

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION, WRONGS RIGHTED OR REACTION & REITERATION

*Jocelynne A. Scutt**

‘The arc of the moral universe is long, but it bends toward justice.’
Martin Luther King

ABSTRACT

Since the United States adopted a written constitution as a consequence of the War of Independence, it is fair to say that most Western democracies with written constitutions have taken some guidance from that founding document. Inevitably, a key provision for any written constitution is ‘how can it be amended’. Even where there is an unwritten constitution (as for the United Kingdom, Aotearoa/New Zealand and Israel), the ‘rules’ established by convention or custom or some other means cannot be immutable: the passage of time or changing ideas require some means of altering or updating the rules.

Changing a constitution is a matter of law, yet one inescapably imbued with politics. This article explores the way constitutional change has come, and how the rules have worked, in Australia (the 1951 referendum to ban the Australian Communist Party – unsuccessful, and the 1967 referendum to recognise rights of Indigenous Australians – successful) and the United States (the Equal Rights Amendment – situation ongoing), with a foray into the referendum process in United Kingdom (the 2017 ‘Brexit’ vote). It explores, too, the ‘change’ to a constitution where there is no change to the words of the document, but a change in interpretation – this in the context of Canada in 1929. There, consistent with judgments in Aotearoa/New Zealand, Australia, the United Kingdom and the United States, the Canadian Supreme Court interpreted ‘person’ as appearing in the North America Act as not including women, denying women any entitlement to be appointed to the Canadian Senate. As related here, women were finally acknowledged as ‘persons’ when the Privy Council pronounced this to be so, an unanticipated outcome from a judicial body considered by both Canada and Australia to be so hidebound as not to be ‘right’ as the final court of appeal for Britain’s former colonies.

* Senior Teaching Fellow at the University of Buckingham, Cambridgeshire County Councillor and member of the Labour Party and Australian Labor Party.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION, WRONGS RIGHTED OR REACTION & REITERATION

Keywords: Australian Constitution; Canadian Constitution; United States Constitution; Brexit Referendum; United Kingdom Referendums; ‘Person’ not including Women; ‘Person’ Cases; Australian Communist Party Referendum 1951; Equal Rights Amendment (ERA); Australian Aborigines Referendum 1967; provisions for Amending Constitutions; Constitutional Amendments; the politics of constitutional change; power to change Constitutions; written Constitutions; unwritten Constitutions.

INTRODUCTION

The Australian, Canadian and United States Constitutions stand as testimony to colonisation, colonialism and Empire. Although the United States freed itself of colonial rule through winning the War of Independence, it did not free itself of British law and legal notions. The United States sees its Constitution as anchored in Magna Carta. Albeit the notion adhered to by American jurists is that its origins are Magna Carta 1215, it appears that Magna Carta 1225 is the ‘true’ source.¹ As for Australia and Canada, having become independent through agreement or the relaxation of colonial rule, not through war or conflict, British control or influence in constitutional matters is readily apparent. The British North America Act set the scene for Canadian self-rule,² whilst Australia’s Constitution came from Constitutional Conventions where delegates from the various colonies were voted into delegate positions – raising the question of who could vote, who could be a delegate.³ The outcome in any event is that for Canada, the British North America

¹ Library of Congress, ‘Magna Carta and the US Constitution: Magna Carta – Muse and Mentor’ <<https://www.loc.gov/search/500/>> accessed 1 December 2018; Martin Kelly, ‘Importance of the Magna Carta to the US Constitution’, (History and Culture) <<https://www.thoughtco.com/why-magna-carta-key-document-usa-104638>> accessed 1 December 2018; Nicholas Vincent, *Magna Carta – Origins and Legacy* (University of Chicago Press 2016).

² British North America Act 1867 (UK) <<http://www.legislation.gov.uk/ukpga/Vict/30-31/3/contents>> accessed 1 December 2018.

³ Catherine Helen Spence, the first woman in Australia to stand for public office, famously stood for election despite contentions that as a woman she lacked status to do so. South Australian women gained the right to vote and stand for parliament in 1894. They argued that they should have the right to stand and vote in the ballots for participation in the Constitutional Conventions. Although she did well, ultimately Spence garnered insufficient votes: she came twenty-second of thirty-three candidates: Catherine Helen Spence, ‘Constitution for a Nation’ <<http://www.naa.gov.au/collection/explore/federation/constitution-website/stories/the-people/pods/catherine-helen-spence-1897/index.html>> accessed 1 December 2018; see generally Parliament of Australia, *Records of the Australasian Federal Conventions of the 1890s* <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s> accessed 1 December 2018.

Act 1867 was passed by the United Kingdom Parliament. In 1982 in Canada it became the Constitution Act, when passed by the Canadian Parliament.⁴ However the Australian Constitution is an Act of the United Kingdom Parliament alone.⁵ This raises questions of its status in light of the principle of parliamentary sovereignty and the inability of United Kingdom parliaments to bind their successors.⁶ Even with Canada, according to United Kingdom parliamentary sovereignty the British North America Act 1867 could theoretically be repealed or independently amended by the United Kingdom Parliament.⁷ Yet unlike the Australian situation, at least the Constitution Act 1867 would remain as the foundation of Canada's Constitution. Not so for Australia.

The Australian Constitution Act 1900 problem arises with the Statute of Westminster 1931. The latter is, however, generally accepted as existing 'in perpetuity', although this is inconsistent with Dicey's principles:

- That parliament may pass whatever law it desires;
- That no Acts are 'constitutional' or have a status capable of being classed as unable to be repealed or amended, which would overrule the sovereignty of parliament;
- That no parliament has power to bind its successors.⁸

Probably, if the United Kingdom Parliament were to repeal the Australian Constitution Act, the Australian Parliament would itself (endeavour to) pass the Act (as happened in Canada in 1982) – although this would raise the whole question of its status and content. There would be robust debates emanating from women members of Parliament, activist women and women's groups, from Indigenous Australian members, activists and groups, and those of minority ethnic background – for no women or Indigenous Australians were delegates to the 1890s Constitutional Conventions and most, if not all, were of conventional Caucasian

⁴ See Government of Canada, 'Constitution Acts 1867–1982' (Justice Laws Website) <<https://laws-lois.justice.gc.ca/eng/Const/>> accessed 1 December 2018.

⁵ Commonwealth of Australia Constitution Act 1900 (UK).

⁶ A V Dicey in J W F Alison (ed) *Introduction to the Study of the Law of the Constitution* (OUP 2013).

⁷ Nick Hobson, 'Is Our Constitution Safe' <https://www.statusquo.org/aru_html/html/const_safe.html> accessed 1 December 2018; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press 1998).

⁸ A V Dicey (n 6).

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

background.⁹ Whether under those circumstances the Australian Constitution Act would pass through the Australian Parliament is a real question. Would this leave Australia in limbo? It would at least be a catalyst for revisiting the basic law, although whether agreement could be reached (bearing in mind parliamentary and public debates and disagreements on constitutional matters) is an open question.¹⁰

That ‘history’ requires attention in this context leads into the subject of this article – namely the way in which constitutions once in force can be amended, the process of amendment and the success or failure of any proposals for change. It also adverts to the issue of what is ‘success’, what ‘failure’: that is, if an amendment is adopted whether by the people through referendum or the legislative bodies by majority vote, or by whatever other method is chosen, or if it is defeated, is the adoption ‘good’, the defeat ‘bad’? This depends upon the nature, content and proposed effect of any amendment and, as history (again) shows, proposals for change can be positive, negative or problematic. This can be explored in the context of the Canadian, United States and Australian examples. For Canada, ‘Are Canadian women persons? The Supreme Court of Canada versus the Privy Council’.¹¹ For Australia, ‘Fighting the Red Peril – The High Court and the People

⁹ See Larissa Behrendt, ‘Indigenous Rights and the Australian Constitution – A Litmus Test for Democracy’ <<https://openresearch-repository.anu.edu.au/bitstream/1885/42068/2/Behrendt.pdf>> accessed 1 December 2018; George Williams, ‘A Guide to Our Constitution’ (National Archives of Australia) <<http://www.naa.gov.au/collection/publications/papers-and-podcasts/australian-constitution/professor-george-williams.aspx>> accessed 1 December 2018; see also Peter Hanks and Deborah Cass, *Australian Constitutional Law: Materials and Commentary* (Butterworths 1999); K C Wheare, *The Constitutional Structure of the Commonwealth* (Oxford/Clarendon Press 1960); Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901 edn reprinted Legal Books 1995); Luke Beck, *Religious Freedom and the Australian Constitution – Origins and Future* (Routledge 2018).

¹⁰ Within the Indigenous Australian community, for example, there is considerable dissent from some as to whether the Constitution has any relevance at all, as impinging on their sovereignty, whilst others see it as vital to include Indigenous Australians in the Constitution. See Jocelyne A. Scutt, ‘Subverting or Affirming Indigenous Rights – The Australian Problem Writ Large’ in Sarah Sargent and Jo Samanta (eds), *Indigenous Rights under the UN Declaration on the Rights of Indigenous Peoples* (University of Buckingham Press 2019). Whether or not Australia should become a republic could also be anticipated as creating insuperable difficulties, bearing in mind the arguments surrounding the 1999 republic referendum: Australian Electoral Commission (AEC), 1999 Referendum Report and Statistics, 24 October 2012 <https://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/> accessed 28 November 2018.

¹¹ See *Edwards v AG of Canada* (Reference re the Meaning of the Word ‘Persons’ in Section 24 of the British North America Act) [1928] SCR 276; *Edwards v. AG of Canada* [1929] UKPC 86; [1930] AC 143; *Edwards v. AG of Canada* [1930] AC 124; and see further below.

versus the Government’,¹² and ‘Can Constitutionally Entrenched Racism be Undone? Humanity Speaking in the Voice of Humanity.’¹³ For the United States, ‘Are US Women Equal? Wanted, Three More States.’¹⁴

Referendum Rules and Precedents

United Kingdom – Yet before addressing principles governing constitutional change in Canada, the United States and Australia, a digression into the United Kingdom position is instructive. From 2016 through to 2019 and likely beyond,¹⁵

¹² See *Australian Communist Party v Commonwealth* (‘Communist Party case’) [1951] HCA 5, (1951) 83 CLR 1; the Communist Party Dissolution Act 1950 (Cth); ‘The Communist Party Case 65 Years On’ (Rule of Law Institute of Australia, 9 March 2016) <<https://www.ruleoflaw.org.au/65th-communist-party-case/>> accessed 15 November 2018; and see further below.

¹³ See Parliamentary Library, ‘The 1967 Referendum’ Parliament of Australia <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/May/The_1967_Referendum> accessed 15 November 2018; ‘The 1967 Referendum’ National Library of Australia <<https://www.nla.gov.au/research-guides/the-1967-referendum>> accessed 15 November 2018; and see further below.

¹⁴ See This Day in History, ‘March 22, 1972 Equal Rights Amendment Passed by Congress’ History <<https://www.history.com/this-day-in-history/equal-rights-amendment-passed-by-congress%3E%20accessed>> accessed 12 November 2018 <This URL “<<https://www.history.com/this-day-in-history/equal-rights-amendment-passed-by-congress%3E%20accessed>” is not working.>; Joan Hoff Wilson, *Law, Gender and Injustice: A Legal History of U.S. Women* (NYU Press 1991); Inae Oh, *Meryl Steep Is Pushing Congress to Finally Revise the Equal Rights Amendment* (Mother Jones, 24 June 2015) <<http://www.motherjones.com/mixed-media/2015/06/meryl-streep-congress-equal-rights-amendment>> accessed 15 November 2018; see further below.

¹⁵ Kenneth Armstrong, *Brexit High Court Ruling on Article 50 Explained* (Centre for European Legal Studies, University of Cambridge) <<https://www.cam.ac.uk/research/news/brexit-high-court-ruling-on-article-50-explained>> accessed 1 June 2018; ‘EU Referendum and Brexit – Analysis’ (Oxford and Brexit, University of Oxford) <<http://www.ox.ac.uk/news-and-events/oxford-and-brexit/brexit-analysis>> accessed 1 December 2018; Davor Jancic, ‘Why the European Court of Justice isn’t Going Away’ (Brexit? LSE) <<http://blogs.lse.ac.uk/brexit/2017/04/26/why-the-european-court-of-justice-isnt-going-away/>> accessed 1 December 2018; Raphael Hogarth, *Brexit and the European Court of Justice* (Institute for Government, June 2017) <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_Euro_Court_Justice_WEB.pdf> accessed 1 December 2018; ‘Brexit Court Case Could “Lead to Disaster” EU Lawyers Warn’ *BBC News* (27 November 2018) <<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-46345287>> accessed 1 December 2018; ‘EU Judges to Rule on Brexit on Eve of May’s Crucial Vote’ *Reuters – World News* <<https://www.reuters.com/article/us-britain-eu-court-idUSKBN1O50QR>> accessed 6 December 2018.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

the United Kingdom Parliament and the people have laboured under the lead-up to and the consequences of the Brexit referendum.¹⁶ As an election promise prior to the 2015 general election, the (then) Prime Minister, David Cameron, bowed to the anti-European Unionists: should the Conservatives win government, he affirmed, a referendum would be held to determine whether the country would leave or remain in the European Union.¹⁷ Then, having won the election and become Prime Minister, so confident was he and his like-minded colleagues¹⁸ of a ‘yes – remain’ vote, rather than a ‘no – leave’ majority, he approved a process ill-thought out, if at all, with no safeguards (such as a required majority of two-thirds for ‘out’, for example, or for a majority ‘out’ for each country of the union – England, Scotland, Wales and Northern Ireland).¹⁹ Approving of a referendum process upon such a crucial matter, when the United Kingdom is so firmly wedded to its representative parliamentary system, could be considered as surprising in itself by countries where the formulae for constitutional amendment outline clear rules providing certainty as to the requirements of a ‘vote’ necessary to sanction change.

Certainly United Kingdom referendum precedents exist not only in relation to devolution and the EU’s predecessors²⁰ but whether there should be a Mayor of London, the more recent 2010 referendum on whether to change from the ‘first past the post’ electoral system to the ‘alternative vote’, and the question of Scotland’s

¹⁶ Krishnadev Calamur, ‘Global – The Brexit Campaign: A Cheat Sheet’ (The Atlantic, 23 June 2016) <<https://www.theatlantic.com/international/archive/2016/06/uk-brexit-guide/482730/>> accessed 1 December 2018; Richard White, ‘Time to Campaign for a No-Deal Brexit’ (The Conservative Woman, 21 August 2018) <<https://www.conservativewoman.co.uk/time-to-campaign-for-a-no-deal-brexit/>> accessed 1 December 2018; ‘Brexit – Best for Britain Launches Campaign for Another Referendum’ *BBC News* (8 June 2018). <<https://www.bbc.co.uk/news/uk-politics-44413526>> accessed 1 December 2018.

¹⁷ ‘David Cameron Promises In/Out Referendum on the EU’ *BBC News* (20 January 2013) <<https://www.bbc.co.uk/news/uk-politics-21148282>> accessed 1 December 2018; Nicholas Watt, ‘EU Referendum: In/Out Choice by End of 2017 Cameron Promises’ *The Guardian* (23 January 2013) <<https://www.theguardian.com/politics/2013/jan/22/eu-referendum-2017-david-cameron>> accessed 1 December 2018.

¹⁸ European Union Referendum Act 2015 (UK); Political Parties, Elections and Referendums Act 2000 (UK).

¹⁹ This is akin to the Australian provision, see below.

²⁰ United Kingdom Parliament, previous referendums in the UK <<https://www.parliament.uk/get-involved/elections/referendums-held-in-the-uk/>> accessed 5 November 2018:

8 March 1973: Northern Ireland – Northern Ireland sovereignty referendum on whether Northern Ireland should remain part of the United Kingdom or join the Republic of Ireland (yes to remaining part of the UK);

independence.²¹ However, putting forward a referendum without bearing in mind the volatility of the electorate and the strong indicators of anti-EU forces built up over the years by UKIP's relentless campaigning and tabloid and sensationalist media scaremongering – particularly against migration of refugees and asylum seekers escaping wars, and free movement bringing a wide range of EU citizens to the United Kingdom,²² proved unwise. The 2010 general election had seen a vote so indecisive that a coalition of Conservative and Liberal Democrats had to be cobbled together to

5 June 1975: UK – Membership of the European Community referendum on whether the UK should stay in the European Community (yes);

1 March 1979: Scotland – Scottish devolution referendum on whether there should be a Scottish Assembly (40 per cent of the electorate had to vote yes in the referendum, although a small majority voted yes this was short of the 40 per cent threshold required to enact devolution);

1 March 1979: Wales – Welsh devolution referendum on whether there should be a Welsh Assembly (no);

11 September 1997: Scotland – Scottish devolution referendums on whether there should be a Scottish Parliament and whether the Scottish Parliament should have tax varying powers (both referendums received a yes vote);

18 September 1997: Wales – Welsh devolution referendum on whether there should be a National Assembly for Wales (yes);

7 May 1998: London – Greater London Authority referendum on whether there should be a Mayor of London and Greater London Authority (yes);

22 May 1998: Northern Ireland – Northern Ireland Belfast Agreement referendum on the Good Friday Agreement (yes);

3 March 2011: Wales – Welsh devolution referendum on whether the National Assembly for Wales should gain the power to legislate on a wider range of matters (yes);

5 May 2011: UK – referendum on whether to change the voting system for electing MPs to the House of Commons from first past the post to the alternative vote (no, first past the post will continue to be used to elect MPs to the House of Commons);

18 September 2014: Scotland – referendum on whether Scotland should become an independent country (no, the electorate voted 55 per cent to 45 per cent in favour of Scotland remaining within the UK).

²¹ See Electoral Reform Society, 'First Past the Post' <<https://www.electoral-reform.org.uk/voting-systems/types-of-voting-system/first-past-the-post/>> accessed 5 November 2018; Electoral Reform Society, 'Voting Systems' <<https://www.electoral-reform.org.uk/voting-systems/>> accessed 5 November 2018.

²² See LSE European Institute, Free Movement of Persons and Migration – Report of the Hearing held on 21st January 2016, LSE Commission on the Future of Britain in Europe, Eiko Theilemann (LSE) and Daniel Shade (LSE), Rapporteurs, <<http://www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-4---Free-Movement-of-Persons-&-Migration-REPORT.pdf>> accessed 1 December 2018.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

run the country. Next, the 2015 general election saw a Conservative government returned with the slimmest of majorities. Then the 23 June 2016 EU referendum vote generated a 72.2 per cent turnout resulting in 48.1 per cent remain (16,141,241 votes), 51.9 per cent leave (17,410,742 votes).²³ This was followed by squabbling, court challenges,²⁴ cabinet resignations and reinstatements, mixed messages from various EU identities, and increasingly large marches seeking to pursue a ‘remain’ agenda, arguing for a ‘people’s vote’ which its proponents apparently believed, confidently, would result in a turn-around of ‘leave’ into ‘remain’.²⁵

This is not to say that the referendum process necessarily works without some dissatisfaction in countries like the United States and Australia, with written constitutions and clear guidelines for amendment. However, the guidelines do mean that outcomes have a relatively stable acquiescence and controversy is generally directed largely at the substantive issue rather than the mechanism by which change is brought about.²⁶ In the United States, the requirement that not only the US Congress agree to the proposal going forward, but that each state legislature has a stake in the outcome with the vote being that of elected representatives via their legislatures rather than the population at large, provides opportunities for debate within these forums, with people lobbying their representatives. This avoids the instability that has proven to be the United Kingdom outcome, generated by people ‘in the raw’ having the say, without any ‘rule’ beyond a bare majority.²⁷ Similarly the Australian and Canadian provisions enable structured debate and effective involvement at state and provincial levels. The room seems open for debate in the United Kingdom as to how future referendums might be fashioned, to avoid the

²³ See The Electoral Commission, ‘EU Referendum Results’ <<https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>> accessed 5 November 2018.

²⁴ *R* (on the application of Shindler and Anor) v *Chancellor of the Duchy of Lancaster and Anor* [2016] UKSC 2016/0105; *R* (on the application of Miller and Anor) v *Secretary of State for Exiting the European Union* [2017] UKSC 5, on appeals from [2016] EWHC 2768 (Admin) and [2016] NIQB 85.

²⁵ See for example Richard Elkins, ‘The Legitimacy of the Brexit Referendum’ (UK Constitutional Law Society) <<https://ukconstitutionallaw.org/2016/06/29/richard-ekins-the-legitimacy-of-the-brexite-referendum/>> accessed 5 November 2018.

²⁶ See further this article.

²⁷ The UK’s membership of the European Union generated the founding of at least two political parties with the direct aim of objecting to EU membership and reversing the decision to join and subsequent referendum (1973) to remain: Referendum Party (founded by James Goldsmith in the 1990s) and UKIP (United Kingdom Independence Party) which outlasted its rival and remains in existence (albeit a shaky one) despite the ‘out’ or

public expression of being ‘sold out’ on the part of the ‘remainers’, agitation for another vote – surely generating another round of agitation if this time around those voting ‘stay in’ were to win. There is no guarantee that closeness of the vote that led to this would not be replicated.

Canada – Pre-patriation of the Constitution in 1982, amendments to Canada’s Constitution required amendment to the British North America Act which contained no provisions for its amendment. Changes came through the United Kingdom Parliament (as the ‘Imperial Parliament’) and were themselves entitled British North America Acts.²⁸ The Canadian federal government, for the House of Commons and Senate, issued an address to the British government requesting amendment. This address included a resolution setting out the amendments requested. The British Parliament passed them, generally with little or no debate. Now Part V of the Canada Act 1982²⁹ contains amendment provisions namely sections 38–49 setting out ways in which the Constitution can be amended. Section 38 contains the ‘general amendment procedure’ or ‘7+50 formula’, requiring adoption of identical resolutions passed by the House of Commons, the Senate and two-thirds or more of the provincial legislative assemblies representing at least 50 per cent of the national population.³⁰ Section 42 lists matters covered by the general

‘leave’ vote winning. See Neil Carter and others, ‘Europe, Goldsmith and the Referendum Party’ *Parliamentary Affairs* (1998) 51(3) 470–85; Richard Davenport-Hines, Goldsmith, Sir James Michael, *Oxford Dictionary of National Biography* (OUP 2004); Alex Hunt, ‘UKIP: The Story of the United Kingdom Independence Party’s Rise’ *BBC News* (21 November 2014) <<https://www.bbc.co.uk/news/uk-politics-21614073> accessed 5 November 2018; Catherine MacMillan, ‘The European Union as a Totalitarian Nightmare: Dystopian Visions in the Discourse of the UK Independence Party (UKIP)’ (2016) 13 *Romanian Journal of English Studies* 1; Simon Usherwood, ‘The UK Independence Party: The Dimensions of Mainstreaming’ in Tijtske Akkerman, Sarah de Lange and Matthijs Rooduijn (eds), *Radical Right-Wing Populist Parties in Western Europe: Into the Mainstream* (Routledge 2016).

²⁸ British North America Act 1867 (UK).

²⁹ Canada Act 1982 (UK).

³⁰ Section 38 is headed ‘General procedure for amending Constitution of Canada’, section 38(1) providing:

An amendment to the Constitution of Canada may be made by proclamation issued by the Governor-General under the Great Seal of Canada where so authorised by:

- (a) resolutions of the Senate and House of Commons;
- (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least 50 per cent of the population of all the provinces;

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

amendment procedure, being:

- a. the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
- b. the powers of the Senate and the method of selecting senators;
- c. the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of senators;
- d. subject to paragraph 41(d),³¹ the Supreme Court of Canada;
- e. the extension of existing provinces into the territories; and
- f. the establishment of new provinces.

A constitutional amendment affecting one province only requires assent of the Canadian Parliament and the relevant province's legislature.³² Some constitutional amendments require unanimous consent of all provinces plus the House of Commons and Senate, the 'unanimity formula' covering:

- a. the office of the Queen, the Governor-General and the Lieutenant Governor of a province;
- b. the right of a province to a number of members in the House of Commons not

³¹ Section 41 addresses 'amendment by unanimous consent', providing that amendment may be made by proclamation issued by the Governor-General under the Great Seal of Canada where authorised by resolutions of the Senate and House of Commons and of the legislative assembly of each province, relating to: E+W+S+N.I.

- (a) the office of the Queen, the Governor-General and the Lieutenant Governor of a province;
- (b) the right of a province to a number of members in the House of Commons not less than the number of senators by which the province is entitled to be represented at the time this Part comes into force;
- (c) subject to section 43, the use of the English or the French language;
- (d) the composition of the Supreme Court of Canada; and
- (e) an amendment to this Part.

³² Section 43 'amendment of provisions relating to some but not all provinces', provides: An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

- (a) any alteration to boundaries between provinces; and
- (b) any amendment to any provision that relates to the use of the English or the French language within a province, may be made by proclamation issued by the Governor-General under the Great Seal of Canada only where so authorised by resolution of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

- less than the number of senators by which the province is entitled to be represented at the time the Constitution Act 1982 came into force;
- c. subject to section 43,³³ the use of the English or the French language;
 - d. the composition of the Supreme Court of Canada; and
 - e. changing the amendment procedure itself: section 41

Others can be made by proclamation in certain circumstances, as section 43 sets out. Further, the Senate or House of Commons, or a provincial legislative assembly can initiate amendment procedures under sections 38, 41, 42 and 43, whilst amendments can be made without a resolution of the Senate. In such cases, constitutional amendments under sections 38, 41, 42 or 43 may be made without the Senate's resolution authorising proclamation:

... [I]f, one hundred and eighty days after the adoption of the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution: s. 47(1).

The 180-day period does not include 'any period when Parliament is prorogued or dissolved: s. 47(2)'

The United States – The Declaration of Independence 1776 and the Articles of Confederation 1781 were adopted unanimously, the Articles incorporating explicitly the rule of states' unanimity for ratification in respect of both original Articles and any amendments.³⁴ In 1787, the Convention that brought into being the United States Constitution was constituted by delegates from each of the (then existing) states, with the task of reporting to Congress and states, the agreed draft to be approved by both. From May to September that year the delegates debated the draft provisions, ratified the Constitution, then sent the document out to the states for their ratification.³⁵ This was similar to the procedure now contained in the Constitution, whereby Article V sets down two methods:

A constitutional amendment proposal coming forward through Congress on two-thirds vote of each house, with ratification being approval by three-fourths of the states, by state legislatures or convention in the states; or

³³ Ibid.

³⁴ US Constitution and Amendments, 'The Constitutional Convention' <<https://www.constitutionfacts.com/us-constitution-amendments/the-constitutional-convention/>> accessed 25 November 2018.

³⁵ Ibid.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION, WRONGS RIGHTED OR REACTION & REITERATION

A national convention called by Congress on application of two-thirds of state legislatures, again with ratification begin approval by three-fourths of the states, by state legislatures of conventions in the states.

Congress makes the choice between these two options.

Australia – Section 128 of the Constitution Chapter VIII sets out requirements for constitutional referendums, providing that the Constitution may be amended by referendum only. That is, a Referendum Act must be submitted to the Australian electors for approval. This can occur in one of two ways. For the first, a Bill containing the proposed change must be passed by both houses – the House of Representatives (lower house) and the Senate (upper house) by an absolute majority of total members (not just those present or members voting).³⁶ The Act then goes to the electors. For the second, if one house passes the Bill, whilst the other does not or includes amendments not agreed by other house, then it remains possible for the Bill to go forward to the people. Thus if, after three months, the first house passes the Bill again but the second house refuses, the Governor-General can submit the Bill as an Act to electors for referendum. For this step, the Prime Minister must advise the Governor-General. This means that the party not in government is confronted by a difficulty if wishing to put to referendum a constitutional change: without the Prime Minister's support, the proposal will languish. The only solution for an opposition is to win government so as to have control of the process, for once the Prime Minister has advised the Governor-General, the Governor-General submits the proposed change to the electors for a referendum. The referendum must occur at least two months after the Bill is passed, and at most six months after.

Section 128 allows the Parliament to make laws setting out the exact procedures for a referendum (presently under the Referendum (Machinery Provisions) Act 1984 (Cth))³⁷ and all eligible voters – that is, all entitled to vote in House of Representative elections – are eligible to vote in referendums.³⁸

Section 128 also allows for the situation existing immediately after federation (1901) when no laws covering suffrage at federal level existed. Under section 128 until federal suffrage laws were introduced, in any state having full adult suffrage

³⁶ Commonwealth of Australia Constitution Act 1900 (UK).

³⁷ Australian Legal Information Institute (Austlii) (Commonwealth Consolidated Acts) <http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/rpa1984353/> accessed 1 December 2018.

³⁸ In 2006 the right of persons serving a term of imprisonment was removed by the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth).

(for women and men) only half the votes in that state would be counted. This provision is now obsolete, following the introduction of uniform voting laws by the Commonwealth Electoral Act 1902.³⁹

Under section 128 a referendum succeeds if:

- a. a majority of electors voting approve of the change in a majority of states (four out of six); and
- b. a majority of all electors across Australia (including electors in ACT and NT) approve of the change.

This is the ‘double majority’.

Further under section 128, any state specifically affected by the amendment must be one of the states with a majority vote in favour of the change. Situations specifically referred to in section 128 include:

- a. if the change proportionally reduces a state’s representation in either house of parliament;
- b. if the change reduces the minimum number of representatives of a state in the House of Representatives;
- c. if the change alters the state’s boundaries, by increasing or decreasing them; or
- d. if the change alters the provisions of the Constitution specifically in relation to that state.

This is known as the ‘triple majority’.

Section 128 has been amended once, by the 1977 referendum, providing for participation of territory (ACT, NT) electors in referendums. Electors in territories which can be represented in the House of Representatives (NT and ACT) are counted in determining whether a majority of all electors in Australia approve a change. Electors in other territories (external territories – Norfolk Island, Christmas Island) cannot vote in referendums.⁴⁰

³⁹ Since amended by various Acts and now being the Commonwealth Electoral Act 1918 (Cth). See Commonwealth Electoral Act 1905 (Cth); Commonwealth Electoral Act 1906 (Cth); Disputed Elections and Qualifications Act 1907 (Cth); Commonwealth Electoral Act 1909 (Cth); Commonwealth Electoral Act 1911 (Cth); Commonwealth Franchise Act 1902 (Cth); Electoral Divisions Act 1903 (Cth).

⁴⁰ Referendum (Machinery Provisions) Act 1984 (Cth).

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION, WRONGS RIGHTED OR REACTION & REITERATION

A change proposed to section 128 which failed was contained in the 1974 referendum:

- a. providing for territory voting at referendums (successful in 1977);
- b. modifying the requirement that a majority of electors in a majority of states approve a change, so that if an equal number of states approved and disapproved of a proposed change, but a majority of electors nationally approved, the referendum would succeed.

ARE CANADIAN WOMEN PERSONS? SUPREME COURT vs PRIVY COUNCIL INTERPRETATION

Turning, then, to the question of what action has been taken and how successfully in terms of constitutional change, the first example (for Canada), was a ‘change’ through interpretation. Section 24 of the British North America Act 1867 was taken from its inception to exclude women from the Senate. Not unexpectedly, activist women objected. The debate was whether the words of section 24 were being interpreted correctly, meaning constitutional amendment would be required to include women as potential senators, or whether the interpretation eliminating women from consideration was erroneous, meaning that women could be considered, albeit the word ‘woman’ did not appear. The argument lay in what the words ‘qualified person’ meant and, ultimately, the meaning of ‘person’.

Section 24 of the British North America Act provided that ‘qualified persons’ alone could be appointed to the Senate:

The Governor-General shall from time to time, in the Queen’s name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a senator.

‘Qualified persons’ were those thirty years of age and above, owners of property to the value of at least \$4,000, and who resided in the province from which they were to be appointed. The traditional view was that the words applied to men alone, and that a woman who was over thirty years, possessed property of the requisite value, and was resident in the relevant province was not ‘qualified’ because ‘person’, it was said, did not include ‘woman’. This interpretation was consistent with decisions of courts in England, the United States, Australia and Aotearoa/New Zealand.⁴¹

⁴¹ See Jocelyne A. Scutt, ‘Are Women Persons?’ in Jocelyne A. Scutt (ed), *Women and Magna Carta: A Treaty for Rights or Wrongs* (Palgrave/Macmillan 2016) 13–39; Joan Hoff Wilson, *Law, Gender and Injustice: A Legal History of U.S. Women* (NYU Press

'Person' was determined by judges to refer only to men. Consistent with this, the Canadian government had denied women the right to sit as senators.⁴²

When Emily Murphy was proposed for the Senate by women activists in Alberta, she was determined not to be ruled ineligible due solely to her being female. Thousands supported her, with strong representations from the National Council of Women of Canada, the Federated Women's Institutes, and the Montreal Women's Club. This made no difference. Nor did the support of newspapers, or that she was Canada's first woman magistrate.⁴³ She was a woman, and that was taken as disqualifying her. Ultimately, activist women decided their only recourse was to the courts.

Emily Murphy, Henrietta Muir Edwards, Irene Parlby, Nellie McClung and Louise McKinney took on the case together, becoming known as 'the Famous Five' and, as Sharpe and McMahon point out in their history and analysis of the case, each 'had [already] played a distinctive role in the promotion of women's legal rights and equality'.⁴⁴ Together, they represented 'the struggle for suffrage, the fight for prohibition, the effort to apply Christian values to public issues, and the promotion of improved legal and social rights for women and children'.⁴⁵ Yet how could they get the case to court? Appointment to the Senate was discretionary, meaning that Murphy, like any other woman, had no right giving her standing to launch a suit. She had no standing. However, section 60(5) of the Supreme Court Act 1906 provided that the government could refer directly to the Supreme Court any question of law or fact relating to the interpretation of the British North America Act provisions, or the constitutionality or interpretation of any federal or provincial legislation. Hence, the angle the women took was to petition the government to direct a reference to the Canadian Supreme Court, on the basis that if the government did so, Murphy and her four confederates could intervene. The Court's answer would be advisory only; however, it would be taken to be authoritative.

1991); Jocelyne A. Scutt, 'Sexism in Legal Language' (1985) 59(10) ALJ 163-74; Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias* (Martin Robertson 1978); and see also Mary Jane Mossman, *The First Women Lawyers* (Hart Publishing 2006).

⁴² Robert J Sharpe and Patricia I McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (University of Toronto Press 2004); Sheryl N Hamilton, *Impersonations: Troubling the Person in Law and Culture* (University of Toronto Press 2009).

⁴³ Ibid, ch 4; 'Emily Murphy's Senate Campaign' 74-103.

⁴⁴ Sharpe and McMahon (n 42) 37.

⁴⁵ Ibid.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

The question ultimately put to the Court by the Attorney General of Canada was:

Does the word ‘Persons’ in section 24 of the British North America Act, 1867, include female persons?⁴⁶

Although they were not confident of an outcome favourable to their position, the women’s hope nonetheless was that the Court would interpret ‘person’ and hence ‘qualified person’ to include women. Unfortunately, that hope foundered. The Court did recognise the British North America Act as ‘intended to be the foundation of [a] new structure’ and, insofar as the House of Commons (the legislature) and the executive were in contemplation, there was ‘some plausibility’, said Chief Justice Anglin,⁴⁷ in contending:

... [T]here would be something incongruous in a parliamentary system professedly conceived and fashioned on this principle, if persons fully qualified to be members of the House of Commons were by an iron rule of the constitution, a rule beyond the reach of Parliament, excluded from the Cabinet or the Government; if a class of persons who might reach any position of political influence, power or leadership in the House of Commons, were permanently, by an organic rule, excluded from the Government⁴⁸

Yet the ‘new structure’ argument did not hold sway insofar as the Senate was in issue, and there was no acceptance that ‘women’ were a ‘class of persons’ who, if denied an equal place in the polity, would be thereby ‘wrongly excluded’. Rather, the Supreme Court fell back on old notions applied to the United Kingdom and the judicial exclusion of women as a class from public office, from suffrage, from legal and other professional practice, from university, and from membership of the House of Lords.⁴⁹

The principal authority relied upon was *Chorlton v Lings*,⁵⁰ decided by the House of Lords in 1868. Thousands of women in England, Scotland and Wales had

⁴⁶ Reference re meaning of the word ‘Persons’ in section 24 of The British North America Act 1867 (known as *Edwards v Attorney General of Canada* [1928] SCR 276).

⁴⁷ The designation or correct title of the Chief Justice was CJC – Chief Justice of Canada.

⁴⁸ *Edwards v Attorney General of Canada* (n 46) 297.

⁴⁹ Chief Justice Anglin wrote the principal judgment, concurred in by Justices Lamont and Smith. Justice Mignault agreed with the majority, albeit on slightly different grounds: *Edwards v Attorney General of Canada* (n 46) 302–03.

⁵⁰ [1868] LR 4CP 374.

voted or sought to vote in parliamentary elections when their names had been added to the electoral rolls.⁵¹ Some had their names eliminated from the rolls by the barristers whose role it was to ensure the integrity of the electoral process. Others' names remained on the rolls, so went to the polling stations. Some were allowed to vote; some were turned away. Some had their votes challenged by unsuccessful candidates who contended that the women had breached the law by voting, that their votes should not have been accepted and that their inclusion in the count meant the ballot was spoiled. The argument was that the Reform Act of 1867, extending the vote to all householders, had ensured the suffrage to women householders.⁵² The word used in the Reform Act was 'man', not 'person'; however recourse was had to the Interpretation Act 1850, known popularly as Lord Brougham's Act, which provided 'man' embraces 'woman'. In other words, where the word 'man' appeared in a statute, this was deemed to include 'woman'.⁵³ Lord Coleridge and his junior Richard Pankhurst contended that this meant the women had voted legitimately, each being a householder and hence being included within the Reform Act's suffrage provisions.

Sir James Easte Willes, of whom it was said 'a finer judge never lived',⁵⁴ asserted in *Chorlton v Lings* that Lord Brougham's Act had no application. This was not because women were fickle or constitutionally unsuited to performing in public life,⁵⁵ including exercising suffrage, but because they were held in such great esteem that voting and other appurtenances of public power were not for them:

Women are under a legal incapacity to vote at elections. What was the cause of it, it is not necessary to go into: but, admitting that fickleness of judgment and

⁵¹ See Scutt, 'Are Women Persons' 2016 (n 41).

⁵² For extensive discussion of this and other 'person' cases, see Scutt, 'Are Women Persons' (n 41); Hoff Wilson, *Law, Gender and Injustice* (n 41); Scutt, 'Sexism in Legal Language' (n 41); Sachs and Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias* (n 41).

⁵³ See Women's History Network, 'This Is Where it All Could Have Begun-But Did it?' (WHN Blog) <<https://womenshistorynetwork.org/tag/lord-broughams-act-1850/>> accessed 28 November 2018.

⁵⁴ *Edwards v Attorney General of Canada* (n 46) 283; see Sachs and Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias* (n 41) 34; Lord Esher in *Beresford-Hope v Sandhurst* (1889) 23 QBD 79 [95] said similarly of Willes LJ that a 'more learned' judge never lived.

⁵⁵ Contentions made by judges in other cases – for example *Jex Blake and Ors v Senatus of University of Edinburgh* [1873] 11 M 784; and see cases from the United States, Australia, Canada, the United Kingdom and Aotearoa/New Zealand cited by Scutt, 'Sexism in Legal Language' (n 41); Sachs and Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias* (n 41).

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

liability to influence have sometimes been suggested as the ground of exclusion, I must protest against its being supported to arise in this country from any under-rating of the sex either in point of intellect or worth. That would be quite inconsistent with one of the glories of our civilisation, – the respect and honor in which women are held. This is not a mere fancy of my own, but will be found in Selden ..., in the discussion of the origin of the exclusion of women from judicial and like public functions, where the author gives preference to this reason, that the exemption was founded upon motives of decorum, and was a privilege of the sex.⁵⁶

The Chief Justice cited *Beresford-Hope v Sandhurst*⁵⁷ where *Chorlton v Lings* was relied upon by Lord Esher, MR in his assertion that by ‘neither the common law nor the constitution of [Great Britain] from the beginning of the common law until now can a woman be entitled to exercise any public functions ...’⁵⁸ Willes, J and *Chorlton v Lings* were called upon again in Viscountess Rhondda’s Claim, where the contention that a woman should take her seat in the House of Lords, she being the only surviving holder of the qualifying title, was initially upheld. Yet the Lord Chancellor objected, reconstituted the House of Lords committee, and ensured that by a substantial majority the claim was quashed.⁵⁹

A recurring theme in previous decisions and repeated by the Chief Justice was that no woman ‘had ever’ applied for whatever position was under contention – whether it be entry to university as in *Jex Blake*,⁶⁰ the right to vote as in *Chorlton v Lings*,⁶¹ the right to go into the practice of law or take up articles as a precursor to legal practice as in *Bebb v The Law Society*⁶² and *Edith Haynes v Law Society*.⁶³ Yet this argument meant that there was no point in any woman at any time applying for any public post or to engage in any public responsibility, for the argument that no woman had applied before her would be employed to denounce her claim. Further, it made no difference to the Supreme Court that the Interpretation Act 1850 had been repealed and replaced by the Interpretation Act 1889, making the ‘man embraces woman’ provision arguably stronger by stating that ‘man’ used in any statute must be taken to include ‘woman’ ‘unless the

⁵⁶ *Chorlton v Lings* [1868] LR 4 CP 374, 392.

⁵⁷ (1889) 23 QBD 79.

⁵⁸ *Edwards* (n 46) 284.

⁵⁹ [1922] AC 339.

⁶⁰ *Jex Blake* (n 55).

⁶¹ *Chorlton* (n 56).

⁶² [1914] 1 ch 286.

⁶³ [1904] 6 WAR 209.

contrary intention appears'. That this meant in other words 'man' in legislation is equivalent to 'woman and man' was unpersuasive. 'Person' in the Supreme Court's view continued to mean 'man' and no woman was therefore 'qualified' to enter the Senate.

Fortunately for 'The Famous Five', the refusal to accept them as 'persons' meant they did not have to let the matter rest. An appeal to the Privy Council was instituted so that the matter could be settled at the highest appellate level. At that time, Canada was not enamoured of the Privy Council, considering it hide bound and not a suitable appellate court for cases originating from a 'new' country with different geography, a different demographic, and new ideas. This unhappiness with the Privy Council was replicated in Australia, too, for very much the same reasons: why should a body sitting in distant London pronounce upon disputes arising from a very different country, with a disparate topography, a hugely dissimilar climate, long distances, deserts and a population crowded mainly in city centres on the coast.⁶⁴ This assessment of the Privy Council as unsuited to be the appellate court for the Dominions was ironic, for it was the Privy Council that took the momentous step of declaring 'women are persons'. This was the first appellate decision of any common law court, in any of the countries where the debate had raged and courtroom battles had been fought for at least fifty years, recognising women as persons.

Lord Justice Sankey, presiding over the Privy Council as Lord Chancellor, wrote the unanimous decision of the five Lords on the Judicial Committee. The word 'persons' did he said (the emphasis being his own) include 'women'. Women were entitled to exercise the privileges hitherto reserved for men alone. Women were entitled to enter public offices formerly considered to be reserved to men. Women were entitled to be called to serve on the Canadian Senate. The judgment read:

The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary. Such exclusion is probably due to the fact that the deliberate assemblies of the early tribes were attended by men under arms, and women did not bear arms. The likelihood of

⁶⁴ The Australian Constitution originally included the High Court of Australia as its highest appellate court, but this was altered when the Bill went through the United Kingdom Parliament, reinstating the Privy Council as the final court of appeal. See generally Murray Gleeson, 'The Privy Council – An Australian Perspective' <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_18jun08.pdf> accessed 28 November 2018.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

attack rendered such a proceeding unavoidable, and after all what is necessary at any period is a question for the times upon which opinion grounded on experience may move one way or another in different circumstances. This exclusion of women found its way into the opinions of Roman jurists. The barbarian tribes who settled in the Roman Empire, and were exposed to constant dangers, naturally preserved and continued the tradition.⁶⁵

Barbarous times where no longer upon us, the judgment continued, and the long line of ‘persons cases’ holding women not to be included in the term were no longer applicable. The British North America Act had set about establishing the foundation for a new country, with a political structure appropriate to the new times in which the people of Canada lived. Effectively endorsing what the Supreme Court had said about the legislature (the House of Commons) and the executive, the Privy Council extended this to include the Senate. The Senate was a part of the political and parliamentary system created by the British North America Act, and could not be set apart from it. Rather it should be seen in context – the context of a creating a constitution for a new country. In this, too, it should not be assumed that ‘old’ notions as to women’s place and person should prevail. This followed for the word person itself:

The word ‘person’ may include members of both sexes, and to those who ask why the word should include females, the obvious answer is, why not? In these circumstances the burden is upon those who deny that the word includes women to make out their case.⁶⁶

If women were ‘expressly excluded from public office’ there would be no difficulty in concluding the matter accordingly. But the British North America Act’s provision said that ‘persons’ were those entitled to be summoned to or placed in public office; this meant that ‘different considerations arise’.⁶⁷ Customs need to be recognised, said Lord Sankey, for the part they have played in referencing the word ‘person’. The word ‘is ambiguous and in its original meaning would undoubtedly embrace members of either sex’. He continued:

On the other hand, supposing in an Act of Parliament several centuries ago it had been enacted that any person should be entitled to be elected to a particular office it would have been understood that the word only referred to males, but

⁶⁵ *Henrietta Muir Edwards and Ors v Attorney General of Canada and Ors* [1930] AC 4.

⁶⁶ *Ibid* 4.

⁶⁷ *Ibid*.

the cause of this was not because the word ‘person’ could not include females but because at Common Law a woman was incapable of serving a public office. The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made, or the point being contested. Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared. The appeal to history therefore in this particular matter is not conclusive.⁶⁸

The Privy Council concluded that the subject matter of the legislation, and facts existing at the time of its passage ‘are legitimate topics to consider’ in determining the object and purpose of the Parliament in passing a Bill. However, ‘the argument must not be pushed too far’. Citing Lord Justice Farwell in *Rex v West Riding of Yorkshire County Council*,⁶⁹ Lord Sankey said that despite its ‘perhaps’ being legitimate to call upon history as an aid to show what facts existed to bring a statute into being, ‘the inferences to be drawn therefrom are exceedingly slight’.⁷⁰ It was wrong to ‘apply rigidly’ to contemporary Canada ‘the decisions and the reasonings ... which commended themselves ... to those who had to apply the law in different circumstances, in different centuries to countries in different stages of development’.⁷¹ An appeal to Roman Law and early English decisions (as cited in Chief Justice Anglin’s judgment) ‘is not of itself a secure foundation on which to build the interpretation of the British North America Act of 1867’.⁷²

Having concluded thus on extraneous matters going to interpretation of the provisions, the Privy Council then addressed internal evidence derived from the Act itself. The Privy Council being the final Court of Appeal from the colonies, great care should be taken, Lord Sankey concluded, ‘not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another’. The object of the British North America Act was to grant Canada a Constitution. In so doing ‘a living tree was planted, capable of growth and expansion within its natural limits’ and ‘like all written constitutions it has been subject to development through usage and convention’.⁷³ The Act’s provisions should not be ‘cut down ... by a narrow and technical construction’. Rather, the Act should be given ‘a large and liberal interpretation so that [Canada] to a great extent, but within

⁶⁸ *Henrietta Muir Edwards* (n 65) 5.

⁶⁹ [1906] 2 KB 676.

⁷⁰ *Henrietta Muir Edwards* (n 65) 7, citing Crias, *Statute Law* (3rd ed) 118.

⁷¹ *Henrietta Muir Edwards* (n 65) 5.

⁷² *Ibid.*

⁷³ *Ibid* 5–6, citing Sir Robert Borden, *Canadian Constitutional Studies*, 1922, 55.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs'.⁷⁴

Referencing the Act's provisions establishing the political and parliamentary system, Lord Sankey determined that the question in issue was 'not to the rights of women' but was simply 'a question as to their eligibility for a particular position'. Neither males nor females had a right to be summoned to the Senate. Hence, 'the real point at issue is whether the Governor-General has a right to summon women to the Senate'. Nothing in the Act led to a conclusion that the Governor-General was precluded from that right. The role of the Governor-General was to call 72 'members' as senators, and the word 'member' is 'not in ordinary English confined to male persons'. As to 'qualified persons', 'persons' is 'not confined to members of the male sex', and what is the effect of 'qualified'?⁷⁵ Clearly, said Lord Sankey, 'qualified' relates to those requirements or matters listed in the Act as defining 'qualified'. None precluded women. Furthermore, Chief Justice Anglin's concern that marriage created an obstacle for women was unfounded: the Aliens Act 1844 provided that any woman married to a natural born subject or person naturalised 'shall be deemed and taken to be herself naturalised and have all the rights and privileges of a natural born subject'.⁷⁶

As to other matters going to political representation, until 1916 women were excluded from the suffrage in federal and provincial elections. However, from 1916 to 1922 various Dominion and Provincial Acts were passed admitting women to the vote and acknowledging their right to sit in Dominion and Provincial legislative bodies as members. Quebec alone continued to deny women participation in provincial elections on the same basis as men.⁷⁷

A 'heavy burden' rests upon an appellant seeking to set aside a unanimous judgment of the Supreme Court. However Lord Sankey had regard to several issues:

- a. to the object of the Act, viz, to provide a constitution for Canada, a responsible and developing state;
- b. that the word 'person' is ambiguous and may include members of either sex;

⁷⁴ *Henrietta Muir Edwards* (n 65) 6.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*; see Parliament of Canada, 'Women's Right to Vote in Canada' (Senate House of Commons ParlInfo) <https://lop.parl.ca/sites/ParlInfo/default/en_CA/ElectionsRidings/womenVote> accessed 28 November 2018.

- c. that there are sections in the Act above referred to which show that in some cases the word ‘person’ must include females;
- d. that in some sections the words ‘male persons’ is expressly used when it is desired to confine the matter in issue to males, and;
- e. to the provisions of the Interpretation Act.

He continued that their Lordships ‘have come to the conclusion that the word “persons” in section 24 includes members both of the male and female sex and that, therefore, the question propounded by the Governor-General must be answered in the affirmative ...’⁷⁸

Thus it was that without any constitutional amendment, the British North America Act was effectively changed. In interpreting the Act’s provisions, the Privy Council overturned an interpretation that denied women personhood and eligibility for the Senate, concluding that women were persons and hence were eligible to be summoned to and become members of the Senate of Canada. This provides an example of the way constitutional change can occur without recourse to provisions governing constitutional amendment.

FIGHTING THE ‘RED PERIL’ – THE COURT AND THE PEOPLE vs THE GOVERNMENT’S MISCALCULATION

The second example – Australia – relates to a change proposed through a referendum,⁷⁹ when an earlier effort by the government to ban the Communist Party and its affiliates failed.⁸⁰ The impetus was the desire of a conservative government to

⁷⁸ Ibid 7.

⁷⁹ Communist Party of Australia, ‘When the Australian People said ‘No!’ (Australian Marxist Review) <<http://www.cpa.org.au/amr/54/amr54-03-when-australia-said-no.html>> accessed 1 December; Australian Communist Party Referendum 1951 (Communists and Communism)<<https://www.revolvy.com/page/Australian-referendum%2C-1951-%28Communists-and-Communism%29?stype=topics&cmd=list>> accessed 1 December 2018.

⁸⁰ Communist Party Dissolution Act 1950 (Cth), an earlier ban under the National Security (Subversive Organisations) Regulations 1940 (Cth) when the Menzies United Australia Party – National Country Party government declared it an illegal organisation was lifted when the Curtin Labour government came to power in 1942. A condition was that the Party assist the allied war effort: Drew Cottle, ‘How Australia Failed to Destroy Communism’, *Australian Society for the Study of Labour History*, <<http://www.labourhistory.org.au/hummer/the-hummer-vol-10-no-1-2015/australia-failed/>> accessed 1 December 2018; Alastair Davidson, *The Communist Party of Australia: A Short History* (The Hoover Institution 1968); W J Brown, *The Communist Movement and Australia* (Australian Labour Movement History Publications 1986); Stuart Macintyre, *The Reds* (Allen & Unwin 1998).

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

retain federal government⁸¹ and the rise of the Union of Soviet Socialist Republics (USSR) as a world power governed by the Communist Party. In 1950s Australia, the conservatives – newly named the Australian Liberal Party – were in government. During the Second World War, Australia, traditionally allied with and seeing the United Kingdom as its ‘protector’, changed course towards the United States. The war in the Pacific had been fought by the United States and Australia, without British help – the United Kingdom being taken up in Europe and the Middle East and contrary to Australia’s welfare wishing to retain Australian troops to pursue the war in Europe.⁸² After the war, the USSR, a former ally, became the bête noir of the Western world. The Cold War had begun. With China joining the USSR politically through Chairman Mao’s Communist Party, Australia’s interests under the conservative government became even more allied to those of the United States. In the United States, the House Un-American Activities Committee (HUAC) and Senator McCarthy chairing an associated committee took a leading part in tarring US citizens with the label ‘Communist’ and hence with being untrustworthy and traitorous.⁸³ The Menzies’ government saw an opportunity to taint its political rival the Australian Labour Party (based in workers’ rights, industrial democracy, and supported by unions) with the diktat of the Communist menace,⁸⁴ passing legislation aimed at banning the Australian Communist Party

⁸¹ George Williams, ‘The Communist Party Dissolution Bill and its Aftermath’ (Australian Society for the Study of Labour History 8 May 2010) <<https://labourhistorycanberra.org/2015/05/the-communist-party-dissolution-bill-and-its-aftermath/>> accessed 1 December 2018.

⁸² The Australian Prime Minister, John Curtin, defied this demand from Churchill and ordered the Australian troops back to defend Australia in the Pacific: Defining Moments, ‘Curtin Brings Home the Troops – 1942: Australian Troops Return to Fight in the Pacific’ (National Museum Australia) <<http://www.nma.gov.au/defining-moments/resources/curtin-brings-home-troops>> accessed 1 December 2018.

⁸³ See for example Walter Goodman, *The Committee* (Farrer, Straus and Girous, 1968); David Frum, *How We Got Here: The ‘70s* (Basic Books 2000); Thomas Patrick Doherty, *Cold War, Cool Medium: Television, McCarthyism, and American Culture* (Brandeis University Press 2003); Bruce Cook, *Trumbo* (Grand Central Publishing 2015); Larry Ceplair and Christopher Trumbo, *Dalton Trumbo: Black Listed Hollywood Radical* (University Press of Kentucky 2017).

⁸⁴ When the High Court with one dissenter (Chief Justice Latham) struck down the Communist Party Dissolution Act 1950 (Cth) and the referendum failed (see below), Menzies instituted a Royal Commission into what became known as ‘the Petrov Affair’. The federal election had been announced and, on 13 April, the eve of the last parliamentary sitting day before the 1954 election campaign, Menzies announced the defection of

as a 'revolutionary party' aiming to overthrow or subvert by treason or subversion the existing system of government.⁸⁵

The Communist Party Dissolution Act 1950 (Cth) set out to dissolve the Australian Communist Party (ACP) and to provide that members of the Communist Party were ineligible to hold office in trades unions and, as 'declared persons', were obliged to forfeit their property to the Commonwealth, just as any property owned by the Communist Party itself was forfeit. The Act's preamble set it out starkly, asserting that the Australian Communist Party:

... [I]s a revolutionary party using violence, fraud, sabotage, espionage and treasonable or subversive means for the purpose of bringing about the overthrow or dislocation of the established system of government of Australia and, particularly by means of strikes or stoppages of work, causing dislocation in certain industries which are declared to be vital to the security and defence of Australia.⁸⁶

By section 5 the Act further provided, subject to a declaration by the Governor-General, 'means for the dissolution of bodies of persons associated in the manner specified in the statute with the Communist Party or communism' and by section 8 for the forfeiture of the property of such associations. Any acts directed towards the continuance of the activities of such an association would be penalised under section 7, whilst sections 9 and 10 moved on to providing that, subject to a declaration by the Governor-General, persons with specified communist associations shall be ineligible for holding office under or for employment by the Commonwealth or for holding office in an industrial organization which the Governor-General declares to be an organisation in industries such as coal mining, iron and steel, engineering, transport, building or power. The legislation was

Vladimir Petrov, an official attached to the Russian (USSR) Embassy. He implicated Herbert Vere Evatt, the leader of the Labour opposition, and ultimately won the election. Varying views exist as to the entire affair; however, reliable historians do assess this episode as one in relation to which at minimum the timing was engineered to damage Labour's prospects at the polls (as indeed it did): 'The Petrov Affair' (Royal Commission) <https://petrov.moa.doph.gov.au/royal-commission.html> accessed 1 December 2018; 'The Petrov Affair' (The Affair) <<https://petrov.moadoph.gov.au/the-affair.html>> accessed 1 December 2018; Robert Manne, *The Petrov Affair: Politics and Espionage* (Pergamon 1987); National Museum Australia (NMA), 'Petrov Affair – 1954: Soviet Diplomat Vladimir Petrov Defects' (Defining Moments) <<http://www.nma.gov.au/defining-moments/resources/petrov-affair>> accessed 1 December 2018.

⁸⁵ Communist Party Dissolution Act 1950 (Cth), Preamble.

⁸⁶ *Ibid.*

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

challenged by the Communist Party and ten trades unions (not all registered under the Commonwealth Conciliation and Arbitration Act 1904–49) as being unconstitutional. This was an attack on organised labour. The first battle was fought in the Australian High Court.⁸⁷

The Full Court consisting of Chief Justice Latham and Justices Dixon, McTiernan, Williams, Webb, Fullagar and Kitto sat. Justices Dixon,⁸⁸ McTiernan,⁸⁹ Williams,⁹⁰ Webb,⁹¹ Fullagar⁹² and Kitto⁹³ found unanimously that the Communist Party Dissolution Act was invalid in its entirety. The Chief Justice stood alone in his determination against the Australian Communist Party and resoundingly for the Commonwealth government.⁹⁴

To address Latham CJ first, Latham held that the Act was entirely within the power of the federal government under section 51(vi) (the defence power) and section 51(xxxix) (the incidental power), which provide:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(vi) the naval and military defence of the Commonwealth and of the several states, and the control of the forces to execute and maintain the laws of the Commonwealth;

...

(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.⁹⁵

He also adverted favourably to section 61, upon which the Commonwealth also relied. It provides that the executive power of the Commonwealth, being vested in the Crown, is exercisable by the Governor-General as representing the

⁸⁷ *Australian Communist Party v The Commonwealth* [1951] HCA 5; (1951) 83 CLR 1.

⁸⁸ *Ibid* 174–205.

⁸⁹ *Australian Communist Party v The Commonwealth* (n 87) 205–13.

⁹⁰ *Australian Communist Party v The Commonwealth* (n 87) 213–32.

⁹¹ *Australian Communist Party v The Commonwealth* (n 87) 232–48.

⁹² *Australian Communist Party v The Commonwealth* (n 87) 248–71.

⁹³ *Australian Communist Party v The Commonwealth* (n 87) 271–85.

⁹⁴ *Australian Communist Party v The Commonwealth* (n 87) 129–74.

⁹⁵ Australian Constitution, ‘Part 5 – Powers of the Parliament’ Parliament of Australia.

Crown, and that this extends to ‘the execution and maintenance of [the] Constitution, and of the laws of the Commonwealth’.⁹⁶

As to the defence power, for Latham CJ it did not matter that no war was being waged, nor that no war was on the horizon. The Korean War was in train, Australia was supporting the United States in its stand against North Korea, and had sent troops. But Australia was not on a war footing.⁹⁷ Hence it was not possible to contend (and Latham CJ did not) that there was danger in the nature of the First or Second World War or any equivalence to them. Notwithstanding this, he held that even in peacetime it was within the federal government’s power to pass legislation in the nature of the Communist Party Dissolution Act, disbanding a political organisation and industrial bodies, forfeiting their property and denying officials connected to or associated with these organisations employment by the federal government or with the named unions. The High Court was not entitled, he held, to question the Parliament’s assessment of these organisations or bodies as subversive, or as ‘an integral part of the world communist revolutionary movement which, in the King’s dominions and elsewhere, engages in espionage and sabotage and in activities or operations of a treasonable or subversive nature ...’ or the Governor-General’s assessment of bodies associated with the Australian Communist Party as themselves engaged in such activities.⁹⁸

As to further submissions made by the plaintiffs, Latham CJ found against them, too. Some counsel argued, he said, ‘as if the Commonwealth Constitution contained provisions corresponding to those contained in ... other Constitutions’⁹⁹ including that of the United States and Canada. The United States provisions were those ‘preventing the enactment of laws impairing the obligation of contracts or depriving persons of life, liberty or property without due process of law’.¹⁰⁰ As for Canada, the British North America Act by section 92 says ‘property and civil rights within the province[s]’ are under the exclusive power of provincial legislatures.¹⁰¹ Yet, said the Chief Justice:

None of these provisions appear in the Constitution of the Commonwealth, and ... there is no basis whatever for the attempt to create such provisions by

⁹⁶ Australian Constitution, ‘Chapter II – The Executive Government’, Parliament of Australia.

⁹⁷ See Dixon J in *Australian Communist Party* (n 87) 196. See further below.

⁹⁸ *Australian Communist Party* (n 87) 134.

⁹⁹ *Australian Communist Party* (n 87) 169.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

arguments based upon the judicial power¹⁰² and s. 92 of the Constitution¹⁰³ and the natural dislike of suppressive laws. The [Communist Party] Act does affect civil rights. It does affect proprietary rights. It does affect contracts of employment. But there is no reason why it should not do all of these things if it is legislation with respect to a subject upon which the Commonwealth Parliament has power to make laws ...¹⁰⁴

He then took issue with the proposition that federal legislation could not 'abolish a body which had Federal political objectives or State political objectives'. The plaintiffs' contention as to Federal political objectives was that the Constitution 'provided for voting by electors, impliedly providing that there should be political parties and therefore impliedly ... the electors should have the constitutional right to vote for any body of persons which was a political party'. Further, contended the plaintiffs, the Constitution 'impliedly provided for the existence of any political parties which any persons chose to form and, accordingly, that the Commonwealth Parliament had no power to suppress any party'.¹⁰⁵

As to state political objectives, the plaintiffs 'conceded that the constitutions of the States, like the Constitution of the Commonwealth, say nothing about political parties'. Nonetheless, Latham CJ said, for the plaintiffs it was argued that the constitutions of the states, like that of the Commonwealth, 'assumed the existence of political parties and that therefore all political parties can continue to

¹⁰² The judicial power is contained in Chapter 3, The Judicature, and most particularly section 71 which provides: 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with Federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes'.

¹⁰³ Section 92 is the trade and commerce power which provides: Trade within the Commonwealth to be free.

On the imposition of uniform duties of customs, trade, commerce, and intercourse amongst the states, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any state, or into any colony which, whilst the goods remain there, becomes a state shall, on thence passing into another state within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

¹⁰⁴ *Australian Communist Party* (n 87) 169.

¹⁰⁵ *Ibid.*

exist notwithstanding any legislation directed against them'. The conclusion of such arguments would be that 'bodies, however traitorous and subversive, are entitled to continue to exist if they are political parties though individual persons could be punished if they were prosecuted for and convicted of offences'.¹⁰⁶

All this, said Latham CJ, was 'such an insubstantial argument' that it was 'difficult to deal with'. Nonetheless, deal with it he did by saying:

The Commonwealth Parliament has full power to make laws with respect to traitorous and subversive activities of persons, whether they act individually or in association. If that be so, the fact that the bodies have other characteristics – political, athletic, artistic, literary, etc. – Cannot possibly exclude the application of ... laws [prohibiting them from operation].¹⁰⁷

As to section 92, the trade and commerce power, including free movement or intercourse between the states in pursuance of trade and commerce, the plaintiffs submitted that the Australian Communist Party and the industrial organisations covered by the Communist Party Dissolution Act were engaged in inter-state activities, writing letters from one state to another, with union officers travelling from state to state in undertaking their duties. Therefore, ran the plaintiffs' argument, they should be exempt from any law inhibiting such activities. This was countered by Latham CJ, saying that 'most other bodies of any consequence in Australia' engaged in such activities, and the plaintiffs had provided nothing in the way of trade, commerce or intercourse in which they engaged so as to bring their organisations within the scope of section 92. He agreed that in its operation the Act would restrict various activities of those to whom it applied, including inter-state activities. However, this was consistent, he said, with any Act providing for imprisonment for any offence, one requiring persons to take licences or to possess qualifications before they can follow certain occupations in a particular state,¹⁰⁸ and quarantine Acts and scores of other acts.¹⁰⁹ 'Commerce', he said, is remote from these activities. A law would be valid, not infringing section 92, if it

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ It should be noted that Latham CJ's contention as to section 92 allowing for state licensing or qualifications to be restricted by states, has since been determined to be prohibited where Queensland required a residency qualification before (for example) a qualified barrister or solicitor could be admitted to practice: *Street v Queensland Bar Association and Ors* (1988) HCA 37, (1988) 79 ALR 79, (1988) 2 ALJR 437; *Street v Queensland Bar Association* [1989] HCA 53, (1989) 168 CLR 461.

¹⁰⁹ *Australian Communist Party* (n 87) 169.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

prohibited passage across state frontiers of ‘creatures or things calculated to injure its citizens’, meaning that consistent with section 92 inter-state transfer of diseased cattle and noxious drugs could be prevented by law. Hence, he continued:

There can be nothing more injurious and dangerous than traitorous and subversive activities. If, in order to stop them, certain action is thought necessary by Parliament, if it is otherwise within power it is no objection to such action that it has the effect of preventing all those activities and other activities, whether inter-state or intra-state.¹¹⁰

Finally, Latham CJ addressed forfeiture of property. Acknowledging that section 51(xxxi) of the Constitution provides that the Parliament may make laws for the acquisition of property upon just terms, he observed that this is the only provision to address the matter.¹¹¹ He saw no conflict between section 51(xxxi) and the provisions of the Communist Party Dissolution Act:

The Act forfeits property because the party or the association engages in or is connected with activities of the kind described in the recitals, that is, activities which are considered by Parliament to be traitorous or subversive. If this is to be regarded as a law ‘for the acquisition of property’ I fail to see anything unjust in Parliament forfeiting the property of an association which in the opinion of Parliament possesses those characteristics.¹¹²

The Act, he said, ‘is seen to be very mild’ when compared with ‘the common form of legislation in many countries with respect to espionage, sabotage and the like activities directed against the state, the penalty for which is often death’.¹¹³

Dixon J set out the plaintiff’s case in brief compass, stating the primary ground upon which the validity of the Communist Party Dissolution Act was attacked was ‘simply that its chief provisions do not relate to matters falling within any legislative power expressly or impliedly given by the Constitution to the Commonwealth Parliament but relate to matters contained within the residue of legislative power belonging to the States’.¹¹⁴ It was true, he said, that as a general statement ‘the law governing the formation, existence and dissolution of voluntary

¹¹⁰ Ibid.

¹¹¹ Ibid, citing *Johnson Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* [1943] HCA 18, (1943) 87 CLR 314.

¹¹² *Australian Communist Party* (n 87) 170.

¹¹³ Ibid.

¹¹⁴ *Australian Communist Party* (n 87) 174.

associations of people falls within the province of the States'.¹¹⁵ This meant the validity of section 4 of the Act could be sustained only if a subject of federal legislative power could be found 'to which the enactment of such a provision is fairly incidental'. As noted, the Commonwealth relied on section 51(vi) and 51 (xxxix) of the Constitution.

Observing that the defence power aspect was clear: to be valid, the Act had to fall within its terms, Dixon J went on to address the incidental power argument which, he said, had to rely upon the power possessed by the federal parliament:

... [T]o make laws for the protection of the Commonwealth against subversive designs, whether ... attributable to the interplay of s.51(xxxix) with s.61 or form[ing] part of a paramount authority to preserve both its own existence and the supremacy of its laws necessarily implied in the erection of a national government.¹¹⁶

As to section 5, this took section 4 a step further in being directed against 'bodies of persons possessing communist affiliations or connections of certain [defined] forms ... but does not apply to industrial organisations registered under the law of the Commonwealth or of a State'. For such a body to come within the terms of the Act, a declaration by the Governor-General was required.¹¹⁷ Albeit in relation to the latter 'specified conditions' were set out, to be determined as existing by the Governor-General, Dixon J concluded that 'every element involved' was left to the opinion of the Governor-General in Council: it would be for the Governor-General in Council 'to judge of the reach and application of the ideas expressed by the phrases "security and defence of the Commonwealth", "execution of the Constitution", "maintenance of the Constitution", "execution of the laws of the Commonwealth", "maintenance of the laws of the Commonwealth" and "prejudicial to"'. Furthermore, he said, 'the expression by the Governor-General in Council of the result in a properly framed declaration is conclusive'. A body against which a declaration was made could not 'go behind such an executive act done in due form of law' to 'impugn its validity upon the ground that the decision upon which it is founded has been reached improperly' by taking extraneous considerations into account, or 'because there was some misconception of the meaning or application ... of the statutory description of the matters of which the Governor-General in Council should be satisfied', or 'because of some other supposed miscarriage'.¹¹⁸

¹¹⁵ *Australian Communist Party* (n 87) 175.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Australian Communist Party* (n 87) 178.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

Dixon J then discussed the principle that the Governor-General could not be subject to a prerogative writ, the good faith of his acts as the Crown's representative could not be impugned 'in a court of law', and no inquiry could be made into the grounds upon which the advice was tendered for the purpose of invalidating an act formally done by the Governor-General in the Crown's name. Propositions put by the Commonwealth to address these factors, which gave rise to there being no substantive way of challenging a declaration, Dixon J said were 'unreliable'. One required 'a construction or constructions of the provision of which it is clearly incapable'. The other relied upon applying to the Governor-General in Council 'rules of law which have never been applied to him and are inapplicable as well as being inconsistent with the plain meaning of the provision'.¹¹⁹

The validity of forfeiture, seen by Latham CJ as beyond question, met with Dixon J's critique. As it appeared in the Act, forfeiture was 'neither part of a punishment for a breach of the law nor an acquisition for the purposes of the Commonwealth upon just terms'. Rather it was 'something in the nature of a final or permanent deprivation of property as a preventive measure taken by direct legislative or executive action'. This meant Latham CJ's justifications for it were unsustainable.¹²⁰ Similarly as to the proposition that denying employment to members of the Australian Communist Party or affiliated bodies could come within the defence power, Dixon J was unable to find such a relationship. He looked to whether the provisions could be sustained under the Commonwealth's power to legislate with respect to the public service.¹²¹ This was not so, he said, because 'a declaration about a man, if validly made, is an absolutely privileged statement in the [Commonwealth] Gazette of a most disparaging description'. It could be 'published of anybody, where or not ... in the service of the Commonwealth or an authority of the Commonwealth or whether or not there is any chance of his ever entering such a service'.¹²² Hence, the denial of employment provisions was not valid.¹²³ So, too, with the provisions covering industrial organisations. The Commonwealth's power lay under section 51 (xxxv) relating to 'conciliation and arbitration for the prevention and settlement of two-State industrial disputes'. This provided no basis for sanctioning of such organisations. In the first place, bodies had to be registered under the Commonwealth Conciliation and Arbitration Act 1904 (Cth) to come within section 51(xxxv) and if they did, the power did not and could not extend to disbanding them as the Act sought to do.¹²⁴

¹¹⁹ *Australian Communist Party* (n 87) 180.

¹²⁰ *Australian Communist Party* (n 87) 182.

¹²¹ Section 51(xxxv).

¹²² *Australian Communist Party* (n 87) 204.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

As to the defence power, Dixon J emphasised that where provisions ‘upon a matter of its own nature prima facie outside Federal power’, encompassing ‘nothing in themselves disclosing a connection with Federal power’, but were dependent upon ‘a recital of facts and opinions concerning the acts, aims and propensities of bodies and persons to be affected in order to make it ancillary to defence’, it was self-evident that ‘nothing but an extreme and exceptional extension of the operation or application of the defence power will support’ them:

It may be conceded that such an extreme and exceptional extension may result from the necessities of war and, perhaps ... of the imminence of war. But the reasons for this are to be found chiefly in the very nature of war and the responsibility borne by the government charged with the prosecution of a war.¹²⁵

Citing Williams J in *Victorian Chamber of Manufactures v The Commonwealth*,¹²⁶ he added that the paramount consideration ‘is that the Commonwealth is undergoing the dangers of a world war, and that when a nation is in peril, applying the maxim *salus populi suprema lex*, the courts may concede to the Parliament and to the Executive which it controls a wide latitude to determine what legislation is required to protect the safety of the realm’.¹²⁷ In the instance of a war ‘of any magnitude’ the necessity of organising the nation’s resources of men and materials, controlling the country’s economy, ‘employing the full strength of the nation and co-ordinating its use’, along with ‘raising, equipping and maintaining forces on a scale formerly unknown’ and ‘exercising the ultimate authority in all that the conduct of hostilities implies’ is clearly imposed upon the government. The defence power must provide the necessary authority. However, such necessity cannot exist in this form during any period of ostensible peace:

Whatever the dangers are experienced in such a period and however well-founded apprehension of danger may provide, it is difficult to see how they could give rise to the same kind of necessities. The Federal nature of the Constitution is not lost during a perilous war. If it is obscured, the Federal form of government must come into full view when the war ends and is wound up. The factors which give such a wide scope to the defence power in a desperate conflict are for the most part wanting.¹²⁸

¹²⁵ *Australian Communist Party* (n 87) 202.

¹²⁶ (1943) 67 CLR 335, 400.

¹²⁷ *Australian Communist Party* (n 87) 202.

¹²⁸ *Australian Communist Party* (n 87) 203.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

The use of the defence power in war and peace hitherto was subject to a marked distinction, he went on. But the High Court had never accepted that the continued existence of a formal state of war ‘is enough in itself, after the enemy has surrendered’, to bring or retain within the legislative power over defence ‘the same wide field of civil regulation and control as fell within it while the country was engaged in a conflict with powerful enemies’.¹²⁹ It could not now sustain the Communist Party Dissolution Act.

The majority decision against the Act precipitated the Menzies government into seeking to amend the Constitution. Taking place on 22 September 1951, the referendum put the question:

Do you approve of the proposed law for the alteration of the Constitution entitled ‘Constitution Alteration (Powers to deal with Communists and Communism) 1951?’¹³⁰

The Constitution Alteration (Powers to deal with Communists and Communism) Bill 1951 sought to give the Commonwealth Parliament power to make laws with respect to Communists and Communism where necessary for the security of the Commonwealth. This was to be done by introduction of a new section 51A providing:

1. The Parliament shall have power to make such laws for the peace, order and good government of the Commonwealth with respect to communists or communism as the Parliament considers to be necessary or expedient for the defence or security of the Commonwealth or for the execution or maintenance of this Constitution or of the laws of the Commonwealth.
2. In addition to all other powers conferred on the Parliament by this Constitution and without limiting any such power, the Parliament shall have power:
 - a. . . . to make a law in the terms of the Communist Party Dissolution Act 1950:
 - i. without alteration; or
 - ii. with alterations, being alterations with respect to a matter dealt with by that Act or with respect to some other matter with respect to which the Parliament has power to make laws;
 - b. to make laws amending the law made under the last preceding paragraph, but so that any such amendment is with respect to a matter

¹²⁹ *Australian Communist Party* (n 87) 195, citing *R. v Foster* (1949) 79 CLR 43 at 83, 84.

¹³⁰ Parliament of Australia, ‘Part 5 – Referendums and Plebiscites – Results’, House of Representatives, <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22handbook/newhandbook/2014-10-31/0049%22>> accessed 1 December 2018.

- dealt with by that law or with respect to which the Parliament has power to make laws; and
- c. to repeal a law made under either of the last two preceding paragraphs.
3. In this section the ‘Communist Party Dissolution Act, 1950’ means the proposed law passed by the Senate and the House of Representatives, and assented to by the Governor-General on the twentieth day of October, 1950, being the proposed law entitled ‘An Act to provide for the Dissolution of the Australian Communist Party and of other Communist Organisations, to disqualify Communists from holding certain Offices, and for purposes connected therewith’.¹³¹

Anticipating a ‘yes’ vote, Menzies, so often seen as an arch political tactician,¹³² miscalculated. With three states against and only three states for, and an ‘against’ majority of 2,370,009 as opposed to 2,317,927 ‘for’, the referendum was lost. Herbert Vere Evatt, as leader of the Labour opposition, is recognised as being a key to the referendum’s defeat. He travelled throughout Australia relentlessly in the period leading up to the vote, speaking at numerous rallies and to smaller and small gatherings.¹³³

It is often said that Australians are conservative in their approach to referendums and the potential for constitutional change. This is based on the relatively rare occasions when a referendum has succeeded, and the many more times a referendum has been lost. However, this blanket assessment ignores the possibility that Australians are disposed to think carefully about the nature and subject matter of proposed changes, and compulsory voting likely plays a significant part in this. In 1912 compulsory registration of voters for Federal elections was introduced. In 1915 compulsory voting for state elections was introduced in Queensland. In 1924 voting became compulsory in Federal elections. This engenders widespread political debate within the community and through the media, with Australians from all walks of life engaged: Australian Electoral Commission (AEC), ‘History of Compulsory Voting in Australia’ (Compulsory Voting) <https://www.aec.gov.au/Voting/Compulsory_Voting.htm> accessed 28 November 2018. Today, it is recognised

¹³¹ See Leicester Webb, *Communism and Democracy in Australia* (FW Cheshire 1954) 178; Fay Woodhouse, ‘The 1951 Communist Party Dissolution Referendum Debate at the University of Melbourne’ (Honours Thesis, University of Melbourne October 1996) <<http://vuir.vu.edu.au/30227/1/Fay%20Woodhouse.pdf>> accessed 1 December 2018.

¹³² Judith Brett, *Robert Menzies’ Forgotten People* (Macmillan 1992); Ian Cook, *Liberalism in Australia* (OUP 1999) ch 7; A W Martin, *Robert Menzies: A Life* (University of Melbourne Press 1993 & 1999) vols 1 & 2.

¹³³ Webb (n 131).

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

generally that the ‘no’ vote was right: banning the Australian Communist Party and ‘communism’ would have taken the country down an autocratic road, with a potential for authoritarianism accompanied by political disruption and dispute. This was the very nature of the complexion cast by the Menzies’ government on the Party and organisations it sought to ban. It was the referendum provision’s requirements for a ‘double majority’ – of states and in overall population – that brought about the negative result. This requirement provides a safeguard that can be criticised yet which managed to provide a just outcome in the Communist Party case, and in the subsequent ‘yes’ vote for Indigenous Australian rights¹³⁴ provided a just result, too.

Result ¹³⁵							
State	On rolls	Ballots issued	For		Against		Invalid
			Votes	%	Votes	%	
New South Wales	1,944,219	1,861,147	865,838	47.17	969,868	52.83	25,441
Victoria	1,393,556	1,326,024	636,819	48.71	670,513	51.29	18,692
Queensland	709,328	675,916	373,156	55.76	296,019	44.24	6,741
South Australia	442,983	427,253	198,971	47.29	221,763	52.71	6,519
Western Australia	319,383	305,653	164,989	55.09	134,497	44.91	6,167
Tasmania	164,868	158,596	78,154	50.26	77,349	49.74	3,093
Armed Forces		9,472	6,478		2,917		82
Total for Commonwealth	4,974,337	4,754,589	2,317,927	49.44	2,370,009	50.56	66,653
Obtained majority in three states and an overall minority of 52,082 votes.							
Not carried							

* Armed forces totals are also included in their respective states.

CAN RACISM BE UNDONE? WHEN HUMANITY SPEAKS IN THE VOICE OF HUMANITY – WRONGS RIGHTED

The third example – again from Australia – relates to a proposal set out in a referendum which succeeded overwhelmingly, through intensive political action in an effort to right a grievous wrong. This arose from the fact that when Australia was federated in 1901, Indigenous Australians were written out of the Constitution. Rather than the Federal Parliament taking responsibility for Indigenous Australian affairs,

¹³⁴ See below.

¹³⁵ Parliament of Australia (n 130).

control (and it was control) of Torres Strait Islanders and Aboriginal Australians was left to the states. By 1962, the right of Indigenous Australians to vote in federal elections had been consolidated,¹³⁶ and Queensland, the last state to ensure Indigenous Australians' the right to vote in state elections, conceded the right in 1965.¹³⁷ However, the Australian Constitution contained racially discriminatory provisions requiring amendment. The offending sections provided:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...(xxvi) The people of any race, other than the aboriginal people in any state, for whom it is necessary to make special laws.

127. In reckoning the numbers of the people of the Commonwealth, or of a state or other part of the Commonwealth, aboriginal natives should not be counted.

The 1967 referendum put the question whether the words '... other than the aboriginal people in any State ...' should be removed from section 51(xxvi), and whether section 127 in its entirety should be excised from the Constitution. Despite dissenters on both sides of politics, the Constitution Alteration (Aboriginals) Act 1967 (Cth) was passed unanimously by the House of Representatives and the Senate, so that the referendum went ahead without an official 'no' case being presented. With almost 90 per cent of voters turning out to vote, the referendum resulted in the highest 'yes' vote ever recorded in a Federal referendum. Over 90 per cent (90.77 per cent) voted for the change, with a majority in every state.

This was followed by the Constitution Alteration (Aboriginals) Act 1967 (Cth), assented to on 10 August 1967, amending the Constitution to give formal effect to the referendum outcome.

That the result was so overwhelming was the consequence of a campaign waged since the inception of the Commonwealth, which in turn was founded on the history from 1788 and the coming of Captain Arthur Phillip, who became Governor Phillip of the colony established at Sydney. The invasion, colonisation or

¹³⁶ Commonwealth Electoral Act 1962 (Cth).

¹³⁷ Voting rights were extended to Indigenous Australians prior to these dates; however, there was little firm clarification until 1962 federally, and variation in state voting rights. See National Archives of Australia, 'Voting Rights for Aborigines – Policy'A4940, C3496 (Record Search) <<https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=971071&isAv=N>> accessed 28 November 2018; Australian Electoral Commission (AEC), 'Electoral Milestones for Indigenous Australians', 10 October 2017 <<https://aec.gov.au/indigenous/milestones.htm>> accessed 28 November 2018.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

settlement of Australia spurred Indigenous Australians to action whether through wars or retaliation for colonial killings of Aborigines, and submissions made for land rights and recognition of sovereignty.¹³⁸ Then, in the lead-up to federation, just as the 1890s Constitutional Conventions featured no representation by women, Indigenous Australians were absent. This was despite the activism of both and their agitation for recognition and rights.¹³⁹

Result ¹⁴⁰								
State	On rolls	Ballots issued	For		Against		Invalid	Result
			Votes	%	Votes	%		
New South Wales	2,315,828	2,166,507	1,949,036	91.46	182,010	8.54	35,461	Yes
Victoria	1,734,476	1,630,594	1,525,026	94.68	85,611	5.32	19,957	Yes
Queensland	904,808	848,728	748,612	89.21	90,587	10.79	9,529	Yes
South Australia	590,275	560,844	473,440	86.26	75,383	13.74	12,021	Yes
Western Australia	437,609	405,666	319,823	80.95	75,282	19.05	10,561	Yes
Tasmania	199,589	189,245	167,176	90.21	18,134	9.79	3,935	Yes
Australian Total	6,182,585	5,801,584	5,183,113	90.77	527,007	9.23	91,464	Yes
Obtained majority in all six states and an overall majority of 4,656,106 votes.[615]								
Carried								

¹³⁸ See Al Grassby and Marji Hill, *Six Australian Battlefields* (Allen & Unwin 1988); Noel A Loos, *Invasion and Resistance: Aboriginal-European Relations on the North Queensland Frontier 1861–1897* (ANU Press 1982); Henry Reynolds, *Forgotten War* (NewSouth Books 2013); Peter Stanley, *The Remote Garrison: The British Army in Australia 1788–1870* (Kangaroo Press 1986); Robert Foster, Rick Hostling and Amanda Nettleback, *Fatal Collisions: The South Australian Frontier and the Violence of Memory* (Wakefield Press 2001).

¹³⁹ On women, see Jocelyne A. Scutt, ‘The Long, Long Struggle for Equal Pay and Pay Equity’ (PhD Thesis, University of New South Wales 2006); Scutt, ‘Are Women Persons’ (n 41); Robin R Joyce, ‘Feminism: An Early Tradition Amongst Labour Women’ Women and Labour Conference, *All Her Labours*, vol. 1 (1984, Hale & Iremonger); Robin R Joyce, ‘Labour Women: Political Housekeepers or Politicians’ in Marian Simms (ed) *Australian Women and the Political System* (Longman 1984); sources (n 3); on Indigenous Australians (n 9).

¹⁴⁰ Table taken from Parliamentary Library of Australia, ‘Part 5 – Referendums and Plebiscites – Referendum Results’, *Handbook of the 44th Parliament, 2014*, Canberra, ACT, Australia.

Indigenous and non-Indigenous Australians worked together in the campaign for the 1967 referendum. From early in the 20th century proposals were put forward that the Federal Government should, contrary to the Constitution's negative provisions, exercise powers in relation to Aborigines. As Gardiner-Garden points out,¹⁴¹ by August 1910 the Australian Board of Missions was calling upon both federal and state governments 'to agree to a scheme by which all responsibility for safeguarding the human and civil rights of the aborigines should be undertaken by the Federal Government', then in 1911 the Commonwealth Government took from South Australia responsibility for the Northern Territory. As the Indigenous Australian population of the Northern Territory was substantial relative to the states, this meant as a practical matter that the Federal Government moved into 'native welfare administration', previously a sole state responsibility.¹⁴² Some twenty years later, relying upon state and colonial governments, having been 'tried from the earliest days of colonisation', was said by the Association for the Protection of the Native Races of Australasia and Polynesia to have 'undeniably failed'. The federal government was more likely, the Association argued, to 'deal with the whole problem [sic] more adequately' than the state governments.¹⁴³ This was contradicted by a 1929 Royal Commission into the Constitution which determined by majority that 'on the whole the states are better equipped for controlling Aborigines than are the Commonwealth'. That the Federal Parliament should 'accept responsibility' for Indigenous Australians' well-being was the basis of the dissenting report.¹⁴⁴

During the Second World War John Curtin's Labour government sought to place Aborigines and Torres Strait Islanders within Commonwealth government

¹⁴¹ See generally J Gardiner-Garden, *The origin of Commonwealth involvement in Indigenous Affairs and the 1967 Referendum*, Background Paper No 11 (1996–97) Parliamentary Library, Canberra, ACT, Australia, 1997; J Gardiner-Garden, *The 1967 Referendum – history and myths*, Research Brief No 11 (2006–07), Parliamentary Library, Canberra, ACT, Australia, 2007; National Museum Australia, 'The Referendum, 1957–67', *Collaborating for Indigenous Rights 1957–73* <http://indigenoustrights.net.au/civil_rights/the_referendum_1957-67> accessed 28 November 2018; Parliamentary Library, *Parliamentary Handbook of the Commonwealth of Australia: 44th Parliament*, Parliamentary Library, Canberra, ACT, Australia, 2014, <<http://apo.org.au/node/54064>> accessed 28 November 2018.

¹⁴² Gardiner-Garden (n 142).

¹⁴³ 'The Aborigines – Letter to the Editor' (Sydney Morning Herald 25 January 1911) quoting Bain Attwood and Andrew Markus, '1967 and All That: Narrative and Myth, Aborigines and Australia', *Australian Historical Studies*, vol 29 (No 111) October 1998 73; cited Gardiner-Garden (n 142).

¹⁴⁴ Report of the Royal Commission on the Constitution, *Parliamentary Papers, 1929–1930–1931*, vol 1, pt 1, 270, 303; cited Gardiner-Garden (n 142) 5.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

responsibility and to ensure their inclusion in the planned post-war reconstruction. Plans for post-war reconstruction included a panoply of programmes to be established to advance housing construction, industrial development, planning and economic management. A referendum went forward in 1944 seeking constitutional change by proposing the transfer to the federal government fourteen powers held by the states, to be time limited to the duration of the war and five years after its conclusion. One of the fourteen powers listed for transfer anticipated the 1967 referendum: making laws with respect to ‘the people of the aboriginal race’. The Attorney General of the time, Herbert (‘Bert’) Vere Evatt, a principal proponent of the 1944 referendum, stated that at the 1942 Constitutional Convention leading up to the referendum ‘strong representations [were] made’ that this responsibility should be taken over by the Commonwealth.¹⁴⁵

The referendum failed, more likely due to the scope of the other thirteen powers sought to be transferred from states to Commonwealth than indicative of any antagonism in respect of the Indigenous responsibility question.¹⁴⁶ However, it gave an added impetus to the Indigenous rights campaign.

Indigenous and non-Indigenous Australians joined together in organisations, demonstrations and marches, lobbying government and opposition. The Aboriginal League worked with the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI), alongside older and more newly formed organisations, including the Aboriginal Australian Fellowship (AAF), Aborigines Education Union (AEU), Aborigines Progressive Association, Committee for Aboriginal Citizenship and Council for Aboriginal Rights. Faith Bandler, whose father was a Kanaka ‘blackbirded’¹⁴⁷ from the Pacific Islands to Queensland to work in the sugar cane industry, was prominent in the AEU and FCAATSI,¹⁴⁸

¹⁴⁵ B Griffen-Foley, ‘Dr H.V. Evatt and Letters to the Press in the 1944 Referendum Campaign’ (Australian Society for the Study of Labour History) <<http://www.labourhistory.org.au/hummer/vol-2-no-1/evatt-and-letters/>> accessed 28 November 2018; B Griffen-Foley, ‘“A Nearly Great Man”: Dr H.V. Evatt in the Press’ (BA Hons Thesis, Macquarie University) ch 3; Parliament of Australia, House of Representatives, Commonwealth Parliamentary Debates 20 July 1944, 351.

¹⁴⁶ Gardiner-Garden (n 142).

¹⁴⁷ ‘Blackbirding’ was the name given to the slave trade operating between the Pacific Islands and Queensland, with Kanakas kidnapped and forced into working on the sugar cane plantations. See Faith Bandler, *Wacvie* (Rigby 1977); *Welou, My Brother* (Wild & Woolley 1984).

¹⁴⁸ Faith Bandler, *Turning the Tide: A Personal History of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders* (Aboriginal Studies Press 1989); Faith Bandler, ‘A Good Innings’ in J A Scutt (ed), *As a Woman – Writing Women’s Lives* (Artemis Publishing 1992), 166–76.

working with non-Indigenous Australians Jessie Street¹⁴⁹ and Diana (Di) Graham¹⁵⁰ and Indigenous rights activists Pearl Gibbs¹⁵¹ and Len Fox.¹⁵² One of the most recognised in the struggle and success of the 1967 referendum, Faith Bandler writes of being approached by Pearl Gibbs to become involved, Gibbs telling Bandler that she must ‘get up out of her comfort zone’ and ‘get activist, get working’. Faith took the message to heart and put in ten solid years of activism in lobbying for the referendum and to persuade the Australian public that ‘now was the time’ to eliminate racism from the Constitution and to include Indigenous Australians as equally entitled as their non-Indigenous counterparts.

In 1957 Gibbs, Bandler, Street, Fox and Graham worked together, eventually engaging hundreds more, on a petition launched by the AAF to change the Australian Constitution. This led directly to the referendum. Initially, the Bill that was required to enable the referendum to be run included reference to section 127 alone. Prime Minister Robert Menzies saw section 51(xxvi) as essential for the protection of Indigenous Australians against discrimination by the Commonwealth Parliament, for the power enabling Parliament to make special laws encompassed the right to make discriminatory laws. The exclusion of ‘the people of the Aboriginal race’ from section 51 of the Constitution meant no valid laws could be passed by the Commonwealth that would ‘treat them as people outside the normal scope of the law’ or deny them enjoyment of benefits granted to other Australian citizens and impose upon them burdens not imposed upon other Australian citizens. Giving the Commonwealth Parliament the power ‘to make special laws with respect to the Aboriginal race’, said Menzies, ‘that power would very likely extend to enable the Parliament to set up, for example, a separate body of industrial, social, criminal and other laws relating exclusively to Aborigines’.¹⁵³

¹⁴⁹ Jessie Street, *Truth or Repose* (Australasian Book Society 1966); Peter Sekules, *Jessie Street: A Rewarding But Unrewarded Life* (Prentice Hall 1978); Heather Radi, *Jessie Street, Documents and Essays* (Women’s Redress Press 1990); Jessie Street and Lenore Colthart (eds) *Jessie Street: A Revised Autobiography* (Federation Press 2004).

¹⁵⁰ Di Graham, ‘In Pursuit of Equality’ in J A Scutt (ed), *Different Lives – Reflections on the Women’s Movement and Visions of Its Future* (Penguin Books Australia 1987), 178–87.

¹⁵¹ Heather Goodall, ‘Gibbs, Pearl Mary (Gambanyi) (1901–1983)’ in *Australian Dictionary of Biography in Australian Dictionary of Biography* (Melbourne University Press 2007) vol 17; Heather Goodall, ‘Pearl Gibbs: Some Memories’ (1983) 7 *Aboriginal History* 20–26.

¹⁵² Faith Bandler (contributor), *The Time was Ripe* (Alternative Publishing Cooperative 1983); Faith Bandler and Len Fox, *Marani in Australia* (Alternative Publishing Cooperative 1986).

¹⁵³ House of Representatives, Hansard, 11 November 1965, 2639; quoted Gardiner-Garden (n 91).

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

The Australian Labour Party opposition leader at the time, Arthur Calwell, advocated for the inclusion of section 51(xxvi) along with section 127 in the Referendum Bill, and ultimately Menzies' view did not prevail,¹⁵⁴ for upon his retirement in 1966 the new Liberal Party leader and Prime Minister Harold Holt reconstituted the Bill to include both.¹⁵⁵ Gordon Bryant, who became Minister for Aboriginal Affairs in the 1972 Gough Whitlam Labor Government, and Whitlam himself when in opposition promoted the principle that the federal government should exercise responsibility in the field of Indigenous Australian rights, particularly human and civil rights, housing, provision of medical and legal services, and land rights.¹⁵⁶

That the referendum succeeded so well is attributed by Max Griffiths¹⁵⁷ and Gardiner-Garden to factors coming increasingly into play during the 1960s, including:

- a. Increasing numbers of Aborigines drifting from reserves and traditional country to become fringe-dwellers alongside larger non-Aboriginal communities;
- b. The resource boom bringing development to areas where many Aborigines continued to live traditionally and who did not welcome this activity;
- c. Many missionary groups beginning to question their paternalistic practices;
- d. Many Aborigines who had been educated, even if also embittered, in missions or in non-Aboriginal communities becoming articulate Aboriginal leaders;
- e. A growing international interest in human rights issues, and particularly in racial discrimination;
- f. A growing general awareness (possibly contributed to by television and the family car) of the poor socio-economic situation of the Indigenous population;
- g. A growing awareness amongst policy makers of a movement towards decolonization (including the movement towards independence for New Guinea).¹⁵⁸

¹⁵⁴ Unfortunately the Australian High Court has held Menzies' view to be correct, meaning that the Commonwealth does have power to pass laws under section 51(xxii) that are not solely beneficial to Indigenous Australians: *Kartinyari and Ors v The Commonwealth* [1998] HCA 22, 195 CLR 337, 152 ALR 540, 72 ALJR 722.

¹⁵⁵ Gardiner-Garden (n 92).

¹⁵⁶ Jenny Hocking, *Gough Whitlam – A Moment in History* (University of Melbourne Press 2008); Jenny Hocking, *Gough Whitlam – His time* (University of Melbourne Press 2012). Whitlam changed to 'Labor' Party permanently.

¹⁵⁷ Max Griffiths, *Aboriginal Affairs, A Short History 1788–1995* (Kangaroo Press 1995) 72.

¹⁵⁸ Quoted directly from Gardiner-Garden (n 142).

The success of the referendum, and that it gained massive majority support around Australia, was not taken by the federal Liberal Country Party¹⁵⁹ government as a mandate for engaging the Commonwealth in substantial Indigenous Australian projects or programmes.¹⁶⁰ It was not until the Whitlam Labour government was elected in 1972 that the referendum was honoured by the establishment of housing associations and funding bodies such as Tangentyere Council run by Aboriginal people in Alice Springs, establishing and funding various educational programmes at school and university levels, and providing funding to already established bodies such as the Aboriginal Legal Service and the Aboriginal Medical Service.¹⁶¹ However, the 1967 referendum remains a highpoint in Australia's Indigenous history and a distinctive confirmation that constitutional wrongs can be righted through a clearly articulated constitutional reform process. Australian states were notorious for policies and practices detrimental to Aboriginal people, and for their support of church-run organisations that engaged in control of Aborigines and Torres Strait Islanders by forcing them onto missions and imposing religion upon them, despite their having their own spiritual ceremonies and beliefs.¹⁶² Justice in many ways remains elusive for Indigenous Australians, yet the referendum showed that Australians, Indigenous

¹⁵⁹ Now the National Party of Australia rather than the Country Party or Australian Country Party (established 1920), the change occurring in 1982, with an intervening period from 1975 when it was titled the National Country Party: 'The Nationals for Regional Australia' <<http://nationals.org.au/>> accessed 1 December 2018.

¹⁶⁰ Gardener-Garden (n 142).

¹⁶¹ Graham Freudenberg, *A Certain Grandeur: Gough Whitlam's Life in Politics* (Viking, revised edn 2009); Gareth Evans, *Labor and the Constitution 1972–1975: The Whitlam Years in Australian Government* (Heinemann 1977); Gough Whitlam, *Abiding Interests* (University of Queensland Press 1997); Jenny Hocking (n 157); Zoe Pollock, 'Aboriginal Medical Service' (Dictionary of Sydney 2008) <https://dictionaryofsydney.org/organisation/aboriginal_medical_service> accessed 1 December 2018.

¹⁶² See for example Australian Human Rights Commission, *Bringing Them Home: The Stolen Children Report* (AHRC 1997); Colin Tatz, 'Genocide in Australia' (1999) 1 *Journal of Genocide Research* 315–52, <<https://www.tandfonline.com/doi/abs/10.1080/14623529908413964?src=recsys>> accessed 28 November 2018; Asafa Jalata, 'The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians' (Sage Open 7 August 2013) <<https://journals.sagepub.com/doi/full/10.1177/2158244013499143>> accessed 28 November 2013; Jocelyne A. Scutt, 'The Stolen Generations: Stealing Children, Stealing Culture, Stealing Lives' in J A Scutt (ed), *The Incredible Woman – Power and Sexual Politics* (Artemis Publishing 1997) vol 2, ch 31, 215–30; Aborigines and Torres Strait Islanders Legal Service (Qld), *Beyond the Act* (Foundation for Aboriginal and Islander Research, 1979).

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

and non-Indigenous could come together to achieve a just outcome providing a foundation for future just claims.¹⁶³

ARE UNITED STATES' WOMEN EQUAL? WANTED – 'THREE MORE STATES ...': REACTION AND REITERATION

The fourth attempt at constitutional change – in the United States – was a proposal that languished for some fifty years, then revived – appeared to be leading towards success, then failed. Chances are, thanks to actress Meryl Streep and fellow women's rights activists, it may in rising again succeed.¹⁶⁴

After United States' women won the vote in 1920 with the passage of the Nineteenth Amendment, along with other activists Alice Paul¹⁶⁵ and Crystal Eastman¹⁶⁶ decided women's rights should not end at the ballot box. They drafted what at first was known as 'the Lucretia Mott Amendment', named after the abolitionist, women's rights activist and women's suffrage campaigner.¹⁶⁷ It was submitted into the Congress in 1923 and for many years annually, stating simply:

'Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction'.

In 1940 Paul redrafted it to read:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

¹⁶³ See further Scutt, 'Subverting or Affirming Indigenous Rights – The Australian Problem Writ Large' (n 10).

¹⁶⁴ Joanna Walters, 'Meryl Streep Urges Congress to Back Equal Rights Amendment' *The Guardian* (24 June 2015) <<https://www.theguardian.com/film/2015/jun/23/meryl-streep-congress-equal-rights-amendment>> accessed 28 November 2018; Inkoo Kang, 'Meryl Streep Urges Congress to Pass the Equal Rights Amendment (ERA)' (IndieWire 24 June 2015) <<https://www.indiewire.com/2015/06/meryl-streep-urges-congress-to-pass-the-equal-rights-amendment-era-203318/>> accessed 28 November 2018.

¹⁶⁵ National Women's Party (NWP), Alice Paul, Our Story, <<https://www.nationalwomansparty.org/our-story>> accessed 28 November 2018.

¹⁶⁶ National Women's History Museum, Crystal Eastman (1888–1921), Education & Resources – Biography <<https://web.archive.org/web/20120123051653/http://www.nwhm.org/education-resources/biography/biographies/crystal-eastman/>> accessed 28 November 2018.

¹⁶⁷ 'Lucretia Mott' (History Network) <<https://www.historynet.com/lucretia-mott>> accessed 28 November 2018.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

It thereafter became known as ‘the Alice Paul Amendment’ then, in the 1970s, was referred to simply as the Equal Rights Amendment or ERA.¹⁶⁸

The history of this effort to effect women’s rights went back to the Civil War, when the US Constitution was amended to add the Thirteenth, Fourteenth and Fifteenth Amendments. The Thirteenth Amendment was aimed at eliminating slavery. The Fourteenth Amendment provided that no state could abridge the privileges and immunities of citizens of the United States. The Fifteenth Amendment was designed to guarantee the right to vote, without regard to race. From the time they were passed, and indeed before, women fought to ensure that these amendments would protect all citizens’ rights, women and men. However, they were faced with the ‘person’, ‘male’, ‘female’, ‘woman’, ‘man’ issue that confronted women throughout the common law world. In particular, the Fourteenth Amendment included the word ‘male’ and this concluded the matter so far as courts (peopled by male justices only) were concerned. Women were not included, so women were not protected, and women were not considered thereby to gain equal rights with men.

The passage of the Nineteenth Amendment in 1919 and its ratification in 1920 resolved the question of suffrage. This galvanised Paul and Eastman, generating their actions designed to ensure that women should have all the same rights and privileges as men. Their aim, consistent with the Fourteenth Amendment’s prohibition on the denial of privileges and immunities to male citizens regardless of race, was for equal rights for women.

Despite notions that women’s activism collapsed after the vote was won, women remained involved at all levels, including the peace movement, the struggle for equal pay, activism against violence against women, and promotion of women into public life.¹⁶⁹ In the late 1960s the war in Vietnam engaged a new generation and spawned a host of books, journals and samizdat publications.

¹⁶⁸ National Women’s Party (NWP), ‘The NWPs Fight for Equality’, Our Story <<https://www.nationalwomansparty.org/our-story>> accessed 28 November 2018.

¹⁶⁹ See for example Mary Ritter Beard, *Woman as a Force in History. A Study in Traditions and Realities* (Macmillan 1946); Evelyn Reed, ‘The Myth of Women’s Inferiority’ (1954) 15 *Fourth International* 58–66; Alice S Rossi, ‘Equality Between the Sexes: An Immodest Proposal’ (1964) 93 *Daedalus* 607–52; Betty Friedan, *The Feminine Mystique* (WW Norton & Co 1963). See also Scutt, ‘Are Women Persons’ (n 41).

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

Amongst others, activists included Gloria Steinem,¹⁷⁰ Bella Abzug,¹⁷¹ Betty Friedan,¹⁷² Shulamith Firestone,¹⁷³ Susan Brownmiller,¹⁷⁴ Andrea Dworkin,¹⁷⁵ Robin Morgan,¹⁷⁶ Catharine Mackinnon¹⁷⁷ and Kate Millet.¹⁷⁸ This led to a new forcefulness in promoting the Equal Rights Amendment. It also produced an aggressive counter-movement, the principal promoter of which was Phyllis Schlafly.¹⁷⁹

The Equal Rights Amendment emerged from Congress on 22 March 1972 with a greater than 90 per cent vote in support. Over the ten years from the date it began its trek around the states to be endorsed by state legislatures, up to the extended deadline of 30 June 1982 when the Equal Rights Amendment stood defeated in the absence of three of the thirty-eight states required for its ratification, women's rights activists struggled against conservative arguments. Hawaii was the first state to ratify, and in the year immediately following some thirty states followed suit.¹⁸⁰ Yet the process then faltered, as the conservative voices opposing it, Phyllis

¹⁷⁰ Gloria Steinem <<https://www.gloriasteinem.com/>> accessed 1 December 2018.

¹⁷¹ Humanities – History & Culture, 'Bella Abzug – Activist and Member of Congress' (ThoughtCo) <<https://www.thoughtco.com/bella-abzug-biography-3525012>> accessed 28 November 2018.

¹⁷² People, 'Betty Friedan – Women's Rights Activist, Activist, Journalist (1921–2006)' (Biography) <<https://www.biography.com/people/betty-friedan-9302633>> accessed 28 November 2018.

¹⁷³ Humanities – History & Culture, 'Shulamith Firestone – Radical Feminist, Theorist and Author' (ThoughtCo) <<https://www.thoughtco.com/shulamith-firestone-biography-3528984>> accessed 28 November 2018.

¹⁷⁴ Profiles, 'Susan Brownmiller, Author of "Against Our Will"' (Makers) <<https://www.makers.com/profiles/591f27815bf6236c3464b1c4>> accessed 28 November 2018.

¹⁷⁵ People, 'Andrea Dworkin – Women's Rights Activist, Activist (1946–2005)' (Biography) <<https://www.britannica.com/biography/Andrea-Dworkin>> accessed 28 November 2018.

¹⁷⁶ (Robin Morgan) <<https://www.robinmorgan.net/>> accessed 1 December 2018.

¹⁷⁷ Michigan Law, 'Mackinnon, Catharine A' (Faculty Biographies – University of Michigan) <<https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=camtw>> accessed 1 December 2018.

¹⁷⁸ Julie Bindel, 'Kate Millet – obituary' *The Guardian* (8 September 2017) <<https://www.theguardian.com/world/2017/sep/07/kate-millett-obituary>> accessed 28 November 2018.

¹⁷⁹ Education Reporter, 'The Life and Legacy of Phyllis Schlafly' (Phyllis Schlafly – Eagles) <<https://www.phyllisschlafly.com/phyllis/>> accessed 1 December 2018.

¹⁸⁰ This Day in History, 'March 22 – Equal Rights Amendment passed by Congress' (History) <<https://www.history.com/this-day-in-history/equal-rights-amendment-passed-by-congress>> accessed 28 November 2018.

Schlafly's prominent amongst them, spoke out at rallies and attended numerous coffee morning conversations, gained endorsement from evangelical churchmen, were taken up by the media, and rallied women to take up the opposition banner.¹⁸¹

A constitutional lawyer, conservative political activist, campaigner against abortion and Communism as well as the Equal Rights Amendment, Schlafly worked full-time whilst urging women to retain traditional roles and to fight against the ERA in order to do so.¹⁸² The acronym standing for 'Stop Taking Our Privileges' her 'STOP ERA' movement campaigned upon the principle that the Equal Rights Amendment would deny women privileges they possessed simply by being women. It reflected William Blackstone's 18th-century proposition that the common law tenet that in marriage the husband and wife 'became one, that one being the husband' advantaged women and that 'even the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favourite is the female sex of the laws of England'.¹⁸³

Schlafly and her STOP ERA crusade relied upon 'states rights' sentiments, arguing that the Equal Rights Amendment would transfer power from the states to the federal government. She posited that the ERA meant:¹⁸⁴

- a. Endorsement and promotion of homosexual marriages: traditional gender roles were essential for preserving the family; therefore, the ERA was 'against' family life and the family as an institution that protected women;
- b. Women going into combat alongside men: military service for women violated traditional gender norms and this in turn would weaken the combat strength of the military;
- c. Taxpayer funded abortions: abortions denied the right to life, undercut women's role as 'life makers' and homemakers, weakened the family structure, and weakened women's place as producers of the new generations;

¹⁸¹ Linda Napikoski, 'STOP ERA: Phyllis Schlafly's Campaign Against Women's Equality' (ThoughtCo, 28 February 2018 (updated)) <<https://www.thoughtco.com/stop-equal-rights-amendment-3528861>> accessed 28 November 2018.

¹⁸² Douglas Martin, 'Phyllis Schlafly, "First Lady" of a political march to the Right, dies at 92' *The New York Times* (5 September 2016) <<https://www.nytimes.com/2016/09/06/obituaries/phyllis-schlafly-conservative-leader-and-foe-of-era-dies-at-92.html>> accessed 1 December 2018.

¹⁸³ William Blackstone, *Commentaries on the Laws of England*, vol 1, 1765, 442–45, <<https://www.thoughtco.com/blackstone-commentaries-profile-3525208>> accessed 28 November 2018.

¹⁸⁴ See generally Napikoski (n 182); Jane Mansbridge, *Why We Lost the ERA* (University of Chicago Press 1986); Catharine Mackinnon, 'Unthinking ERA Thinking' (1987) 54 *University of Chicago Law Review* 759–67.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

- d. Unisex bathrooms or lavatories: this would deny safe spaces for women and redounded against women's rights to feminine expression and female-only facilities;
- e. Abolition of or tampering with rape laws and laws governed by gender in defining sex crimes: women's safety and protection of the laws would be removed or undermined;
- f. Elimination of widow's social security benefits: as women should remain in the home and not participate in the paid workforce, their right to pensions and benefits would be denied because they had contributed no income tax;
- g. Damage families: a husband's legal responsibility to support his wife and family would be abolished, as would a wife and mother's entitlement to child support and alimony, as now being governed by gender neutrality;
- h. Undermine men's rightful authority over women: the proper power relationship for well-functioning families and public institutions was to maintain men 'on top', not make them subordinate to women.

These 'Reasons to Stop the ERA' were publicised by Schlafly and her cohort, taken up by media, conservative politicians and fundamentalist ecclesiastics.¹⁸⁵

Pro-ERA women worked through women's organisations, particularly NOW – the National Organisation for Women, set up by Betty Friedan, Pauli Murray, Muriel Fox and others in October 1966 with 300 founding members.¹⁸⁶ On 21 May 1969 Congresswoman Shirley Chisholm of New York spoke in the House of Representatives in favour of the Equal Rights Amendment, proposing that the Congress take the first step in ensuring its place as an addition to the Bill of Rights.¹⁸⁷ She set out the reasons for her advocacy of the ERA going forward to the states for ratification. 'Mr Speaker', she said:

... [W]hen a young woman graduates from college and starts looking for a job, she is likely to have a frustrating and even demeaning experience ahead of her. If she walks into an office for an interview, the first question she will be asked is, 'Do you type?'

¹⁸⁵ Mansbridge 1986 (n 185).

¹⁸⁶ Including Catherine Conroy, Inka O'Hanrahan, Rosalind Loring, Mary Eastwood, Dorothy Haener, Kay Clarenback, Gene Boyer and Analoyce Clapp, NOW – National Organisation for Women <<https://now.org/>> accessed 28 November 2018.

¹⁸⁷ Shirley Chisholm, 'Equal Rights Amendment for Women' (Duke University Libraries – Digital Collections 21 May 1969) <https://library.duke.edu/digitalcollections/wlmpc_wlmms01015/> accessed 28 November 2018.

There is a calculated system of prejudice that lies unspoken behind that question. Why is it acceptable for women to be secretaries, librarians, and teachers, but totally unacceptable for them to be managers, administrators, doctors, lawyers, and Member of Congress. The unspoken assumption is that women are different. They do not have executive ability, orderly minds, stability, leadership skills, and they are too emotional.¹⁸⁸

Chisholm went on to demolish (ahead of Schlafly's STOP ERA movement) the very arguments that were to form the foundation of the movement against the ERA and which ultimately succeeded.

In the first year of its journey around the states, twenty-two states ratified: Alaska, California, Colorado, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Tennessee, Texas, West Virginia and Wisconsin. The following year, 1973, eight more states ratified: Connecticut, Minnesota, New Mexico, Oregon, South Dakota, Vermont, Washington and Wyoming.¹⁸⁹ The velocity then appreciably slowed with 1974 seeing three states alone ratifying: Maine, Montana and Ohio. In 1975 North Dakota alone said 'yes', whilst in 1976 no states did so. On 18 January 1977 Indiana ratified, the final state to take that step. The three-fourths rule applying to constitutional amendments,¹⁹⁰ even with the three-year extension the Amendment fell short. No states took advantage of the new 'finish' date.

As another blow to Equal Rights Amendment proponents, some legislators changed their minds, moving from a 'yes' to a 'no' position. Boycotts organised by NOW and other pro-ERA organisations made no difference.¹⁹¹ Fifteen states had stood firm against ratification: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah and Virginia. Five states sought to rescind it: Idaho, Kentucky, Nebraska, South Dakota and Tennessee.¹⁹² This raised questions as to the interpretation of the constitutional amendment rules and process.¹⁹³ First, were states that had ratified entitled to undo the ratification at all? Article V of the US Constitution in setting out the amendment process refers to ratification only,

¹⁸⁸ Ibid 1.

¹⁸⁹ Shaping a New America, '57c. The Equal Rights Amendment', U.S.History.org <<http://www.ushistory.org/us/57c.asp>> accessed 28 November 2018.

¹⁹⁰ US Constitution and Amendments (n 34).

¹⁹¹ See Now (n 187).

¹⁹² Shaping a New America (n 190).

¹⁹³ US Constitution and Amendments (n 34).

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

without any indication of states' rights to rescind ratifications that have passed through their legislature in the way set out in Article V. Legal precedent exists for invalidating rescission of ratification of other amendments.¹⁹⁴ Second, was the amendment ratification left intact if it were accepted that the states were rescinding legally only incorrectly worded procedural resolutions? Third, did the passing of the deadline render all ERA questions moot?

That three states were needed to ratify at the expiry of the ratification period is said by some legal scholars to mean that the 35-state ratification remains valid, leaving three states more to be added for the Equal Rights Amendment to pass today.¹⁹⁵ The campaign launched in 2015 by Meryl Streep and joined by other high-profile women¹⁹⁶ is impacting with a real possibility of the Equal Rights Amendment becoming the next Bill of Rights Amendment. Although the Virginia Senate Rules Committee voted against to cries of 'shame' on 9 February 2018,¹⁹⁷ on 20 March 2018 ratification went through the Nevada legislature.¹⁹⁸ Then on 31 May Illinois was the thirty-seventh state to ratify. The focus then returned to Virginia. Despite the Senate Committee's view, on 16 January 2019 the Virginia Senate revisited the ERA. This time, the vote was in favour, 26:14 with seven Republicans joining the nineteen Democrats.¹⁹⁹ Political analysts said the next step would be more difficult, for the House of Delegates 'has never cleared' the ERA resolution:

Del Mark Cole, R-Pennsylvania, chairman of the Privileges and Elections Committee, has said he's not sure how he'll handle the issue. Eileen Davis,

¹⁹⁴ Shaping a New America (n 190).

¹⁹⁵ This is on the basis that the deadline for ratification was not contained in the Equal Rights Amendment text, but was part of the accompanying instructions only: *ibid*.

¹⁹⁶ Walters (n 165); Kang (n 165); WUNRN, 'USA – ERA: Equal Rights Amendment – Campaigning & Film by High Profile Hollywood Stars' (Women's UN Report Network) <<https://wunrn.com/2016/04/usa-era-equal-rights-amendment-campaigning-film-by-high-profile-hollywood-stars/>> accessed 28 November 2018.

¹⁹⁷ Catherine Marshall, 'Virginia Committee Votes Down Equal Rights Amendment' (Eagle Forum) <<https://eagleforum.org/topics/era/virginia-committee-votes-down-era.html>> accessed 20 December 2018.

¹⁹⁸ Colin Dwyer and Carrie Kaufman, 'Nevada Ratifies The Equal Rights Amendment ... 35 Years After The Deadline', *The Two-Way: Breaking News from NPR*, 21 March 2018 <<https://www.npr.org/sections/thetwo-way/2017/03/21/520962541/nevada-on-cusp-of-ratifying-equal-rights-amendment-35-years-after-deadline>> accessed 20 December 2018.

¹⁹⁹ Karen Kirk, 'Virginia Senate Passes ERA Resolution' (*The Blue View* 21 January 2019) <<http://blueviewfairfax.org/2019/01/16/virginia-senate-passes-era-resolution/>> accessed 20 January 2019.

Co-founder of Women-Matter.org, said last month that even though the Senate has passed the resolution five times previously, Cole had never put it on the House agenda.²⁰⁰

This proved true. On 22 January a Virginia House of Delegates subcommittee ‘killed four bills [designed] to ratify the federal Equal Rights Amendment on a 4-2 party-line vote’.²⁰¹ This outcome, ‘amid verbal conflicts between the [subcommittee] chairwoman and members of the audience’ was said to ‘mark the end’ of efforts of proponents in Virginia to pass legislation ratifying the ERA, unless it was ‘brought up in the full House Privileges and Elections Committee’ the following Friday.²⁰² On that day, Republicans blocked a Democrat move to have the matter debated before the House, so Virginia lost out on becoming the thirty-eighth state to ratify.²⁰³

This leaves one more state to be gained for the Amendment proposed in 1923, reconstituted in 1940, failing in 1978, and reiterated in 2015 to become law.²⁰⁴ Yet even with ratification from one of the twelve states (omitting Virginia) yet to endorse the Equal Rights Amendment,²⁰⁵ whether the ERA is law may remain dependent upon the interpretation of the Supreme Court decision in *Coleman v Miller*.²⁰⁶

In *Coleman v Miller* the Child Labour Amendment was in issue, the Kansas legislature having voted against it, then ‘for’ it by the Governor’s having certified it as having passed. The relevant finding vis-à-vis whether the campaign to achieve the ‘three more states’ required to meet the thirty-eight states stipulation for the Equal

²⁰⁰ Ibid.

²⁰¹ Georgia Green, ‘Virginia House Subcommittee Kills Bills to Pass Equal Rights Amendment’ (VCU Capital News Service 22 January 2019) <<https://eu.delmarvanow.com/story/news/local/virginia/2019/01/22/virginia-house-committee-kills-bills-pass-equal-rights-amendment/2648449002/>> accessed 23 January 2019.

²⁰² Ibid.

²⁰³ ‘Effort to Revive ERA Bill Fails in Virginia’ *The Washington Post* (25 January 2019) <https://www.washingtonpost.com/gdpr-consent/?destination=%2flocal%2fvirginia-politics%2feffort-to-revive-era-bill-fails-in-virginia%2f2019%2f01%2f25%2fcac45b5c-20cb-11e9-8e21-59a09ff1e2a1_story.html%3f> accessed 29 January 2019.

²⁰⁴ Bill Chappell, ‘America – One More to Go: Illinois Ratifies Equal Rights Amendment’ (NPR – Breaking News from NPR 31 May 2018) <<https://www.npr.org/sections/thetwo-way/2018/05/31/615832255/one-more-to-go-illinois-ratifies-equal-rights-amendment>> accessed 1 December 2018.

²⁰⁵ Alabama, Arizona, Arkansas, Florida, Georgia, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina and Utah.

²⁰⁶ 307 US 433 (1939).

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION,
WRONGS RIGHTED OR REACTION & REITERATION

Rights Amendment is that the Supreme Court in *Coleman v Miller* held that Congress, 'in controlling the promulgation of a constitutional amendment', has the power to make 'the final determination of the question whether, by lapse of time', the proposed amendment has 'lost its vitality before being adopted by the requisite number of legislatures'.²⁰⁷ The argument against this is that the Child Labor Amendment carried no stipulation as to the time period within which the amendment should be passed by thirty-eight states, whereas the Equal Rights Amendment did and hence 'does'.²⁰⁸ For those in favour of the (now) 'one more state' proposition, the argument is that the ERA itself carried no time requirement. It was a 'resolving clause' only, meaning the time stipulation is irrelevant.²⁰⁹ Crucial to this is that Congress did extend the deadline from 1978 to 1982; hence, there is (or should be) nothing to prevent Congress from extending it again. Furthermore, the Twenty-seventh Amendment on Congressional Pay was one of the original twelve amendments and was ratified finally in 1992.²¹⁰ Questions do arise as to the renunciation by five legislatures (Idaho, Kentucky, Nebraska, South Dakota and Tennessee) of their original ERA ratification, yet this is not fatal as there is a suggestion that these states left the amendment ratification intact, renouncing 'incorrectly worded procedural resolutions' only.²¹¹ A further argument is that on the authority of *Coleman v Millar*²¹² renunciation of ratification is a political question to be answered by Congress, so that it is within the authority and power of the Congress to accept the ratifications as they originally stood.²¹³

Despite Phyllis Schlafly's death, her organisation The Eagle Forum remains active. The Eagle Forum and its supporters it could be anticipated as challenging reliance upon *Coleman v Miller* and likely seeking to intervene should the question go to the Supreme Court as may be the case. However, pro-ERA forces such as

²⁰⁷ Ibid 451.

²⁰⁸ Marshall (n 198).

²⁰⁹ Dwyer and Kaufman (n 199) citing Senator Pat Spearman.

²¹⁰ See Cornell Law School, 'Amendment of the Constitution' (Legal Information Institute) <<https://www.law.cornell.edu/constitution-conan/article-5/amendment-of-the-constitution>> accessed 1 December 2018.

²¹¹ Jone Johnson Lewis, 'Which States Ratified the ERA and When Did they Ratify?' (Thought Co) <<https://www.thoughtco.com/which-states-ratified-the-era-3528872>> accessed 28 November 2018.

²¹² Kirk (n 201). *Coleman v Miller* found otherwise than had been considered in *Dillon v Gloss* 256 US 368 (1921), dealing with the Eighteenth Amendment on prohibition and addressing extension of time for ratification.

²¹³ See generally Edwin S Corwin and Mary Louise Ramsey, 'The Constitutional Law of Constitutional Amendment' (1951) 26 *Notre Dame Law Review* 185–213.

NOW (the National Organisation for Women)²¹⁴ and the ERA Coalition²¹⁵ appear to be more active and organised. Additionally, it is not insignificant that Illinois has ratified. This was Schlafly's home state, the centre of her 1970s campaign against the Equal Rights Amendment, and the home state of the Eagle Forum. Albeit the Virginia response indicates that there remain those who retain an oppositional stance to the ERA, many argue that much of what the ERA stood for and stands for has become law in any event.²¹⁶ That Illinois, the anti-ERA stronghold, is not only no longer in opposition but has voted in favour presages well for pro-ERA forces.

Furthermore, the fight has moved to Washington, DC. There, on the very day of the Virginia defeat, a bi-partisan Democrat-Republican announcement of a bid to re-introduce the ERA resolution into the Senate seemed to auger well for the Equal Rights Amendment.²¹⁷ Maryland Democrat senator Ben Cardin and Alaskan Republican senator Lisa Murkowski announced the introduction of a Senate Resolution to 'immediately reopen consideration of the Equal Rights Amendment (ERA)' by 'immediately removing the ratification deadline and reviving consideration of the ERA by the states'.²¹⁸ Effectively, Cardin and Murkoswki said, this would overcome any doubts generated by *Coleman v Miller*.²¹⁹ The Cardin-Murkowski resolution is designed to 'immediately remove the ratification deadline', removing once and for all the issues raised by opponents.²²⁰

The United States experience as exemplified here in the Equal Rights Amendment saga is a reflection upon the constitutional amendment process: once having failed, an amendment can (per *Coleman v Miller*) be re-continued or reactivated and validated. For United States women and all committed to ensuring women and men are equal under the law, the 19th-century omission of women

²¹⁴ See Now (n 187).

²¹⁵ 'Equal Means Equal' (Era Coalition) <<http://www.eracoalition.org/>> accessed 28 November 2018.

²¹⁶ Ibid. Those opposing the ERA say it will 'harm the family' and 'likely boost abortion rights'.

²¹⁷ 'Cardin, Murkowski Introduce Bi-Partisan Measure to Ensure Women Equal Rights in the Constitution' Press Release, Office of Ben Cardin – US Senator for Maryland 25 January 2019 <<https://www.cardin.senate.gov/newsroom/press/release/cardin-murkowski-introduce-bipartisan-measure-to-ensure-women-equal-rights-in-the-constitution>> accessed 29 January 2019.

²¹⁸ Ibid.

²¹⁹ *Coleman v Miller* (n 207).

²²⁰ Senators Cardin and Murkowski effectively address the issues raised by *Coleman v Miller* (n 207) relying upon the arguments which are recounted in this article.

CHANGE THE CONSTITUTION? INTERPRETATION, (MIS)CALCULATION, WRONGS RIGHTED OR REACTION & REITERATION

from the Amendments coming out of the Civil War to extend equality in recognition of the unequal status of African Americans may be rectified.

CONCLUSION

Reflecting on these examples of constitutional change, politics was central to each proposal. Politics was the reason for failure or success. Perhaps in the first example, Canada and the question of whether a woman is a person, personal politics played a part alongside the intensive broader political agitation and expectation characterising all four examples of Constitutional change. Yet ultimately that ‘the personal is political’, a feminist invocation from the 1970s,²²¹ needs to be recognised as playing a part in all political agitation and manoeuvring, whether for change or for retaining constitutions unchanged. Looking at the ‘person’ equals ‘woman’ proposition, in the context of the Equal Rights Amendment example, although back in 1930 the Privy Council was able to put to one side the cases denying women personhood, unfortunately too much US Supreme Court case law stands in the way. An amendment through the US constitutional amendment process is generally accepted as necessary, rather than the Privy Council’s interpretation route being possible so as to revivify the constitutional amendments emanating from the Civil War.²²² The struggle between pro-ERA woman and anti-ERA women played a significant part in the delay which has now led to the argument that the time factor cannot be overcome. The current composition of the US Supreme Court may be a negative factor for ERA proponents if the extension of time question goes to the Court for an answer. Yet, as noted, the Privy Council was not seen as a progressive body yet it was the first judicial entity to recognise women as persons. Perhaps the Supreme Court may, despite its perceived ‘right wing’ majority, concentrate on the issue at hand: namely whether Congress has the power to extend time as in *Coleman v Miller*,²²³ rather than indulging in arguments against women’s rights.

The Australian example of a referendum that received a ‘no’ vote from an equal number of states and a ‘no’ from a relatively slim majority: the referendum to ‘ban’ the Australian Communist Party²²⁴ can be contrasted against the United

²²¹ See Linda Napikoski, ‘The Personal is Political’ (ThoughtCo 31 December 2017 (updated)) <<https://www.thoughtco.com/the-personal-is-political-slogan-origin-3528952>> accessed 12 December 2018.

²²² See ‘Are United States Women Equal ...’ above.

²²³ Green (n 202).

²²⁴ See ‘Fighting the “Red Peril” ...’ above and *Australian Communist Party v The Commonwealth* (n 87).

Kingdom ‘Brexit’ referendum.²²⁵ In the latter case, the slim majority based on voluntary voting and a ‘first past the post’ referendum voting system has led to ongoing disputation, with arguments for another referendum (with ‘remainers’ hoping for a contrary outcome), albeit it is difficult to see that that would resolve the ‘Brexiters’ vs ‘remainers’ argument. Compulsory voting²²⁶ and the preferential voting system applicable to Australian federal and most state and territory elections means that referendums are not a matter of ‘who happens to vote’ but one engaging all Australians of eighteen years and above, and even seventeen-year-olds who have a right to register pending their reaching eighteen years and the right (and duty) to vote.²²⁷ Compulsory voting does appear to promote political awareness and engagement, without the situation now pertaining in the United Kingdom under ‘Brexit’ where many of those who did not vote are now reported as regretting this. One ‘remainers’ argument is that the former non-voters now wish to rectify this by voting ‘yes’ on a ‘people’s vote’ basis.²²⁸

The successes for Canada in ‘the persons case’ and Australia in the Indigenous rights case, together with the failure for Australia in the ‘Reds’ case affirm that the right outcome is possible through proposals for constitutional change. Where voting is in issue, sometimes, ‘yes’ is the right outcome, as with the 1967 Australian referendum. Sometimes, the right outcome is ‘no’ as with the Australian ‘ban the Communist Party’ referendum. For the United States, the failure of the ERA case, yet its reiteration in the 2000s with a real possibility of the Equal Rights Amendment becoming the Twenty-eighth Amendment to the United States Constitution, affirms Martin Luther King’s words: ‘The arc of the moral universe is long, but it bends towards justice.’

²²⁵ See ‘Referendum Rules and Precedents’, ‘United Kingdom’, above.

²²⁶ Introduced in Queensland in 1915 and for Australian Federal elections in 1924 and now extending to all states and territories: ‘Compulsory Voting’ (AustralianPolitics) <<http://australianpolitics.com/voting/compulsory-voting>> accessed 24 November 2018.

²²⁷ Ibid.

²²⁸ Some object to the ‘people’s vote’ terminology and proposition, the British Labour Party for example seeking a ‘public vote’, prioritising a General Election to ensure that the people have a real opportunity to express their wishes for a new government to pursue a new EU ‘deal’ rather than that currently on offer from the Theresa May-led Conservative government.