 will, it is hoped, inform that debate.

