POLICING POPULAR SOVEREIGNTY: ROYAL ASSENT TO AN ANTI-DEMOCRATIC OR INTOLERANT CONSTITUTIONAL AMENDMENT

HENRY PALMERLEE*

Should Australia's Governor-General refuse royal assent to an anti-democratic or intolerant constitutional amendment that has been approved at referendum? The limits on the Australian people's power to amend their own constitution have, to date, been the subject of limited scholarship. Through application of Yaniv Roznai's theory of constitutional unamendability, it is argued that political constitutionalism is a core tenet of the Australian constitutional order, a tenet which would likely call for a refusal of assent to an anti-democratic amendment. By contrast, Australia's relatively weak tradition of legal constitutionalism would not stand in the way of an intolerant alteration to the Australian Constitution*. Understanding the legitimate boundaries of the Governor-General's authority is an ongoing project in Australian constitutional theory. However, these issues can provide fresh insight on long-running academic debates about the role of Commonwealth vice-regal representatives and the source of the* Australian Constitution*'s authority.*

I INTRODUCTION

Vox populi, *vox Dei*.[1]

There never was a Democracy Yet, that did not commit suicide.[2]

The content of the *Australian Constitution* is controlled by the Australian people and their elected representatives. The referendum process in s 128 embodies Australia's strong tradition of popular sovereignty, but also raises the question posed by all constitutional amendment procedures: should it be possible to unmake or radically alter a constitution via amendment? In this article, I link that question to the Governor-General's reserve power to refuse assent to a

* LLB (University Medal)/BPPE, Australian National University. I am grateful to Ron Levy, Ryan Goss, Kieran Pender, Grace Underhill, Renato Costa, and Rebecca Ananian-Welsh for their generous suggestions and insight, and the usual disclaimer applies. I also thank the anonymous referees for their thoughtful comments.

1 Latin proverb, generally translated to 'the voice of the people is the voice of God'.

2 Letter from John Quincy Adams to John Taylor, 17 December 1814, <https://founders.archives.gov/documents/Adams/99-02-02-6371>.

DOI:

constitutional alteration, and examine certain circumstances in which the substance of an alteration might justify the refusal of assent.

Part II first surveys existing literature on the reserve power to refuse assent, and finds that constitutional referendums have, to date, been largely unaddressed by scholars. Part III then briefly summarises Yaniv Roznai's theory of unconstitutional constitutional amendments. The theory says that constitutional amendment powers are a form of delegated constituent power. By virtue of only being a subordinate power, the amendment of a constitution must always be subjected to an implicit limitation: that it cannot be used to create an entirely new constitution. I conclude this methodological section by suggesting that there is at least a prima facie case for the theory being applicable in the Australian constitutional context.

In Part IV, I focus on a specific element of Roznai's theory: the spectrum of unamendability. I suggest that the spectrum concept might be modified to better reflect imperfections in the historical use of constituent power. On this account, we calibrate the limits of the s 128 amendment power with reference to Australia's original exercise of constituent power during the framing and ratification process, thereby tailoring Roznai's theory to our context. This modification, I argue, allows us to square-the-circle between popular sovereignty and constitutional unamendability — two concepts which could otherwise stand in significant tension.

Finally, Part V applies Roznai's theory to investigate whether the Governor-General should refuse assent to a constitutional amendment that is either *fundamentally* (A) anti-democratic or (B) intolerant. For my purposes, an 'anti-democratic' amendment substantially limits procedural aspects of the democratic system of government; an 'intolerant' amendment negatively discriminates based on a given attribute.[3] I argue that Roznai's generalised theory can be applied in

---

[3] I specify 'procedural aspects of the democratic system of government' here to emphasise that the article adopts a procedural (cf substantive) conception of the term '(anti)democratic'. A procedural definition of democracy is one which focuses solely on the institutions which guarantee legitimate electoral contestation and alternation of power — in other words, the institutions which ensure that 'parties lose elections': Adam Przeworski, *Democracy and the Market* (Cambridge University Press, 1991) 10. See further discussion of 'competition' in Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (George Allen & Unwin, 1942); and 'contestation' in Robert A Dahl, *Polyarchy: Participation and Opposition* (Yale University Press, 1971). This definitional issue is important because it enables a meaningful distinction to be drawn between 'democracy' and 'tolerance'. By contrast, substantive definitions of democracy often stipulate certain principles of equality as elements of democracy in a way that amalgamates 'democracy' and 'tolerance', terms which I will use in contradistinction. See, eg, Freedom in the World global report which provides a 'maximalist' substantive definition of democracy: Gerardo L Munck and Jay Verkuilen, 'Conceptualizing and Measuring Democracy: Evaluating Alternative Indices' (2002) 35(1) *Comparative Political Studies* 5, 28. To be sure, however, even on a procedural definition of what constitutes an 'anti-democratic' referendum, there will be examples which are simultaneously 'intolerant'. In the Australian context, Rosalind Dixon has written recently on 'responsive constitutionalism' and its

Australia via the concepts of legal and political constitutionalism. The *Constitution*'s commitment to controlling government power via *political* limitations is one of its core defining features. I conclude that an anti-democratic amendment would remove this defining feature, thereby creating a new constitution; an intolerant amendment, meanwhile, would not. The Governor-General would therefore be justified in refusing assent to an anti-democratic alteration because it is beyond the scope of the s 128 amendment power.

This article is primarily a piece of conceptual constitutional jurisprudence. While it is reassuring to imagine the head of state acting as a boundary-rider *in extremis*, my main objective is theoretical: to test unspoken assumptions about Australian constitutionalism. These include the extent of our *Constitution*'s liberal–democratic commitments; the Governor-General's proper role in Australian political life; and the power of 'the people' to radically remake their politico-legal compact. The powers of vice-regal representatives in Commonwealth countries are at once enormous and poorly understood, as the perennial controversy over the Whitlam Dismissal demonstrates. I submit in the following Part that existing work on reserve powers has little to say about the relationship between vestigial monarchy and constitutional amendment.

Despite its conceptual focus, this article's themes connect to contemporary anxiety regarding the use of democratic processes to effect anti-democratic or intolerant outcomes. The global trend of 'backsliding' in democratic polities has frequently taken the form of a 'constitutional coup' — a process that is formally legal, but which nevertheless results in a radically different constitutional order.[4] Moreover, while noting that s 128 does not provide for citizen-initiated constitutional amendments, other liberal societies have seen the use of direct-democratic mechanisms for intolerant purposes. In 2008 California passed Proposition 8, a successful citizen-initiated referendum banning same-sex marriage.[5] Switzerland held a successful referendum to ban the construction of

---

'*overlapping* commitments' to the 'democratic minimum core', on one hand, and 'thicker understandings of democracy, which emphasise…individual rights and democratic commitments', on the other: Rosalind Dixon, 'Responsive Constitutionalism in Australia' (2024) 52(3) *Federal Law Review* 359, 359–62 (emphasis added). The implications for my argument of this potential for overlap will be discussed in more detail below in Part V.

4 For example, Recep Tayyip Erdoğan's successful 2017 referendum which converted Türkiye into a heavily presidential system with power concentrated in the executive. On constitutional coups, see Kim Lane Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)' (2014) 23(1) *Transnational Law and Contemporary Problems* 51. On backsliding generally, see Nancy Bermeo, 'On Democratic Backsliding' (2016) 27(1) *Journal of Democracy* 5; Susan D Hyde, 'Democracy's Backsliding in the International Environment' (2020) 369 *Science* 1192; Larry Diamond, 'Democratic Regression in Comparative Perspective: Scope, Methods, and Causes' (2021) 28(1) *Democratization* 22; Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown, 2018).

5 See, eg, Michael J Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford University Press, Oxford University Press paperback edition, 2014) ch 6.

Islamic minarets in 2009.[6] This global context has catalysed renewed academic interest in 'militant democracy' theory, which considers ways in which constitutional democracies might protect their democratic system from non-democratic actors.[7] This article aims to contribute to burgeoning Australian interest in militant democracy, and investigate the potential for the Governor-General to play a role in protecting Australian democracy from itself.[8]

II The Refusal of Royal Assent

Before it becomes law, a Commonwealth Bill that has passed both Houses of Parliament must receive royal assent, granted by the Governor-General on the monarch's behalf.[9] This Part briefly sketches the nature of the Governor-General's reserve power to refuse assent, and the existing literature addressing such refusal in the context of ordinary legislation. Constitutional referendums are then identified as an under-examined type of instrument to which the Governor-General might withhold assent.

Although royal assent is almost always granted to legislation, the Governor-General is more than a 'nodding automaton' performing a rubber-stamp function.[10] Vice-regal representatives retain a reserve power — a 'power exercisable by the Queen or the Governor-General, in appropriate circumstances, without or contrary to ministerial advice'[11] — to refuse assent to legislation. While some commentators have doubted whether this power exists at all, academic

---

6 See, eg, Vista Eskandari and Elisa Banfi, 'Institutionalising Islamophobia in Switzerland: The Burqa and Minaret Mans' (2017) 4(1) *Islamophobia Studies Journal* 53.

7 Jan-Werner Müller, 'Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy' (2016) 19(1) *Annual Review of Political Science* 249, 251 ('Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy'). See generally Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 *American Political Science Review* 417; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31 *American Political Science Review* 638; Jan-Werner Müller, 'Militant Democracy' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1253 ('Militant Democracy'); Anthoula Malkopoulou and Alexander Kirshner (eds), *Militant Democracy and Its Critics* (Edinburgh University Press, 2019).

8 For recent work on militant democracy in the Australian context, see Svetlana Tyulkina, 'Militant Democracy: An Alien Concept for Australian Constitutional Law' (2015) 36(2) *Adelaide Law Review* 517; Bohdan Bernatskyi and Marina Gorbatiuc, 'Protecting Australian Democracy: From Attempting to Ban the Communist Party to Resisting Foreign Interference' (2023) 15(2) *Australian and New Zealand Journal of European Studies* 33.

9 *Australian Constitution* s 58.

10 *Federation of Pakistan v Moulvi Tamizuddin Khan* (1955) PLD FC 240 (Munir CJ) (Federal Court of Pakistan).

11 Michael Crommelin, 'Powers of the Head of State' (2015) 38(3) *Melbourne University Law Review* 1118, 1123.

consensus largely accepts the existence of a reserve power to refuse assent.[12] Given the relative similarity of the role of vice-regal representatives across the Commonwealth, scholars have reflected on a global array of case studies to identify situations in which the power ought, or ought not, to be exercised. Mooted examples include where legislation is: passed in a procedurally defective manner, or; the Prime Minister has advised against giving assent, or; the vice-regal representative simply believes the legislation to be undesirable.[13] There has been no shortage of scholarly debate regarding the scope of the reserve power in various complex situations.[14]

Commentators have been especially interested in legislation that runs contrary to prevailing societal norms regarding democracy, rights, and political morality — in particular, anti-democratic or intolerant legislation. Such laws raise difficult questions about whether the Governor-General should play any role in evaluating the substance of Commonwealth laws. On this point, most Australian commentators have arrived at a similar conclusion: that the Governor-General should defer to the High Court's judgement regarding the law's constitutional validity.[15] Twomey, for example, argues that the Governor-General simply 'is not relevant' because the offending law would be dealt with by the High Court.[16] The refusal of assent was also contemplated by Kirby J, regarding any law 'which clearly offends basic constitutional norms'.[17] The Governor-General's role with respect to legislation that may contravene the *Constitution* is therefore limited to *non-justiciable* constitutional breaches.[18] The difficulty, as Tony Thomas observes, is identifying when such a non-justiciable breach would arise.[19]

---

12 Anne Twomey, *The Veiled Sceptre* (Cambridge University Press, 2018) ch 9 ('*The Veiled Sceptre*'). Cf George Winterton, 'The Constitutional Position of Australian State Governors' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) 274; Ivor Jennings, *Cabinet Government* (3rd ed, Cambridge University Press, 1959) 400.

13 For a comprehensive taxonomy of such possibilities, see Twomey, *The Veiled Sceptre* (n 12) ch 9.

14 See, eg, Anne Twomey, 'The Refusal or Deferral of Royal Assent' [2006] *Public Law* 580 ('The Refusal or Deferral of Royal Assent'); Kate Murray, 'Royal Assent in Victoria' (2008) 23(2) *Australasian Parliamentary Review* 41; Y Allard-Tremblay, 'Proceduralism, Judicial Review and the Refusal of Royal Assent' (2013) 33(2) *Oxford Journal of Legal Studies* 379; Greg Taylor, 'Two Refusals of Royal Assent in Victoria' (2007) 29(1) *Sydney Law Review* 85; Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation — On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126.

15 Twomey, 'The Refusal or Deferral of Royal Assent' (n 14) 591. See further Murray (n 14) 56; Anne Twomey, 'Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State' (Papers on Parliament No 9, Parliamentary Library, June 2009) 19 ('Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State'); Tony Thomas, 'A Governor for the Seventh State: Codifying the Reserve Powers in a Modern Constitutional Framework' (1999) 29 *Western Australian Law Review* 225.

16 Twomey, 'Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State' (n 15) 31.

17 *Durham Holdings v New South Wales* (2001) 205 CLR 399, 432.

18 See, eg, George Winterton, *Monarchy to Republic: Australian Republican Government* (Oxford University Press, 1986) 46.

19 Thomas (n 15) 233.

Constitutional referendums present one such possibility, since the High Court might decline to entertain a challenge to the substance of a referendum.[20] In this situation, the Governor-General could refuse assent to an anti-democratic or intolerant constitutional alteration supported by an affirmative vote at referendum. These questions regarding the role of the High Court are necessarily very difficult to answer conclusively in constitutional edge-cases, and it is unnecessary for my purposes to do so. However, even were the High Court to hear such a challenge, the Governor-General would have the earlier opportunity to counteract an objectionable constitutional alteration. There may well be no more important legal norm than protecting the *Constitution* — the supreme law of the land — from being undermined.[21] Hence, whether acting as a constitutional lone wolf or allied with the High Court, there appears to be a role for the Governor-General to play in reacting to an anti-democratic or intolerant alteration to the *Constitution*.

This subject has been addressed obliquely by some earlier scholars, who have considered the possibility of the Governor-General refusing to submit a constitutional alteration to the electors. The wording of s 128 suggests that such a possibility may be open to the Governor-General in circumstances where one House of Parliament has passed the proposed law twice (over the refusal or failure of the other House to do so).[22] More generally, Quick and Garran dismissed the idea that the Crown would intervene in any referendum besides those involving 'Imperial or international policy'.[23] However, the question of whether the reserve power to refuse assent should be exercised against an alteration which has passed at referendum has received very little attention. Is the people's control over the *Constitution* unlimited, or should the Governor-General, the most powerful and visible manifestation of monarchical rule, intervene to save Australian liberal democracy from itself? This issue — whether the reserve power to refuse assent could be exercised in response to an anti-democratic or intolerant alteration — has been under-theorised and will be the focus of the analysis that follows.

---

20 See Graeme Orr, 'The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective' (2000) 11 *Public Law Review* 117; Graeme Orr, 'Electoral Reform as a Tonic for Referenda and Federalism: A Response to Professor Craven' (2005) 20(2) *Australasian Parliamentary Review* 83, 86; Graeme Orr and George Williams, 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia' (2001) 23(1) *Sydney Law Review* 53, 92–3.

21 See generally Gary Lawson, 'Stare Decisis and Constitutional Meaning: Panel II: The Constitutional Case against Precedent' (1994) 17 *Harvard Journal of Law & Public Policy* 23.

22 Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 320–1. Aroney discusses the portion of s 128 which provides for a situation in which either house passes an amendment Bill by an absolute majority, and the other house rejects or fails to pass the Bill. In these circumstances, the Governor-General is empowered to submit the alteration to referendum if the first-mentioned house passes the Bill a second time, after a three-month period. See generally H V Evatt, 'Amending the Constitution' (1937) 1 *Res Judicatae* 264.

23 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 994.

III Roznai's Theory of Unconstitutional Constitutional Amendments

Can the democratic process be used to limit democracy?[24] Should a tolerant society tolerate intolerance?[25] Theorists since Alexis de Tocqueville have recognised liberal democracy's vulnerability to the majority will.[26] As Hannah Arendt described it, 'the so-called will of a multitude … is ever-changing by definition, and … a structure built on it as its foundation is built on quicksand'.[27] Considering whether royal assent should be refused to an alteration approved through a valid referendum enlivens the exceedingly difficult issue of setting principled limits on the people's power. A growing literature has sought to define the extent to which restraints can and ought to be applied to the content of constitutional amendments. Roznai has developed a comprehensive theory of 'unconstitutional constitutional amendments' that aims to address this question. In this Part, I briefly outline Roznai's theory before arguing that there is at least a prima facie case for the theory's applicability in the Australian constitutional context.

A *Roznai's Theory*

In broad terms, Roznai's theory of unconstitutional constitutional amendments proceeds via four key steps.[28] First, he canvases the idea of constituent power — the people of a nation's 'power to establish the constitutional order of [that] nation'.[29] Constitutions are established via an exercise of constituent power, an exercise which in turn creates 'constituted power' (power granted and conditioned by the constitution).[30]

Second, Roznai defines the power to amend the constitution as *sui generis*, existing in a discrete category somewhere between constituent and constituted power. Since it is exercised pursuant to the constitution, the amendment power

---

24 For a detailed discussion of this 'democratic paradox', see Müller, 'Militant Democracy' (n 7).

25 Karl Popper, *The Open Society and Its Enemies* (Princeton University Press, 2013) 581. See further John Rawls, *A Theory of Justice* (Harvard University Press, 1999) 190–4.

26 Alexis de Tocqueville, *Democracy in America*, tr Harvey C Mansfield and Delba Winthrop (University of Chicago Press, 2000) vol 1 pt 2 ch 7. See further Edmund Burke, *Correspondence of Edmund Burke Between the Year 1774–1797*, ed Charles William, Earl Fitzwilliam and Sir Richard Bourke (Rivington, 1844) vol 3, 147; John S Mill, *On Liberty* (Batoche Books, 2001) 8–9.

27 Hannah Arendt, *On Revolution* (Penguin Books, 1963) 163.

28 See Adrienne Stone, 'Unconstitutional Constitutional Amendments: Between Contradiction and Necessity' (2018) 12(3) *Vienna Journal on International Constitutional Law* 357, 358–9.

29 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2019) 105 ('*Unconstitutional Constitutional Amendments*').

30 See, eg, Martin Loughlin, 'Constituent Power' in Martin Loughlin (ed), *The Idea of Public Law* (Oxford University Press, 2004) 99; Joel Colón-Ríos et al, 'Constituent Power and Its Institutions' (2021) 20(4) *Contemporary Political Theory* 926; Lucia Rubinelli, *Constituent Power: A History* (Cambridge University Press, 2020).

necessarily cannot be an exercise of the original constituent power. As Stephen Tierney describes it, when 'the referendum is provided for by the constitution, its process is regulated by that constitution, and its result takes effect within the normative order of that constitution.'[31] Constituent power has 'retired to the clouds' — it may still be exercised, but not through the existing constitution.[32] Instead of being either purely constituent or constituted power, Roznai views the amendment power as a form of delegated constituent power, held on trust by the body authorised to change the constitution.

This concept of delegation — a principal-agent relationship — is critical to understanding Roznai's theory. In Australia, 'the people' wear two different hats. They are both the principal who originally approved the *Constitution* using their constituent power; and the agent to whom the ability to amend the *Constitution* was then delegated. This will not be the case in all jurisdictions — in nations such as Hungary and India, Parliament holds the power to amend the constitution. However, due to the stringently 'popular' nature of Australia's constitutional amendment process, the Australian people have a dual character under Roznai's theory: they act as an agent if amending the *Constitution*, and the principal if creating an entirely new constitutional order.[33]

Third, because of its delegated nature, the amendment power cannot be used to overrule the original exercise of constituent power — in Australian constitutional terms, 'a stream cannot rise higher than its source'.[34] This is the case even where the constitution in question does not contain any *explicit* prohibition on amendment. The very fact of delegation, of constituent power being held 'on trust' by the amending authority, implies the existence of limitations on the sort of amendments that may be made.[35]

Fourth, Roznai argues that the content of these limitations varies from country to country, and depends on the 'fundamental core values or principles which form "the spirit of the constitution"'.[36] This is what he calls a 'foundational structuralist' account of constitutions — the view that constitutions:

> reflect certain basic political–philosophical principles, which form the constitution's foundational substance, its essence or spirit. The constitution is structured upon these basic principles and it is no longer the same without them. The destruction of the

---

31 Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012) 12–14.

32 James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (Little, Brown, and Company, 1893) 5.

33 This 'dual character' is analogous to, for example, the dual roles of a settlor-trustee. At different times, the same natural person may occupy different legal positions and exercise different powers flowing from those positions.

34 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J) ('*Communist Party Case*').

35 But see Stone (n 28) 364–5.

36 Roznai, *Unconstitutional Constitutional Amendments* (n 29) 142.

> constitutional core leads to the destruction of the entire constitution, even though particular constitutional provisions continue to be valid.[37]

As such, the delegated amendment power cannot be used to alter a constitution's fundamental core principles — to create a new constitution — because to do so is beyond the scope of that power. Only true constituent power, exercised via a process *outside* the constitution, can be used to dismantle the existing constitution and erect a new one in its place. In Australia, the people vote in a s 128 referendum in their capacity as trustees of the delegated constituent power. As such, they cannot use it to create a new constitution altogether.

Crucially, Roznai accounts for the intuition that an amendment power exercised by the people should be subject to less stringent limits. This intuition informs a 'spectrum of unamendability', premised on an assertion that 'the more similar the characteristics of the secondary constituent power are to those of a democratic primary constituent power … the less it is bound by limitations, and vice versa.'[38] By recognising that not all amending routes are equal, Roznai allows for greater or lesser degrees of unamendability.[39] The implications of the spectrum of unamendability will be explored more fully in Part IVA. In sum, Roznai's argument is that no constitutionally-prescribed amendment procedure is unlimited; but that the strength of the limitations varies depending on the democratic bona fides of the amendment process.

B *Applicability in Australia*

What Roznai advocates for is, in effect, a recognition of some basic structure in every constitution.[40] Basic structure doctrine, while orthodox in many jurisdictions, might be regarded with suspicion by Australian constitutional lawyers. This Part considers two potential objections to the application of Roznai's theory to the *Australian Constitution*, and three further concerns regarding the role of the Governor-General. Importantly, it is not the aim of this article to robustly defend the internal logic of Roznai's theory.[41] Instead, it seeks to demonstrate that it is not implausible to use the theory as an analytical lens

---

37 Ibid 143.

38 Ibid 158.

39 Ibid 174.

40 Ibid ch 2.

41 For such analysis, see Alec Duncan, 'Unconstitutional Constitutional Amendments: The Limits of Amendment Powers Book Review' (2018) 16(1) *New Zealand Journal of Public and International Law* 101; Lech Garlicki and Zofia A Garlicka-Sowers, 'Unconstitutional Constitutional Amendments Mini Symposium: Yaniv Roznai, Unconstitutional Constitutional Amendments' (2018) 12(3) *Vienna Journal on International Constitutional Law* 307; Rehan Abeyratne, 'Unconstitutional Constitutional Amendments: The Limits of Amendment Powers Book Review' (2017) 1(2) *Indian Law Review* 182.

through which to consider the potential refusal of assent to constitutional alterations.

The most obvious objection is simply that the High Court has never endorsed basic structure doctrine and the concept of constituent power from which it is derived as applicable to Australia.[42] This point raises the preliminary issue of whether the High Court's power even includes ruling on the applicability of the concept of constituent power to Australia. The question is a fraught one because it opens the debate about whether constituent power is the correct theoretical lens with which to frame the power of 'the people' in a polity; and if so, what the term in fact means. We might view constituent power as an extra-legal phenomenon that exists anteriorly to institutions like courts.[43] Alternatively, constituent power might be thought of as an epistemic contingency rather than an empirical reality, 'a language used to make sense of and act upon democratic politics'.[44] To conclusively decide the nature of constituent power and its relationship to judicial power is beyond the reach of a single article — and indeed might be beyond the scope of judicial analysis.[45] While it would prove interesting ground for further scholarship, at present, I will note the interaction of constituent power theory and Commonwealth judicial power as an interesting but ultimately tangential point.

More presciently, our objector might rightly note that the opinion of Australia's leading jurists must surely be *relevant* to the question of basic structure doctrine's applicability, irrespective of one's views on the formal power of the High Court. This invites two further replies. Firstly, Australia is often described as a constitutionally 'frozen continent' in which successful alterations to the *Constitution* are few and far between.[46] As such, judicial silence regarding an issue which could have arisen on only eight occasions in 124 years is hardly surprising.[47] Such silence is especially unremarkable when one considers the historic 'unawareness of constituent power in the English-speaking world'.[48] Secondly, notwithstanding the lack of directly relevant jurisprudence, we might consider how the High Court in *Union Steamship Co of Australia Pty Ltd v King* left open the question of whether there are constraints on States' legislative power derived 'by reference to rights deeply rooted in our democratic system of

---

42 As to the debate regarding whether 'constituent power' is an appropriate conceptual lens to apply in Australia, see William Partlett, 'Remembering Australian Constituent Power' (2023) 46(3) *Melbourne University Law Review* 821; William Partlett, 'Australian Popular Political Constitutionalism' (2024) 52(2) *Federal Law Review* 156; cf George Duke and Carlo Dellora, 'Constituent Power and the Commonwealth Constitution: A Preliminary Investigation' (2022) 44(2) *Sydney Law Review* 199.

43 Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press, 2020) 4–8.

44 Rubinelli (n 30) 29.

45 Indeed, an entire field of legal scholarship is devoted to the nature of the 'judicial power' referred to in s 71 of the *Constitution*. A modern classic in the area is James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2nd ed, 2020).

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

47 Australian Electoral Commission, *Past Referenda Fact Sheet* (Fact Sheet, 2012).

48 Yaniv Roznai, 'The Boundaries of Constituent Authority' (2021) 52(5) *Connecticut Law Review* 1381, 1384.

government and the common law'.[49] It is certainly true that 'common law constitutionalism' lies at the fringe of legal scholarship in Australia.[50] Nevertheless, given the High Court's repeated references to the above-quoted passage from the judgment in *Union Steamship*, it is not entirely heterodox to suggest that there may be certain basal principles which undergird the *Constitution*.[51] In a similar vein, constitutional functionalist scholarship has devoted significant attention to constitutional values and advanced the case for their recognition by judges and practitioners.[52] Such basal principles or values could supply basic structure doctrine with work to do in the Australian context.[53]

It is true that, compared to jurisdictions like India in which Parliament exercises the amendment power, the relevance of basic structure doctrine is less immediately apparent. Since s 128 gives final say over a referendum to the people, it might appear that there is no need to protect one decision by the popular sovereign from subsequent amendment by that same popular sovereign. The key point to be remembered, however, is that 'the people' perform different roles at different times. Similarly to the dual roles of a settlor–trustee, the same actor may occupy different legal positions and exercise different powers flowing from those positions. As discussed above, original constituent power can never be exercised via a constitutional amendment procedure because that procedure takes place within the existing constitution's normative order. Even though the Australian people are the repository of constituent power, that power can only be exercised via an extra-constitutional process.

Hence, the consequence of an amendment that purports to create a new constitution is not that the people, having decided to don their 'constituent power' hat, change the constitutional settlement. Rather, the amendment will be invalid because a new constitution simply cannot be created via amendment. It will be argued in Part IV that the more appropriate place to account for the

---

[49] (1988) 155 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson and Gaudron JJ). See further Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' [1957] 31 *Australian Law Journal* 240.

[50] Lisa Burton Crawford and Jeffrey Goldsworthy, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 357, 377. See further William Gummow, 'Common Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 190; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

[51] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 636 (Dawson J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 72 (Dawson J); *Kruger v Commonwealth* (1997) 190 CLR 1, 79 (Toohey J); *South Australia v Totani* (2010) 242 CLR 1, 29 (French CJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 216 (Crennan and Kiefel JJ) ('*Momcilovic*').

[52] See, eg, Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018); Ashleigh Barnes 'Constitutional Dignity post *Farm Transparency*' (2023) 45(4) *Sydney Law Review* 497 ('Constitutional Dignity post *Farm Transparency*').

[53] The application of basic structure doctrine in other common law jurisdictions was given detailed attention in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 562–8 (Zainun Ali FCJ) (Malaysian Federal Court).

intuition that there must be some relevant difference between, for example, India and Australia for basic structure purposes is when considering how broadly to define the irreducible core of those respective constitutions. I contend that a highly participatory, democratic amendment process results in fewer elements of a constitution lying beyond the reach of ordinary amendment procedure.

Another objection might be that Roznai's metaphor of trusteeship or delegation is inapposite to the nature of the amendment power in s 128. However, this metaphor has been used by judges and scholars alike in relation to governmental power. Justices Deane and Toohey describe how 'the powers of government *belong to*...the people of the Commonwealth', and McHugh J similarly argues that 'governments are the *agents* of the people'.[54] Leighton McDonald has opined that 'Parliament, rather than being sovereign, acts as a *trustee* of the people's ultimate sovereign power'.[55] Whether or not descriptors involving trusteeship or delegation are the most technically precise way to describe the s 128 amendment power, such language is clearly not alien to Australian constitutional discourse.

Beyond objections to Roznai's theory, there are at least three possible concerns about the role of the Governor-General in this context. The first is a practical question: would a government capable of presenting an anti-democratic or intolerant amendment appoint a Governor-General decent enough to oppose that amendment?[56] Although the government of the day does not always have occasion to advise His or Her Majesty on the appointment of a new Governor-General, this is certainly a legitimate concern. The government could also advise the monarch to dismiss the Governor-General and appoint a more pliable replacement.[57] We might even note that Parliament could simply ignore a refusal of assent, triggering a constitutional revolution.[58] While these political realist questions are undoubtedly important in an actual crisis scenario, I will assume for present purposes that the Governor-General would be willing and able to discharge their duty with respect to the granting of assent.

Secondly, s 128's existing guardrails might be argued to reduce the Governor-General's relevance in 'policing' referendum outcomes. For one, s 128 does not provide for citizen-initiated referendums. At least one house of Parliament would need to endorse an anti-democratic or intolerant amendment

---

54 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ) ('*Nationwide News*') (emphasis added); *Ridgeway v The Queen* (1995) 184 CLR 19, 91 (McHugh J) ('*Ridgeway*') (emphasis added).

55 Leighton McDonald, 'The Denizens of Democracy: The High Court and the Free Speech Cases' (1994) 5 *Public Law Review* 160, 177 (emphasis in original).

56 I am grateful to Ron Levy for raising this objection.

57 On appointment and removal of the Governor-General see, eg, DR Elder and PE Fowler, *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 2; Anne Twomey, 'The Unrecognised Reserve Powers' (High Court Public Lecture, High Court of Australia, 14 November 2012).

58 See Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press, 2020) ch 2.

Bill for the issue considered in this article to arise. Similarly, the double majority requirement — that a referendum be approved by a majority of electors in a majority of States — fastens a federalist constraint to the amendment procedure. One might argue that these procedural requirements are more appropriate — and less jurisprudentially contentious — safeguards for constitutional amendment.

However, the core issue motivating contemporary interest in militant democracy is not simply that governing by majoritarian direct democracy can produce undesirably outcomes. Rather, the problem is that in *any* democratic political system, regardless of the checks, balances, and decision-making procedures that are adopted, it is possible for a completely legal series of moves to radically undermine important democratic principles.[59] The fact that certain rules govern the process by which Australia's *Constitution* may be amended is no solution to this issue — it simply changes the path that a formally legally constitutional upheaval would need to take. Therefore, it is the Governor-General's position *outside* the democratic system, a sort of constitutional umpire, that makes the refusal of assent a possible last line of defence against a constitutional coup.

The final issue relating to the Governor-General's role is whether the rule of law would be undermined by their taking action to neutralise a referendum. On a Diceyan account, the rule of law abhors 'arbitrary power … [and] wide discretionary authority'[60] — descriptors which could be attached to the reserve powers. Some of the Framers were attentive to this dilemma, with Sir Joseph Carruthers expressing concern about 'the Federation [being] plunged into a broil through the Governor taking responsibility on his [sic] own shoulders'.[61] Making such a momentous constitutional decision would be especially difficult given potential issues about the partisanship of the Crown law officers (from whom the Governor-General would ordinarily receive legal advice).[62] Perhaps the most that Governor-General ought to do is encourage the High Court to intervene. Indeed, Roznai's analysis of unconstitutional constitutional amendments is aimed primarily at elaborating a theory of judicial review of such amendments.[63]

The strongest formulation of this objection — a blanket assertion that the reserve powers are inherently inconsistent with the rule of law — is difficult to

---

59 Militant democracy theorists frequently cite Joseph Goebbels' remark that 'this will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed': quoted in András Sajó, 'From Militant Democracy to the Preventive State?' (2006) 27 *Cardozo Law Review* 2255, 2262.

60 AV Dicey, *The Law of the Constitution*, ed JWE Allison (Oxford University Press, 2013) 119, 233.

61 *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 915 (Joseph Carruthers).

62 See generally Anne Twomey, 'Advice to Vice-Regal Officers by Crown Law Officers and Others' (2015) 26(3) *Public Law Review* 193.

63 See Yaniv Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty' in Richard Albert, Xenephon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, 2017) 46–8 ('Amendment Power, Constituent Power, and Popular Sovereignty').

defend.[64] The High Court has recognised that the *Constitution* was framed with the rule of law as a central concern, repeatedly describing it as a 'constitutional assumption'.[65] This fact alone militates strongly against a view that the office and associated powers of the Governor-General — themselves a part of the *Constitution* — are invariably inconsistent with the rule of law.

A more nuanced formulation of the objection could instead be that, *in some instances*, the rule of law would require the Governor-General not to exercise their reserve power to refuse assent. It is neither necessary nor feasible for this article to exhaustively catalogue all such instances. Specifically in relation to unconstitutional alterations, however, I suggest that the rule of law could actually be *enhanced* by the reserve power's exercise — or even its mere existence.[66] The High Court has recognised that the rule of law requires the existence of 'an authoritative decision-maker' on constitutional matters (usually the Court itself).[67] But if the High Court refused to adjudicate on a referendum's substance, the Governor-General would be the only actor capable of protecting Australian constitutionalism from a radically anti-democratic or intolerant expression of popular will.[68] Even were the High Court willing to hear the case, the situations we are considering are serious constitutional crises in which regular assumptions about political behaviour break down and unlikely alliances may be required.[69] In this vein, Quick and Garran endorsed the importance of insulating the *Constitution* from 'the designs of those who wish to disturb it by introducing revolutionary projects' and 'the risk of thoughtless tinkering and theoretical experiments'.[70] It seems no coincidence that the Sword of Damocles — or Twomey's 'veiled sceptre'[71] — is often used as a metaphor in relation to reserve powers, and also appears on the cover of Roznai's book.[72] The mere threat of assent being refused acts as a constant

---

64 For such a viewpoint see, eg, Aaron Kirkpatrick, 'To Dismiss, or Not to Dismiss?' (2019) 6 *Public Interest Law Journal of New Zealand* 102.

65 *Communist Party Case* (n 34) 193 (Dixon J). Numerous cases have cited this passage: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–14 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157*'); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 (Gleeson CJ and Heydon J), 441 (Kirby J); *Thomas v Mowbray* (2007) 233 CLR 307, 342 (Gummow and Crennan JJ); *Momcilovic* (n 51) 216 (Crennan and Kiefel JJ); *South Australia v Totani* (2010) 242 CLR 1, 42 (French CJ). See generally Scott Stephenson, 'Rights Protection in Australia' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 905, 926–7.

66 Twomey, *The Veiled Sceptre* (n 12) 1.

67 *Plaintiff S157/2002* (n 65) 514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

68 See mob rule — *okhlokratia* — in Polybius, *Histories*, tr Robin Waterfield (Oxford University Press, 2010) 373.

69 See generally Jack M Balkin, *The Cycles of Constitutional Time* (Oxford University Press, 2020) 38; Keith E Whittington, 'Yet Another Constitutional Crisis?' (2002) 43(5) *William & Mary Law Review* 2093; Sanford Levinson and Jack M Balkin, 'Constitutional Crises' (2008) 157(3) *University of Pennsylvania Law Review* 707.

70 Quick and Garran (n 23) 989.

71 Twomey, *The Veiled Sceptre* (n 12) 43.

72 See, eg, Allard-Tremblay (n 14) 396.

reminder that the rule of law will fall on any political player acting in breach of the *Constitution* — even the people themselves.

It therefore seems unlikely that Roznai's theory is totally irreconcilable with Australian constitutional discourse. Moreover, there may be a role for the Governor-General to play in its application. The following Parts will accept the prima facie case for applicability of the theory, and examine how it would apply to two types of constitutional amendments: anti-democratic and intolerant alterations.

IV Reconciling Popular Sovereignty with Unamendability

In this Part, I argue that Roznai's concept of the 'spectrum of unamendability' may be used to reconcile popular sovereignty principles with the notion of constitutional unamendability in Australia. However, I first propose a small modification to his theory, through which the process of framing and ratifying the *Constitution* is compared to the contemporary amendment procedure. Given the latter's superior democratic credentials, I argue that the scope of the amendment power in s 128 will be limited only by the most fundamental constitutional principles. The next and final Part will then investigate whether there is such a principle that would render unconstitutional an intolerant or anti-democratic alteration.

A *Popular Sovereignty and Referendums*

Popular sovereignty is 'a central theme in modern political and legal theory', and serves as the theoretical grounding for Roznai's account of constituent power and the spectrum of unamendability.[73] For Roznai, popular sovereignty over constitution-making means that popular amendment powers, like those exercised through referendums, have a 'wider scope' of permissible amendments than do governmental amendment powers, such as super-majority legislation.[74] Popular sovereignty is also one of the most fiercely debated concepts in Australian constitutional theory, and has been the subject of spirited disagreement since Federation. While for Higgins 'the highest authority lying behind the Constitution was the people of the nation as a whole', Quick and Garran saw 'the people' as exercising only a 'quasi-sovereignty'.[75] Sir Owen Dixon, one of Australia's most celebrated jurists, was strongly opposed to the idea of popular sovereignty. In his canonical article on the origins of the Australian politico–legal system, Dixon stated stridently that the *Constitution*:

---

73 Richard Bourke, 'Introduction' in Richard Bourke and Quentin Skinner (eds), *Popular Sovereignty in Historical Perspective* (Cambridge University Press, 2016) 1.

74 Roznai, *Unconstitutional Constitutional Amendments* (n 29) 164.

75 Aroney (n 20) 326; Quick and Garran (n 23) 993.

> is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.[76]

This conservative view has been echoed by judges and scholars alike.[77] By contrast, the political communication cases saw an explosion in judicial rhetoric declaring the people to be 'the ultimate sovereign', recognising that 'ultimate sovereignty reside[s] in the Australian people' and that 'the *Constitution* … depends on the will of the people'.[78] Academic commentators continue to debate whether such judicial statements correctly identify a 'radical relocation of sovereignty' post-*Australia Acts 1986* (UK) and (Cth), or rather form 'the essential constitutional warrant for our continued subordination to an elective dictatorship'.[79] Wading into this constitutional quagmire is beyond the scope of this article. All that is required for my current purposes is to recognise that 'popular sovereignty … was a key element of the Framers' views', and that the concept occupies an important place in Australian constitutional discourse.[80] As such, to be useful in an Australian context, a theory of constitutional unamendability must be able to conceptualise the Governor-General's reserve power to refuse assent consistently with the popular sovereignty principles that underpin referendums. I argue that the spectrum of unamendability can perform this function.

At first blush, it seems difficult to see any role for the Governor-General in the deeply democratic amendment process prescribed by s 128, one which gives robust voice to the idea of popular sovereignty over the *Constitution*. As Sir Ninian Stephen described it, 'the referendum … [is] the nearest approach to absolute democracy that mankind has yet achieved'.[81] The desirability of a vestigial Imperial head of state intervening in this process is not immediately obvious. However, we can reconcile popular sovereignty and constitutional unamendability through Roznai's concept of the spectrum of unamendability. The existence of this spectrum is grounded in 'the myth of "the people" as holders of constituent power' — in other words, popular sovereignty.[82] The spectrum is therefore defined by what Lior Barshack refers to as 'the intensity of

---

76 Sir Owen Dixon, 'The Law and the Constitution' (1935) 51(4) *Law Quarterly Review* 590, 597.

77 Frank Hutley, 'The Legal Traditions of Australia as contrasted with Those of the United States' (1981) 55 *Australian Law Journal* 63, 64; Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16(2) *Sydney Law Review* 213.

78 *Ridgeway* (n 54) 91 (McHugh J); *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106, 137–8 (Mason CJ) ('*ACTV*'); *Nationwide News* (n 54) 216 (Gaudron J).

79 McDonald (n 55) 182; Fraser (n 77) 222.

80 Benjamin B Saunders and Simon P Kennedy, 'Popular Sovereignty, "the People" and the Australian Constitution: A Historical Reassessment' (2019) 30(1) *Public Law Review* 36, 51. See further Brendan Lim, 'Legitimacy' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 315.

81 Sir Ninian Stephen, 'The referendum as an Australian institution' [1998] *Canberra Historical Journal* 2, 2.

82 Roznai, *Unconstitutional Constitutional Amendments* (n 29) 169.

sovereign presence'.[83] The more substantive is the sovereign people's participation in the constitutional amendment process, the weaker will be the fetters on the amendment power itself.

This spectrum of unamendability is relevant for two reasons. Firstly — with modification in line with arguments proposed by Adrienne Stone — it allows us to square-the-circle between the importance of popular sovereignty to Australian constitutionalism and the possibility of the people being overruled by the Governor-General. Secondly, it means that the s 128 amendment power will only be constrained by the most fundamental of constitutional principles. While acknowledging the obscurity and contestability of the descriptor 'fundamental' in the context of constitutional principles or values, Part V will endeavour to show that political constitutionalism is a fundamental constitutional principle in Australia; while legal constitutionalism is not.

On Roznai's account, the more closely the amendment procedure resembles true popular constituent power, the more unconstrained the power to amend will be. He argues that this 'resemblance' is to be assessed with reference to three democratic desiderata — inclusion, participation, and deliberation — based on the growing recognition in democratic theory that 'process matters'.[84] An amendment process that more fully fulfils these desiderata will give more effective recognition to popular sovereignty because it gives voice to an 'actual, deliberate, free choice by society's members'.[85]

However, as Stone has recognised, this evaluation ignores the flip side of the constitutional coin: that the democratic credentials of the *original* exercise of constituent power also matter.[86] Stone suggests that we might instead compare the amendment power to the original procedure by which the relevant constitution was adopted. This modification to Roznai's theory is useful because it recognises the imperfect moral authority of a constitution whose framing involved 'deficiencies in the [original] exercise of the constituent power'.[87] Comparing the amendment power to the original, historically contingent exercise of constituent power will give a more nuanced perspective on the relationship between the amendment power and the relevant country's tradition of popular sovereignty than would the use of acontextual and abstract criteria. Historicising the evaluation of an amendment procedure also avoids the possibility of implicitly undermining an existing constitution — which was likely adopted using procedures which were imperfectly inclusive, participatory or deliberative.

With this modification, unamendability can both respect the central constitutional importance of the people *and* protect the *Constitution* they created

---

83 Lior Barshack, 'Constituent Power as Body: Outline of a Constitutional Theology' (2006) 56 *University of Toronto Law Journal* 185, 201.

84 Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty' (n 63) 30.

85 Ibid 31.

86 Stone (n 28) 365–7.

87 Ibid 366.

from impermissible alteration. The permitted margin of change is calibrated with reference to Australia's autochthonous species of popular sovereignty rather than generalised, aspirational criteria. The exact breadth of this margin of change therefore depends on how closely the amendment measures up to the original exercise of constituent power — in Australia's case, the framing and ratification process. The next section will consider this measurement.

B *Section 128 and Constituent Power*

The framing and ratification process for the *Constitution* had undeniable popular virtue, and was 'by the standards of the times … a remarkably democratic process'.[88] However, Brendan Lim and others have argued that 'it is important not the overstate the democratic credentials' of the framing process.[89] With only around 60% of eligible electors voting — a category which itself excluded most women and racial minorities — the extent to which 'the people' of Australia can be said to have approved the *Constitution* is dubious.[90] Moreover, the Western Australian Parliament nominated its own delegates (rather than putting their election to the people), and no representatives from Queensland participated in the Convention's 1897–8 sessions.[91]

By contrast, the modern referendum process is buttressed by the High Court's teleological view of Australian democracy. In the voting rights cases, the Court held that our voting system has reached a higher level of advancement through a system of universal adult suffrage — rights which cannot now be withdrawn.[92] On these grounds alone, our contemporary referendum procedure not only approaches the same level of popular involvement as the framing process — it is undeniably *more* democratic.[93] Hence, the amendment power in s 128 will only be extremely weakly limited. The content of these limitations will be supplied by principles that make up the 'irreducible core' of the *Constitution*, and whose abrogation would therefore create a new constitution.[94] As alluded to above, the narrowness of these limitations

---

88 Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Bloomsbury, 2010) 11–2.

89 Lim (n 80) 312; Helen Irving, 'The People and Their Conventions' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 113.

90 GJ Lindell, 'Why Is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29, 30. See further LF Crisp, *Australian National Government* (Longman Cheshire, 3rd ed, 1975) 12.

91 Lim (n 80) 312.

92 *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*'); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 ('*Rowe*'). See generally Graeme Orr and George Williams, 'The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia' (2009) 8(2) *Election Law Journal* 123.

93 Stone (n 28) 365–7. But see Ron Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change' (2010) 34(3) *Melbourne University Law Review* 805, 806–810.

94 Roznai, *Unconstitutional Constitutional Amendments* (n 29) 141.

might be contrasted to those existing in a jurisdiction like India. The Indian amendment power is exercised by Parliament, rather than referendum, which has informed a wider range of implicit restrictions.[95]

As has been argued, if a constitutional amendment was to abrogate one such basic or fundamental principles, thereby creating a 'new' constitution, there is a case to be made for the Governor-General to exercise their reserve power to refuse assent. Assembling a comprehensive account of the fundamental essence of the *Australian Constitution* would provide fertile ground for an entire book (or several), and I do not propose to do so in this article. Nor will I attempt to precisely locate the threshold at which a given constitutional change can be described as having intruded upon that fundamental essence.[96] My more limited aim is to consider whether the *Constitution*'s irreducible core would be contravened by a fundamentally anti-democratic or intolerant alteration. Liberal democratic values are certainly not the only constitutional values that a theory of constitutional unamendability could protect. However — being both dearly held and increasingly fragile — these values are a compelling subject for contemporary analysis. The following analysis, it is hoped, will go some way towards developing a practical understanding of how Roznai's high-level theory might be applied in Australia.

V The Constitutionality of Fundamentally Intolerant or Anti-Democratic Amendments

This Part uses Roznai's theory to consider whether a fundamentally anti-democratic or intolerant amendment would be unconstitutional. As discussed above, I consider these types of amendment because they present an intriguing contrast: they are morally repugnant, but are also invulnerable to traditional constitutional grounds of invalidity. They therefore present a situation in which the Governor-General might have an important role to play in protecting the *Constitution* from impermissible alteration. For example, the reader might consider the Menzies government's referendum on banning the Communist Party to be a domestic example of an anti-democratic alteration.[97] A more implausible

---

95 See, eg, Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, 2011) ch 4. For a critical perspective, see Chintan Chandrachud, 'Constitutional Falsehoods: The Fourth Judges Case and the Basic Structure Doctrine in India' in Richard Albert and Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer, 2018) 149.

96 On this point in a theoretical sense — the application of the sorites or 'pile of sand' paradox to unconstitutional constitutional amendments — see Yaniv Roznai, 'The Straw That Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendments' in Alejandro Linares Cantillo, Camilo Valdivieso-León and Santiago García-Jaramillo (eds), *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press, 2021) 147.

97 See generally Michael Kirby, 'HV Evatt, The Anti-Communist Referendum and Liberty in Australia' 7(2) *Australian Bar Review* 93; George Winterton, 'The Significance of the *Communist Party Case*' (1992) 18(3) *Melbourne University Law Review* 630, 653–5.

scenario could involve a referendum to change the wording of ss 7 and 24 and remove the 'directly chosen' requirement which has given rise to (limited) implied rights to vote and to communicate on political matters. These two examples provide clear cases of how an amendment could attempt to unwind the *Constitution*'s commitment to representative government. However, the aim of this Part is not to consider whether a particular alteration to the *Constitution* would in fact be intolerant or anti-democratic. Instead, I use the descriptor 'fundamentally' to stand for *some* conceivable alteration to the *Constitution* that would fit these descriptors. My objective is to consider the *Constitution*'s basal commitments as revealed by judicial and scholarly exegesis, and whether any of these commitments are located within the *Constitution*'s definitional core.

While acknowledging the difficulty of marshalling conclusive authority on such a question, I look to 'constitutionalism' — the overarching conception of how a given polity empowers and limits governmental power — to help locate fundamental principles.[98] I argue that political constitutionalism is central to the *Constitution*'s identity, and would be undermined by an anti-democratic alteration. On this basis, the Governor-General may be justified in refusing assent to a fundamentally anti-democratic amendment. By contrast, Australia's weak tradition of legal constitutionalism would likely not stand in the way of an intolerant amendment.

However, before commencing this analysis it is important to recognise that anti-democratic and intolerant amendments are not mutually exclusive categories.[99] One could hypothesise many anti-democratic referendums also underpinned by sexism, xenophobia, or some other intolerant pathology — for example, undoing the outcome of *Roach v Electoral Commissioner* and enacting a racially discriminatory franchise.[100] In other words, intolerance and discrimination may well be deployed in an overtly anti-democratic manner. The upshot of this observation for the argument that follows is that I accept that an intolerant amendment could be refused assent, but only if it were *also* anti-democratic. My discussion of anti-democratic amendments therefore implicitly includes this combined 'anti-democratic and intolerant' category; while intolerant alterations considered in Part VB are *only* intolerant.

A *Fundamentally Anti-Democratic Amendments*

The *Constitution*'s strong commitment to political constitutionalism is a promising candidate for the sort of fundamental constitutional pillar that Roznai's theory requires. The term 'constitution', while clearly fraught, can generally be defined as a set of legal norms that regulate the establishment and

---

98 Chief Justice Robert French, 'The Future of Australian Constitutionalism' (Speech, Centre for Comparative Constitutional Studies, 27 November 2009) 4–6.

99 I am grateful to one of the anonymous reviewers for emphasising this point.

100 *Roach* (n 92).

the exercise of public power.[101] I adopt the view that constitutionalism is a broadly dichotomous concept, divided between *legal* and *political* constitutionalism. As previously discussed, legal constitutionalism is rooted in a view of government as a perpetually aspiring tyrant, Odysseus chained to the mast only by constitutional limitations. By contrast, Stephen Gageler (prior to his Honour's appointment to the bench) describes how political constitutionalism's fundamental thesis is that 'the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia'.[102] Government is not a separate entity whose power must be carefully limited through strong-form rights review and 'mutual frustration' between different branches and levels of government.[103] Rather, the state is also 'a positive force for the common good'.[104] Government is an extension of the sovereign people, and can be held accountable by them for its use of the power it has been granted.[105]

As in many Commonwealth jurisdictions, Australia's federal government is held to account through the conventions of representative and responsible government.[106] As evocatively described by Isaacs J, responsible government 'is part of the fabric on which the written words of the *Constitution* are superimposed'.[107] Harrison Moore's words in 1902 are also apposite:

> *The predominant feature* of the Australian *Constitution* is the prevalence of the democratic principle … The great underlying principle is that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and *an equal share, in political power*.[108]

As such, political constitutionalism in Australia is synonymous with democracy. As Moore emphasised, the *Constitution* prioritises democratic participation and procedure as opposed to substantive, enumerated rights. In the UK — the archetypal example of common law political constitutionalism — it has been

---

101 Dieter Grimm, 'Types of Constitutions' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 98.

102 Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' [2009] (Winter) *Bar News: The Journal of the NSW Bar Association* 30, 7.

103 Richard Hofstadter, 'The Founding Fathers: An Age of Realism' in Robert H Horwitz (ed), *The Moral Foundation of the American Republic* (University of Virginia Press, 2nd ed, 1979) 62, 67.

104 James Stellios, 'Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of "The Relationship of the Individual to the State"' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 177, 180.

105 Denise Meyerson, 'Equality' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1053, 1054. See further JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1.

106 Benjamin B Saunders, 'Responsible Government, Statutory Authorities and the Australian Constitution' (2020) 48(1) *Federal Law Review* 4, 7–12, 17–26.

107 *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393, 413 (Isaacs J).

108 Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 327–9 (emphasis added).

argued that 'democracy *is* the constitution'.[109] While such a radical view is clearly not directly applicable in Australia, it nevertheless reflects the undeniable centrality of democracy to a political constitutional order. Democracy is not simply a beneficial feature of the *Constitution*; democracy is the essential component of Australian political constitutionalism.[110] An anti-democratic alteration to the *Constitution*, therefore, would fundamentally change how public power is established, granted, and conditioned. In other words, it would create a new constitution, which on Roznai's theory can only be accomplished by the exercise of the original manifestation of constituent power. As such, the Governor-General may well be justified in refusing assent to an anti-democratic alteration to the *Constitution*.

It is important to acknowledge that this conclusion is at least facially paradoxical. Arguing that an unelected head of state should interfere with democratic decisions runs counter to the classic political-constitutional ideals of placing minimal constitutional restraint on the democratic process. This theme of paradox pervades the literature on militant democracy because its core question — whether a democracy should act undemocratically to preserve democracy — is itself catalysed by other paradoxes, like Karl Popper's paradox of tolerance.[111] Popper's paradox states that, since unlimited tolerance of intolerant ideologies might ultimately lead to the erasure of tolerance itself, a tolerant society could (paradoxically) be required to act intolerantly towards intolerant views in order to preserve the society's tolerant character. Scholars are still working through the highly contested normative question of how militant democracy can be justified.[112] For present purposes, it is sufficient to make two observations. The first is that several prominent justificatory theories of militant democracy focus on a sort of 'representation reinforcement' as the objective of militant democracy. I use the term 'representation reinforcement' to describe these normative rationales because they are broadly similar to John Hart Ely's defence of judicial review in a democratic society.[113] Ely's theory of representation reinforcement holds that judicial review should focus on ensuring fair democratic processes by protecting politically marginalised groups from systemic exclusion. Similarities can be observed in the militant democracy literature. Lars Vinx argues

---

109 Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007) 5 (emphasis in original).

110 See, eg, Justice Patrick Keane, 'In Celebration of the Constitution' (Speech, National Archives Commission, 12 June 2008) 1–4 (in which his Honour famously described Australia's *Constitution* as a 'small brown bird').

111 Popper (n 25) 581. Müller notes the prevalence of discussion of paradox in militant democracy literature, but argues that concern about such paradoxes is frequently overblown both empirically and theoretically: Müller, 'Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy' (n 6) 251–3.

112 Jan-Werner Müller, 'A "Practical Dilemma Which Philosophy Alone Cannot Resolve"? Rethinking Militant Democracy: An Introduction' (2012) 19(4) *Constellations* 536, 537.

113 John Hart Ely, *Democracy and Distrust* (Harvard University Press, 1981).

for militant democracy to be deployed where necessary to protect citizens' equal chance to participate in the democratic process.[114] Alexander Kirshner views militant democracy as legitimate where used to help preserve a 'political system in which capable citizens can play a meaningful role' — which he defines in Robert Dahl's terms of 'polyarchy'.[115] As such, the paradox implicit in militant democracy can be approached similarly to the issue of unelected judges' democratic legitimacy: by focusing on its role in reinforcing democratic principles where the political process has malfunctioned in a manner deleterious to democracy itself. This is not to say that these arguments are correct, but simply to observe that navigating facially paradoxical institutional issues is neither an insoluble problem, nor one unique to militant democracy scholarship.

The second point is that, even if militant democracy is opposed to the Diceyan ideal of political constitutionalism, the very existence of Australia's *Constitution* demonstrates that the Framers did not envision such a model. I would observe further that protection of the democratic process by non-democratic actors like courts is already a familiar concept in Australian constitutionalism.[116] I will not explore this point in detail, but it is important to emphasise that Australia does not have an unadulterated system of political constitutionalism. Strict political constitutionalism is not the sole desideratum of Australian constitutional jurisprudence. As such, the mere fact that the refusal of assent posits an external constraint on the democratic process does not, without more, make it inappropriate to the Australian constitutional milieu. In the next section, I consider the constitutional implications of an intolerant amendment.

B *Fundamentally Intolerant Amendments*

A fundamentally intolerant amendment would be anathema to those constitutional systems which are deeply committed to *legal* constitutionalism.[117] The reader will recall that an intolerant amendment would introduce an alteration into the *Constitution* that negatively discriminated against a subset of the population based on a given attribute. Although legal constitutionalism technically only requires a written constitution, the term is mainly associated with strong-form rights review, a system whereby written or implied

---

114 Lars Vinx, 'Democratic Equality and Militant Democracy' (2020) 27(4) *Constellations* 685.

115 Alexander S Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (Yale University Press, 2014) 7. On polyarchy, see Robert Dahl, *Democracy and Its Critics* (Yale University Press, 1989).

116 See *Lange* (n 50); *Roach* (n 92); *Rowe* (n 92).

117 See John Rawls, *Political Liberalism* (Columbia University Press, 1993) 239. But see Samuel Freeman, 'Political Liberalism and the Possibility of a Just Democratic Constitution' (1994) 69 *Chicago-Kent Law Review* 619, 663–7.

constitutional rights are used by judges to invalidate laws and executive actions.[118] The *United States Constitution* is often cited as the archetypal example of legal constitutionalism, and has influenced many other constitutions.[119] Systems of strong-form review reflect a distrust in government and the belief that its powers must be limited in order to protect individual liberties.[120]

The *Australian Constitution*, by contrast, displays little concern with using legal limitations to prevent intolerant government action. This can be explained by two main factors: the racist attitudes of the Framers, and their philosophical suspicion of legal constitutionalism. On the first factor, the Framers rejected Inglis Clark's proposal for an equal protection clause precisely *because* it would prevent parliaments from enacting discriminatory legislation against 'Chinamen, Japanese, Hindoos and other barbarians [sic]'.[121] There was worry that such a clause could invalidate the planned *Commonwealth Franchise Act 1902* (Cth) which would deny voting rights to people of non-European backgrounds; as well as racialised State legislation like Victorian anti-Chinese factory regulations, and Western Australia's ban on Africans and Asians acquiring mining licences.[122]

While such a legacy is undoubtedly a 'stain' on the *Constitution*, the Framers' attitudes towards racial minorities are not conclusive determinants of the character of Australian constitutionalism.[123] Rather, at a broader level, the *Constitution* and its jurisprudence have been shaped by the Framers' suspicion of legal constitutionalism even after their odious social attitudes fell out of favour. It was scarcely conceivable that a Westminster-style parliament —the people's representative, the most venerable and ideal mode of democracy yet achieved — would be a threat to liberties.[124] On the contrary, Parliament would *secure* individual rights through the proper functioning of the political process. The Framers therefore made 'little or no

---

118 See generally Richard Bellamy, 'Political Constitutionalism' in Peter Cane and H Kumarasingham (eds), *The Cambridge Constitutional History of the United Kingdom* (Cambridge University Press, 1st ed, 2023) 59. In relation to strong-form rights review see, eg, Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press, 2008). Cf Aileen Kavanagh, 'What's so Weak about "Weak-Form Review"? The Case of the UK Human Rights Act 1998' (2015) 13(4) *International Journal of Constitutional Law* 1008.

119 See, eg, Lorraine E Weinrib, 'The Postwar Paradigm and American Exceptionalism' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 84.

120 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ); *ACTV* (n 78) 186 (Dawson J). See generally Rosalind Dixon, 'Constitutional Drafting and Distrust' (2015) 13(4) *International Journal of Constitutional Law* 819.

121 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1784 (Sir John Quick). See further John M Williams, '"With Eyes Open": Andrew Inglis Clark and Our Republican Tradition' (1995) 23(2) *Federal Law Review* 149, 175–8.

122 John A La Nauze, *The Making of the Australian Constitution*, (Melbourne University Press, 1972) 231–2.

123 Rosalind Croucher, 'Bringing Rights Home: Mapping an Agenda on Promoting, Protecting and Fulfilling Human Rights in Australia' (2021) 10(1) *Victoria University Law and Justice Journal* 11, 16.

124 Haig Patapan, 'Competing Visions of Liberalism: Theoretical Underpinnings of the Bill of Rights Debate in Australia' (1997) 21(2) *Melbourne University Law Review* 497, 501.

attempt' to constitutionally enshrine an extensive list of civil or social rights;[125] they viewed doing so as both undesirable and unnecessary.[126]

Despite recent advances in implied freedom and Ch III jurisprudence, legal constitutionalism in Australia remains firmly focused on the political process.[127] For example, members of the High Court have recently referred to personal dignity as a constitutional value, one which grounds an individual's prerogative 'not [to be] held captive by an uninvited political message'.[128] On this approach, dignity is not dealt with in expansive liberal rights terms, but rather as a narrowly defined component of the democratic political process.[129] We might wonder whether this *dicta* implies that one's dignity is valued by the *Constitution* only insofar as it is important to the conduct of free elections. Additionally, many of Australia's established legal constitutional norms have been observed to be more concerned with protecting federalism than the rights of individuals.[130] The independent federal judiciary is empowered to restrain the central government so as to form the 'keystone of the federal arch', the ultimate stopgap to preserve the balance of federal power.[131] As Lisa Burton Crawford and Jeffrey Goldsworthy note, this is partly reflected by the fact that the explicit rights protections that are enshrined in the *Constitution* are binding on the Commonwealth but not the States.[132] Compared to those of other nations, Australia's *Constitution* is 'markedly utilitarian' in its emphasis on federalism and politics over substantive rights.[133] Many foundational rights which are not directly connected to the political process — for example, procedural fairness in courts and tribunals — enjoy little or no protection at the constitutional level.[134]

---

125 Sir Robert Menzies, *Central Power in the Australian Commonwealth* (University Press of Virginia, 1967) 52.

126 Patapan (n 124) 501.

127 Crawford and Goldsworthy (n 50) 378. See further Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162.

128 *Clubb v Edwards* 267 CLR 171, 208–9 (Kiefel CJ, Bell and Keane JJ).

129 See further Scott Stephenson, 'Dignity and the Australian Constitution' (2021) 42(4) *The Sydney Law Review* 369; Bede Harris, 'Human Dignity and the Australian Constitution — a Critique' (2020) 17(1) *Canberra Law Review* 2. But see Ashleigh Barnes, 'Constitutional Dignity' (2023) 46(3) *Melbourne University Law Review* 683; Barnes; Barnes, 'Constitutional Dignity post *Farm Transparency*' (n 52).

130 See, eg, James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31(1) *Melbourne University Law Review* 239; Stellios, *The Federal Judicature: Chapter III of the Constitution* (n 45) ch 3.

131 *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 187, 953 (Sir Edmund Barton).

132 Crawford and Goldsworthy (n 50) 367.

133 Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114(1) *Daedalus* 147, 149.

134 On constitutional (under)protection of procedural fairness in Ch III courts, see Kieran Pender, 'Open Justice, Closed Courts and the *Constitution*; Australian and Comparative Perspectives' (2023) 42(2) *University of Queensland Law Journal* 155, 174–8. On legislative abrogation of procedural fairness in executive tribunals, see Henry Palmerlee, 'Taking Procedural Fairness Seriously: Structured Proportionality and Legislative Scrutiny' (2025) *University of New South Wales Law Journal* (forthcoming).

These two factors suggest strongly that the protection of non-political minority rights or interests is not a fundamental principle that would give content to Roznai's theory in the Australian context.[135] An intolerant alteration — while undoubtedly contrary to the current values of Australian society — would be unlikely to create a different constitution altogether. Constitutional intolerance therefore appears to fall within the scope of the 'delegated constituent power' in s 128.

VI Conclusion

This article has attempted to locate a role for the Governor-General in protecting Australian democracy from itself. By bringing Roznai's theory of unconstitutional constitutional amendments to bear on referendums, and giving it content through the notion of political constitutionalism, relatively principled limitations on the Australian people's constitutional authority begin to take shape. However, certainty will invariably be elusive when dealing with such axiomatic issues. These are matters that courts consider only rarely, and usually implicitly. Moreover, by their very nature the reserve powers awaken only in times of crisis and significant political uncertainty. If there are to be central principles that define the *Constitution*'s identity, political constitutionalism seems to be one prime candidate. But until the constitutional day of judgement arrives, our vision of such principles will be seen through a glass darkly.

---

[135] While acknowledging the dictum that 'the personal is political', it seems plausible for constitutional purposes to draw a distinction between political and non-political rights/interests. There appears to be a relevant difference between, for example, the right to vote and the right to own property, or the right to marriage equality. This perspective is analogous to Dixon's distinction between the 'democratic minimum core', and 'thicker understandings of democracy, which emphasise … individual rights and democratic commitments': Dixon (n 3) 359–62, see also discussion above n 3.