

11 July 2014

**Submission to the Joint Select Committee on Constitutional Recognition of
Aboriginal and Torres Strait Islander Peoples**

Dear Committee Members

I am currently a Postgraduate Fellow and an Associate of the Constitutional Reform Unit at Sydney Law School. My area of expertise is constitutional law. The comments in this submission reflect my own views.

Your Committee seeks submissions regarding steps that can be taken to progress towards a successful referendum on Indigenous Constitutional Recognition.

A successful referendum depends in large measure on appropriate proposals for constitutional amendment being submitted to the people at a referendum. The drafting of such proposals should take account of the nature and functions of the *Australian Constitution*.

Professor Jack Balkin in his book *Living Originalism* (Belknap Press, 2011) suggests that constitutions may serve three different but related purposes:

1. A constitution may function as ‘basic law’, distributing powers and setting up institutions of government
2. A constitution may function as ‘higher law’, embodying values and aspirations for the nation
3. A constitution may serve as ‘our law’, helping to constitute the people of a nation as a people

At present, the *Australian Constitution* undoubtedly functions as ‘basic law’. It is more doubtful, however, that the *Australian Constitution* functions as ‘higher law’ or as ‘our law’ at the moment.

The Expert Panel on Constitutional Recognition of Indigenous Australians commissioned qualitative research, which was conducted in 2011, that indicated Australians do not look to the *Australian Constitution* as a repository of values or ideals. That research found:

Focus group participants were aware that Australia has a written constitution. However, most said they did not know much about the *Constitution* ... some felt they knew more

about the *American Constitution* than they did about their own ... Those who knew something about it believe that the *Australian Constitution* is primarily a description of, or formula for, federalism; that is, the respective roles of the states and the Federal Government, and not a statement of beliefs or ideals. Respondents believed it to be different in tone and content from the *American Constitution*...¹

Similarly, material in the Expert Panel's report suggests that the *Australian Constitution* does not function as 'our law'. In its report, the Expert Panel wrote:

Qualitative research conducted for the Panel in August 2011 by Newspoll and a separate study by Reconciliation Australia found there is little knowledge among Australian voters of the *Constitution's* role and importance, or about the processes involved in moving towards and achieving success at a referendum. A 1987 survey for the Constitutional Commission found that 47 per cent of Australians were unaware that Australia has a written constitution. The 1994 report of the Civics Expert Group, *Whereas the People ... Civics and Citizenship Education*, found that only one in five people had some understanding of what the Constitution contains.

Consultations and submissions confirmed this widespread lack of education on and awareness of the *Constitution* among Australians.²

The Expert Panel also wrote in its report that its consultations 'revealed limited understanding among Australians of our constitutional history'.³ This suggest that the *Australian Constitution* plays little role in the Australian people imagining themselves as a people.

So it is doubtful that the *Australian Constitution* serves 'higher law' and 'our law' functions at present. It may well be possible that the *Australian Constitution* comes to serves those functions at some time in the future.

The point I wish to make is that the drafting of proposals for constitutional amendment to achieved constitutional recognition of Indigenous Australians needs to take account of the nature of the *Australian Constitution* and the functions it serves. Proposed amendments for constitutional recognition of Indigenous Australians that seek to serve higher law or our functions may well be less likely to succeed, and require considerably more effort on the part of those prosecuting the 'yes' case if they are to succeed, than proposals for amendment that do not seek to serve those functions.

This is not to say that proposals seeking to serve higher law or our law functions should not pursued. It is simply to point out those would be in a more difficult situation.

¹ Newpoll, *Recognition of Aboriginal and Torres Strait Islander Peoples in the Australian Constitution – Qualitative Research* (30 August 2011) 10
<www.fahcsia.gov.au/sites/default/files/files/foi_disclosure_log/document_1_1.pdf>.

² Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012) 222.

³ Ibid 42.

I attach a copy in draft form of my forthcoming academic paper ‘Jack Balkin’s Constitutionalism and the Expert Panel on Constitutional Recognition of Indigenous Australians’ which discusses these issues in detail. It will soon be published in final form in volume 37(2) of the *University of New South Wales Law Journal*.

Yours sincerely

Luke Beck

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JACK BALKIN'S CONSTITUTIONALISM AND THE EXPERT PANEL ON CONSTITUTIONAL RECOGNITION OF INDIGENOUS AUSTRALIANS?

LUKE BECK*

I INTRODUCTION

In January 2012, the Expert Panel on Constitutional Recognition of Indigenous Australians ('Expert Panel') delivered its report to the then Prime Minister making a number of recommendations to amend the *Australian Constitution* to 'recognise' Indigenous Australians.⁴ Rather than engage in a legal critique of the substance of the Expert Panel's various proposals, this article approaches the Expert Panel's Report and proposals as a whole from the perspective of constitutional theory. It argues that the Expert Panel's Report and proposals strongly reflect the constitutional theory of the American constitutional theorist Jack Balkin.

In his book *Living Originalism*,⁵ Balkin conceives of the *United States Constitution* functioning not only as 'basic law', distributing powers and setting up institutions of government, but also as 'higher law', embodying values and aspirations for the nation, and as 'our law', helping to constitute the people of the nation as a people.⁶ The first claim made in this article is that the Expert Panel conceives of the functions of the *Australian Constitution* in much the same way as Balkin conceives of the functions of the *United States Constitution*. The article makes a second claim. For Balkin, a constitution successfully functioning as basic law gives it procedural legitimacy whilst its success in functioning as higher law and our law gives it moral and sociological legitimacy respectively. Whilst the *Australian Constitution* does not really function as higher law or our law in Balkin's sense, the Expert Panel's adoption of that kind of thinking can be seen as a critique of the legitimacy of the *Australian Constitution*. The Expert Panel implicitly suggests that the *Australian Constitution* can be made more legitimate. The article also makes a third claim building upon the first two. It is argued that the Expert Panel is engaged in a project of constitutional redemption, a concept that features heavily in *Living Originalism* and which is the principal subject of its companion work *Constitutional Redemption: Political Faith in an Unjust World*.⁷

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⁴ Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012).

⁵ Jack M Balkin, *Living Originalism* (Belknap Press, 2011).

⁶ *Ibid* ch 4.

⁷ Jack M Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press, 2011).

This article begins by setting out the background to the Expert Panel's Report and notes its various proposals for amendments to the *Australian Constitution*. The article then turns to the first main claim. It explains Balkin's tripartite view of constitutional functions and explores how the Expert Panel's report and recommendations appear to be based on a view of the *Australian Constitution* as higher law and as our law. The article then turns to the second main claim, explaining how it is difficult to accept that the *Australian Constitution* functions as higher law and our law in Balkin's sense and showing how the Expert Panel's adoption of that thinking offers a critique of the legitimacy of the *Australian Constitution*. The article then turns to the third main claim and explores how the Expert Panel appears to be engaged in a project of constitutional redemption. The article concludes with a reference to *The Castle* and 'the vibe' and suggests that it is possible that the Australian people may one day look to the *Australian Constitution* as higher law and our law.

II THE EXPERT PANEL AND ITS PROPOSALS FOR CONSTITUTIONAL AMENDMENT

A The Expert Panel

In November 2010, the then Australian Prime Minister, Julia Gillard, announced that an Expert Panel on Constitutional Recognition of Indigenous Australians would be appointed to consult with the Australian community about options for constitutional amendment to recognise Indigenous people in the *Constitution*.⁸ The Expert Panel was appointed the following month, and its membership of 19 included both Indigenous and non-Indigenous Australians, academics, community leaders, business figures and politicians from various parties. The Expert Panel was jointly chaired by Professor Patrick Dodson, a leading Indigenous figure, and Mark Leibler AC, a partner in law firm Arnold Block Leibler.⁹

The Expert Panel was given broad terms of reference.¹⁰ In part, the terms of reference provided:

The Expert Panel will report to the Government on possible options for constitutional change to give effect to Indigenous constitutional recognition, including advice as to the level of support from Indigenous people and the broader community for each option by December 2011 ...

In performing this role, the Expert Panel will have regard to:

- Key issues raised by the community in relation to Indigenous constitutional recognition;
- The form of constitutional change and approach to a referendum likely to obtain widespread support;
- The implications of any proposed changes to the Constitution; and

⁸ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 1.

⁹ *Ibid* 2, 234–5, app A.

¹⁰ *Ibid* 3.

• Advice from constitutional law experts.¹¹

At its second meeting in early 2011, the Expert Panel agreed on four principles to guide its thinking on proposals for constitutional amendment.¹² The principles were that each proposal must:

1. contribute to a more unified and reconciled nation;
2. be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples
3. be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
4. be technically and legally sound.¹³

In conducting its national consultation, the Expert Panel released a discussion paper, invited written submissions, implemented a media and digital communications strategy, held public consultation meetings around the country and engaged a professional opinion polling company to conduct opinion polls.¹⁴ The Expert Panel also engaged an external consultant to provide a qualitative analysis of key themes and issues raised in the 3500 written submissions that were received.¹⁵

B The Expert Panel's Proposed Amendments

The Expert Panel recommended five changes to the *Constitution*.¹⁶ The first of the Expert Panel's proposals was to delete section 25 of the *Constitution*, which contemplates the possibility that States may disenfranchise people of particular races.¹⁷ Section 25 provides:

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

The Expert Panel also recommended deleting the so-called 'races power' in section 51(xxvi), which gives power to the Commonwealth Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.¹⁸ In its place, the Expert Panel recommended inserting a new section 51A, which would provide:

¹¹ Ibid 3.

¹² Ibid 4.

¹³ Ibid.

¹⁴ Ibid 4–10.

¹⁵ Ibid 7–8, 264–5, app D.

¹⁶ Ibid xviii; a draft Bill proposing to alter the *Constitution* is provided at ibid 130–1.

¹⁷ Ibid 153.

¹⁸ Ibid. Before the Constitutional Alteration (Aboriginals) 1967 (Cth) took effect, s 51(xxvi) provided power to make laws for 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'.

51A Recognition of Aboriginal and Torres Strait Islander peoples

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

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

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

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

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.¹⁹

The Expert Panel also recommended a provision prohibiting racial discrimination. That provision, to be numbered section 116A, would read:

116A Prohibition of racial discrimination

- (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
- (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.²⁰

The final proposal recommended by the Expert Panel was a languages provision to be numbered section 127A. That section would read:

127A Recognition of languages

- (1) The national language of the Commonwealth of Australia is English.
- (2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.²¹

In its report, the Expert Panel emphasised the ‘interconnected nature of [its] package of proposals for constitutional recognition.’²² It would not be sound, the Expert Panel said, to proceed with some but not all of its proposals.

III CLAIM ONE: THE EXPERT PANEL VIEWS THE AUSTRALIAN CONSTITUTION AS HIGHER LAW AND AS OUR LAW

A Balkin and Constitutional Functions

A necessary step in advancing the first claim of this article is to outline Balkin’s view of constitutional functions. The central purpose of Balkin’s book *Living Originalism* is to

¹⁹ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 153.

²⁰ Ibid 173.

²¹ Ibid 131.

²² Ibid 226.

explain and defend a constitutional theory he calls ‘framework originalism’.²³ In the course of doing so, Balkin offers a tripartite view of the functions of a constitution.²⁴ He contends that a constitution serves three, sometimes overlapping, functions: as basic law, as higher law and as our law.

Balkin says that a constitution functions as basic law in that it establishes a framework for governance that distributes powers, rights, duties and responsibilities and promotes political stability.²⁵ A constitution also functions as basic law in that it is supreme or foundational law that ‘trumps’ other law to the contrary.²⁶ There is no real substantive moral content to this function.²⁷ The *Australian Constitution* can be said to function as basic law in Balkin’s sense because it does in fact establish the framework for governance in Australia.²⁸

For Balkin, a constitution can function not only as basic law but also as higher law and our law. It is more doubtful that the *Australian Constitution* can be said to function as higher law or as our law, a matter that will be returned to below. A constitution is higher law, Balkin says, when it functions as a ‘source of inspiration and aspiration’ and as a ‘repository of values and principles’.²⁹ As higher law, a constitution ‘trumps’ other law in the sense that it ‘is a source of moral critique of ordinary law’.³⁰ As Balkin writes, ‘The idea of higher law views a constitution as a repository of ideals morally superior to ordinary law and toward which ordinary law should strive.’³¹ A constitution as higher law, Balkin says, ‘stands above ordinary law, criticizes it, restrains it, and holds it to account.’³² In its function as higher law, a constitution is something in whose name political and moral claims can be made by social movements to critique the status quo and advocate for change.³³ Balkin cites Martin Luther King’s metaphorical description of the *United States Constitution* as a ‘promissory note’ as a telling rhetorical example of a social movement appealing to a constitution as higher law.³⁴

The third function of a constitution identified by Balkin is its function as our law. A constitution, Balkin writes, is ‘our law when we identify with it and are attached to it’.³⁵

²³ Balkin, *Living Originalism*, above n 2, chs 1, 2.

²⁴ In the body of *Living Originalism*, Balkin appears to contend that all constitutions serve these functions. However, in an endnote he accepts that not all constitutions will necessarily serve all of these functions: *ibid* 359. Balkin repeats that acceptance in subsequent publications: See, eg, Jack M Balkin, ‘Nine Perspectives on *Living Originalism*’ [2012] (3) *University of Illinois Law Review* 815, 846–7; Jack M Balkin, ‘The American Constitution as “Our Law”’ (2013) 25 *Yale Journal of Law & the Humanities* 113, 114.

²⁵ Balkin, *Living Originalism*, above n 2, 59.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ See Jeffrey Goldsworthy, ‘Constitutional Cultures, Democracy, and Unwritten Principles’ [2012] (3) *University of Illinois Law Review* 683, 685.

²⁹ Balkin, *Living Originalism*, above n 2, 60.

³⁰ *Ibid* 66.

³¹ *Ibid* 62.

³² *Ibid* 59.

³³ *Ibid* 66, 85.

³⁴ *Ibid* 84.

³⁵ *Ibid* 60.

It is our law when it serves as ‘constitutive narrative through which people imagine themselves as a people’.³⁶ Seeing the constitution as our law has the consequence, Balkin argues, of helping ‘us imagine ourselves as part of a collective subject persisting over time’³⁷ with ‘shared memories, goals, aspirations, values, duties, and ambitions.’³⁸ As our law, a constitution is central to national identity and to the ability of a people to see themselves as a historically continuing people.³⁹ A constitution allows people of the present generation to see themselves as embarked on a common project with those of previous and future generations.⁴⁰

B The Expert Panel and the *Australian Constitution* as Higher Law

1 *The Expert Panel’s Justifications for Recognition Generally and the Australian Constitution as Higher Law*

The Expert Panel’s thinking appears to be permeated by a view of the *Australian Constitution* as higher law. This is evident not only in the particular proposals for constitutional amendment recommended by the Expert Panel, but also in the starting point of its thinking.

The Expert Panel’s adoption of its guiding principles, noted above, reflect its view of the *Australian Constitution* as a vehicle for national values. Of relevance here are the first two of the Expert Panel’s guiding principles: that proposals must (1) ‘contribute to a more unified and reconciled nation’ and (2) ‘be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples’. There is nothing in the Expert Panel’s report that explains why these principles were chosen. Indeed, the report simply announces that these principles were chosen.⁴¹ Nevertheless, these principles are both heavily value-laden. Whilst there is scope for debate in identifying and articulating what those values are, these principles seem to be infused with notions of reconciliation, national unity, social justice, self-determination and equality.

The Expert Panel’s view of the *Constitution* as a vehicle for national values is also evident in its concern that any Indigenous recognition referendum should succeed. The Expert Panel wrote that ‘the failure of a referendum on recognition of Aboriginal and Torres Strait Islander peoples would result in confusion about the nation’s values’.⁴² However, it is not obvious that this would be the necessary result of a failed referendum. The Expert Panel did not explain its thinking. It is possible that this conclusion might be drawn from the fact that public opinion is revealed through the referendum vote. Whilst perhaps superficially plausible, this is not a persuasive position to adopt. The failure of

³⁶ Ibid 61.

³⁷ Ibid 60.

³⁸ Ibid 61.

³⁹ Ibid 60.

⁴⁰ Ibid 96, 268.

⁴¹ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 4.

⁴² Ibid xvii.

the 1988 Rights and Freedoms referendum,⁴³ for example, cannot sensibly be taken as proof that Australians do not value rights and freedoms. The situation is far more complex than that and referenda fail for a variety of reasons.⁴⁴ Surely, the same may well be true of a failed Indigenous recognition referendum.

It seems, especially when reading the Expert Panel's report as a whole, that the Expert Panel believes confusion about the nation's values would result from the fact that Indigenous recognition would be absent from the constitutional text. Indeed, the Expert Panel wrote, in another part of its report, that its proposals were 'essential if our *Constitution* is to reflect the values of contemporary Australia'.⁴⁵ In other words, the Expert Panel believes that the *Australian Constitution* reflects the nation's values, or at least that it *should* or maybe following a successful referendum *would*. This view of the *Australian Constitution* is the only way that the Expert Panel's comment makes sense. It follows that the Expert Panel seems to have begun its work with a view of the *Australian Constitution* as higher law.

Indeed, it might be argued that the Expert Panel had no choice but to begin its work with a view of the *Australian Constitution* as higher law. Its terms of reference tasked the Expert Panel with developing proposals 'to give effect to Indigenous constitutional recognition'. That task seems to frame the *Australian Constitution* as a higher law. Although the terms of reference do not define the notion of 'recognition', the remarks by the then Prime Minister announcing the establishment of the Expert Panel seem to frame the matter in higher law terms. Julia Gillard said:

[W]e're here today to make an announcement related to the commitment of the Government to acknowledge the special place of our first peoples in the *Australian Constitution*.

Can I start today by saying now is the right time to take the next step and to recognise in the *Australian Constitution* the first peoples of our nation; now's the right time to take that next step to build trust and respect, and we certainly believe that constitutional recognition is an important step to building trust and respect, it's an important step to building and acknowledging that the first peoples of our nation have a unique and special place in our nation.

As we all know the *Australian Constitution* is the foundation document of our system of government, but currently it fails to recognise Indigenous Australians ... We came to government also knowing that change was needed on an emotional level ... The recognition

⁴³ Constitution Alteration (Rights and Freedoms) 1988 (Cth).

⁴⁴ See, eg, George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010); Enid Campbell, 'Southey Memorial Lecture 1988: Changing the Constitution – Past and Future' (1989) 17 *Melbourne University Law Review* 1.

⁴⁵ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 168.

of Indigenous Australians, Aboriginal and Torres Strait Islander peoples, in the *Australian Constitution* is another step, the next step in that journey.⁴⁶

2 *The Expert Panel's Proposals and the Australian Constitution as Higher Law*

A view of the *Australian Constitution* as higher law is also reflected in the various proposals for constitutional amendment suggested by the Expert Panel. This is so in respect of not just the text the Expert Panel proposes to insert but also in respect of the text it proposes to delete.

As noted above, the Expert Panel recommended that section 25 and the races power be deleted from the *Constitution*. The Expert Panel wrote in its report of the 'blemish on our nationhood' caused by the fact of the existence of these provisions in the *Constitution*.⁴⁷ It might readily be conceded that it is fair to judge these provisions, as the Expert Panel does, as morally repugnant on the basis that race-based laws are objectionable.⁴⁸ But any such judgment is not a sufficient basis for saying the mere existence of these provisions, even if they are not used, casts a 'blemish on our nationhood'. After all, many of the Commonwealth's powers would authorise racially discriminatory laws and the Expert Panel does not suggest that those powers, by their mere existence, blemish Australia's nationhood.⁴⁹ For example, as history reveals, the Commonwealth's power with respect to 'immigration'⁵⁰ supported laws implementing a White Australia Policy. An additional premise is necessary to reach the Expert Panel's conclusion that section 25 and the races power cast a 'blemish on our nationhood'. That premise is that the *Constitution* is a repository of (at least some of) the nation's values. If that premise holds true, then by expressly contemplating racially discriminatory laws the existence of those two provisions reveals that Australia does not value racial equality. If that premise does not hold true, those provisions are really no different to the various other powers that would support racially discriminatory laws: it is what is done pursuant to them rather than their existence that would blemish Australia's nationhood. In other words, the Expert Panel's comment is premised on a view of the *Constitution* having a 'higher law' function.

The very same analysis applies to the Expert Panel's comment, in reference to the races power, that people participating in its public consultation process were 'embarrassed to learn that the *Constitution* provides a head of power that permits the Commonwealth to

⁴⁶ Julia Gillard, 'Joint Press Conference with Minister Macklin and the Attorney-General: Indigenous Australians, Referendum on Constitutional Reform' (Transcript, 8 November 2010) <<http://pmtranscripts.dpmc.gov.au/preview.php?did=17469>>.

⁴⁷ Expert Panel, above n 1, xii.

⁴⁸ But note, as the Expert Panel does, that s 25 'was designed to penalise, by a reduction of their federal representation, those States where Aboriginal people had not been given the right to vote.': *ibid* 14. On the purpose of s 25, see also Anne Twomey, 'An Obituary for s 25 of the *Constitution*' (2012) 23 *Public Law Review* 125; cf Dylan Lino and Megan Davis, 'Speaking Ill of the Dead: A Comment on s 25 of the Constitution' (2012) 23 *Public Law Review* 231.

⁴⁹ The Expert Panel does, however, recommend inserting a new provision prohibiting racially discriminatory laws. This provision is discussed below.

⁵⁰ *Constitution* s 51(xxvii).

make laws that discriminate on the basis of “race”.⁵¹ The Expert Panel is not saying that there was embarrassment at the fact that there exist racially discriminatory laws. Rather, the Expert Panel is saying that the fact such laws are expressly permitted by the *Constitution* is a cause for embarrassment. The notion of embarrassment, like that of blemish, is significant. Reference to such morally judgmental notions only really makes sense if the *Constitution* is meant to reflect the nation’s values and aspirations or, in other words, serves as higher law in Balkin’s sense. If the *Constitution* was not to serve as higher law then the Expert Panel would have had little need to give weight in its thinking to the embarrassment the mere existence of the races power prompted in some of those whom it consulted.

‘Higher law’ thinking is also evident in respect of the Expert Panel’s proposals for new constitutional provisions. Perhaps the clearest example is proposed section 127A, which would acknowledge Indigenous languages. Indeed, in respect of that provision the Expert Panel expressly states that the provision would not have any ‘basic law’ function at all. The Expert Panel wrote in its report that section 127A would not give rise to any rights or obligations and would have no legal effect whatsoever.⁵² The provision must therefore be intended to serve some other function or functions. One of those functions appears to be a ‘higher law’ function. The Expert Panel described its proposed section 127A as providing ‘an important declaratory statement in relation to the importance of Aboriginal and Torres Strait Islander languages’⁵³ and as ‘giv[ing] appropriate recognition to the significance of those languages’.⁵⁴ By declaring the significance and importance of those languages, the provision would add a value or principle to the *Constitution*: respect for Indigenous languages or Indigenous cultural identity of which languages are an integral part. A constitutional provision without any intended legal effect or purpose would be very odd unless it was found in a *Constitution* that had functions beyond simply a ‘basic law’ function.

The Expert Panel was also explicit that its proposed section 51A would have more than just a ‘basic law’ function. They described proposed section 51A as consisting of two types of language: preambular language and operative language.⁵⁵ The preambular language is described by the Expert Panel in its Report as ‘introductory and explanatory’⁵⁶ and intended to ensure that the substantive grant of legislative power, in the operative language of the provision, is interpreted to permit only beneficial laws and not adversely discriminatory laws.⁵⁷ To this extent, the preambular recitals in section 51A are intended to serve a ‘basic law’ function. The Expert Panel’s report also explained, however, that the preambular language has the additional, and important, role of serving

⁵¹ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 42.

⁵² Ibid 132. The Expert Panel’s pronouncements about the provision having no legal effect are not binding and the High Court might find that the provision does indeed have some legal effect.

⁵³ Ibid.

⁵⁴ Ibid 131.

⁵⁵ Ibid 133.

⁵⁶ Ibid 130.

⁵⁷ Ibid.

as a ‘statement of recognition’ of Aboriginal and Torres Strait Islander peoples.⁵⁸ This second role is not a ‘basic law’ function. This is plain from the concepts referred to in the preambular recitals: matters of history, relationships with land and water, and culture. Indeed, it is really only the fourth preambular recital – ‘Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples’ – that could have any possible interpretive value in understanding the substantive grant of legislative power in proposed section 51A. In other words, it is only the fourth preambular recital that could have a ‘basic law’ function (in addition to its ‘higher law’ function).

Indeed, the Expert Panel explained that having a ‘statement of recognition’ embedded in the preamble to a substantive grant of power would avoid the need to include a ‘no legal effect’ clause if a ‘statement of recognition’ were to be located on its own, which the Expert Panel objected to as it might suggest that any statement of recognition was an empty gesture or tokenistic.⁵⁹ In other words, the Expert Panel expressly stated that, in part, the language of proposed section 51A is intended to have some sort of non-legal or extra-legal function. The four preambular recitals, taken both individually and together, serve a ‘higher law’ function. Indeed, the use of the words ‘Recognising’,⁶⁰ ‘Acknowledging’⁶¹ and ‘Respecting’⁶² is telling. The concepts recognition, acknowledgment and respect have important moral content, especially given how they are used in the preambular recitals. Those recitals are clearly intended as repositories of principles that the Expert Panel, following its consultation process, believe to be important to the nation.

Similarly, the Expert Panel explained in its report that its proposed section 116A prohibiting racial discrimination is intended to serve more than simply a ‘basic law’ function. The Expert Panel explained in the introduction to its report that proposed section 116A was recommended because there is a case for ‘affirming that racially discriminatory laws and executive actions have no place in contemporary Australia.’⁶³ In the body of the report, the Expert Panel wrote that, in addition to its legal operation, proposed section 116A would serve as a ‘clear and unambiguous renunciation of racial discrimination’.⁶⁴ Moreover, the Expert Panel wrote, this function of proposed section 116A ‘is essential if our Constitution is to reflect the values of contemporary Australia.’⁶⁵ So, for the Expert Panel, proposed section 116A not only prohibits racial discrimination, but also renounces it and affirms that racial discrimination has no place in Australia. This is a moral function; it expresses a morally superior ideal. In Balkin’s tripartite classification of constitutional functions, it is a ‘higher law’ function.

C The Expert Panel and the *Australian Constitution* as Our Law

⁵⁸ Ibid 128–32.

⁵⁹ Ibid 115.

⁶⁰ Ibid 133.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid xiv.

⁶⁴ Ibid 168.

⁶⁵ Ibid.

1 *The Expert Panel's Justifications for Recognition Generally and the Australian Constitution as Our Law*

Just as it views the *Australian Constitution* as higher law, the Expert Panel seems to view the *Australian Constitution* as our law. Indeed, the Expert Panel understood its task, partly, in our law terms.

In its Discussion Paper, released in May 2011, the Expert Panel discussed why constitutional recognition of Aboriginal and Torres Strait Islander peoples was important.⁶⁶ The Expert Panel wrote that ‘the unique contribution of Indigenous Australians to our national life is not reflected in the nation’s founding document’⁶⁷ but it should be. The Expert Panel wrote that recognition would ‘address the gaps in our *Constitution* ... to create a shared vision of the kind of Australia we aspire to become.’⁶⁸ Under the subheading ‘Reflecting who we are as a nation’,⁶⁹ the Expert Panel explained that ‘we have been asked to respond to the desire of many Australians to see the Constitution changed to recognise Aboriginal and Torres Strait Islander peoples so that it more truly reflects the lives and values of Australians today.’⁷⁰ Under the subheading ‘National identity’,⁷¹ the Expert Panel wrote that constitutional recognition ‘would also be a way of reconciling with our past and collectively moving on.’⁷²

The Expert Panel wrote in its Discussion Paper that constitutional recognition ‘could also benefit all Australians by strengthening the sense of belonging by people from diverse backgrounds living in Australia today, and affirming the values of equality, democracy and fairness that unite us all.’⁷³ In other words, the Expert Panel was of the view that constitutional recognition of Aboriginal and Torres Strait Islander peoples would have an our law function. It would have an identity function. It would help constitute the Australian people as a united people by allowing them to imagine themselves as a united people. It would help reflect and constitute Australia’s national identity. As the first of the Expert Panel’s guiding principles states, recognition would ‘contribute to a more unified and reconciled nation’. Much of this could easily have been written by Balkin; after all he writes that in its ‘our law’ function a written constitution helps ‘bind people together’.⁷⁴

The same sentiments are present in the Expert Panel’s report. The Expert Panel wrote in its report of how Australians want to see their ‘sense of nationhood and citizenship

⁶⁶ Expert Panel on Constitutional Recognition of Indigenous Peoples, ‘A National Conversation About Aboriginal and Torres Strait Islander Constitutional Recognition’ (Discussion Paper, May 2011).

⁶⁷ Ibid 5.

⁶⁸ Ibid 6.

⁶⁹ Ibid 10.

⁷⁰ Ibid.

⁷¹ Ibid 12.

⁷² Ibid 13.

⁷³ Ibid.

⁷⁴ Balkin, *Living Originalism*, above n 2, 61.

reflected in the *Constitution*'.⁷⁵ Indeed, the Expert Panel expressly says that constitutional recognition would directly contribute to imagining national identity:

Most significantly, constitutional recognition would provide a foundation to bring the 2.5 per cent [of Australians who are Indigenous] and the 97.5 per cent [of Australians who are non-Indigenous] together, in a spirit of equality, recognition and respect, and contribute to a truly reconciled nation for the benefit of all Australians.⁷⁶

The Expert Panel also wrote that should a recognition referendum fail there would be confusion not just about the nation's values, as mentioned above, but also the nation's 'sense of national identity.'⁷⁷ Indeed, the Expert Panel wrote that Australians 'are also increasingly aware that in one important respect the *Constitution* is incomplete. It remains silent in relation to the prior and continuing existence of Aboriginal and Torres Strait Islander people. An essential part of the national story is missing.'⁷⁸

A failed referendum could only result in confusion about the nation's sense of national identity if the *Constitution* serves as some sort of locus for national identity. The whole idea that amending the *Constitution* would supply an essential, but currently missing, part of Australia's national story is based on a view of the *Constitution* serving as some sort of locus for national identity, as, of course, is the view that notions of national stories are at all relevant to a constitution. Indeed, the minutes of the Expert Panel's second meeting record a member of the Expert Panel saying '[t]here is a possibility for a narrative that really tells Australians [who] they are.'⁷⁹ The Expert Panel is clear that the *Constitution* has, or has the potential to have, an 'our law' function. The Expert Panel wrote that a professional analysis of written submissions showed that one of the most frequently offered reasons in favour of constitutional recognition was that 'constitutional recognition will more accurately reflect Australia's history and national identity.'⁸⁰ In other words, in its own thinking and in the thinking conveyed to it, the Expert Panel understood that its work was very much concerned with national identity. Such an understanding is even reflected in the name of the Expert Panel's website: www.youmeunity.org.au.

2 *The Expert Panel's Proposals and the Australian Constitution as Our Law*

Given the Expert Panel viewed its task partly in our law terms, it is unsurprising that its recommendations reflect our law thinking. Indeed, in one of its proposals the Expert Panel even uses the word 'our'.

⁷⁵ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, v.

⁷⁶ Ibid 11.

⁷⁷ Ibid xvii.

⁷⁸ Ibid 42.

⁷⁹ Expert Panel on Constitutional Recognition of Indigenous Australians, 'Minutes of Meeting', (Meeting No 2, 16–17 March 2011) 19, <www.fahcsia.gov.au/sites/default/files/files/document_1_0.pdf>.

⁸⁰ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 68.

As noted above, proposed section 127A is not considered by the Expert Panel as having any legal effect and therefore any ‘basic law’ function. As well as its ‘higher law’ function explained above, it also seems to have an intended our law function. The Expert Panel wrote in reference to this provision ‘[s]pecifically, the Panel has concluded that recognition of Aboriginal and Torres Strait Islander languages as part of our national heritage gives appropriate recognition to the significance of those languages.’⁸¹

The provision is described by the Expert Panel as ‘an important declaratory statement’⁸² in relation to the importance of those languages. The provision declares something about Australia’s national identity. The Expert Panel wrote in its report of the importance of language to identity.⁸³ In this regard, it quoted a participant at one of its community consultation meetings: ‘recognition of different languages and cultures is very important because that’s your identity.’⁸⁴

Proposed section 127A is very much an identity provision. The first sentence of proposed section 127A that states English is the ‘national language’ of Australia. The Expert Panel writes that that sentence ‘simply acknowledges the existing and undisputed position.’⁸⁵ This is an important aspect of Australia’s identity: it is an English speaking country. The second sentence of the provision is perhaps most explicit in revealing the ‘our law’ thinking at play. That sentence states: ‘The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.’ There are a number of features of this sentence beyond simply its recognition of languages revealing an identity function. The first of these features is describing Indigenous languages as Australian. In doing so, the Expert Panel has put an identity label on those languages. That label may well be obvious and uncontroversial, but the proposed constitutional text is serving an explicit identity function nonetheless. A second feature is the use of the concept ‘national heritage’. That concept is not explained in the Expert Panel’s Report and its precise meaning is not immediately obvious. But national heritage is, at a general level, a concept referring to features from a nation’s past that are thought worthy of being carried on through the present to the future; to adopt Balkin’s words, it ‘helps connect past to present’.⁸⁶ National heritage is part of what is common to the past, present and future of Australian identity.

Perhaps the most telling feature of the second sentence of proposed section 127A revealing its intended identity function is the use of the word ‘our’. For present purposes it can be overlooked that the use of the word ‘our’ is a technical defect in the proposal since the rest of the *Constitution* is written in the third person. What is relevant here is that the proposed constitutional text is intended as speaking not only to but also with the Australian people, all of the Australian people regardless of their backgrounds. The second sentence of proposed section 127A, the Expert Panel explains, declares the

81 Ibid 131.

82 Ibid 132.

83 Ibid 126–8.

84 Ibid 126.

85 Ibid 131.

86 Ibid 268.

significance of those languages ‘especially for Aboriginal and Torres Strait Islander Australians, but for all other Australians as well.’⁸⁷ They are part of *our* national heritage, part of *our* identity. Proposed section 127A is very plainly intended by the Expert Panel to have an important ‘our law’ function. It declares important features of Australia’s national identity.

Proposed section 51A also appears to be intended as serving an ‘our law’ function. The ‘statement of recognition’ aspect to the preambular recitals to proposed section 51A is seen by the Expert Panel as having an identity function. This is particularly so in relation to the third recital: ‘Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples’. The Expert Panel wrote in respect of this recital that ‘[n]umerous submissions suggested that recognition of culture and languages would be a unifying experience for the nation.’⁸⁸ The whole purpose is bringing Australians together, allowing them to imagine themselves as one unified people despite any racial, ethnic or other differences. To quote Balkin, ‘it binds together people... as a single people’.⁸⁹ The Expert Panel also considered that adopting this recital ‘would declare an important truth in Australian history’.⁹⁰ A nation’s history is, of course, important in constructing national identity.

The heading to proposed section 51A also reveals the provision’s our law function. The legal substance of the provision would suggest that an accurate heading to the section would be something like ‘Power to legislate in respect of Aboriginal and Torres Strait Islander peoples.’ Yet the heading proposed by the Expert Panel does not refer to the legal substance of the provision at all. The Expert Panel’s proposed heading to the provision is ‘Recognition of Aboriginal and Torres Strait Islander peoples.’ The Expert Panel’s Report does not offer any explicit explanation for its choice of language for the heading. The Expert Panel did, however, emphasise in its report that a statement of recognition of Aboriginal and Torres Strait Islander peoples would contribute to a more unified and reconciled nation.⁹¹ Given the Expert Panel’s thinking about what its task generally was and what a statement of recognition is intended to achieve, it is perhaps not surprising that the heading to the provision emphasises recognition, a matter obviously connected to notions of inclusion and thus identity, rather than legal (basic law) substance.

Whilst the heading to proposed section 116A ‘Prohibition of racial discrimination’ does refer to the legal substance of the provision, the provision nonetheless has an important ‘our law’ function. This provision’s moral or ‘higher law’ function, as discussed above, in ‘affirming that racially discriminatory laws and executive actions have no place in contemporary Australia’⁹² is closely related to its our law function.⁹³ The Expert Panel

⁸⁷ Ibid 131.

⁸⁸ Ibid 126.

⁸⁹ Balkin, *Living Originalism*, above n 2, 61.

⁹⁰ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 11.

⁹¹ Ibid 128.

⁹² Ibid 157.

wrote that the provision would ‘contribute to a more unified and reconciled nation’ and ‘remove race as a criterion for discrimination by legislative or executive action in all Australian jurisdictions.’⁹⁴ So, proposed section 116A not only assists in binding the Australian people together as a people but also ensures that they cannot by legislative or executive action be unbound on the basis of race. In other words, this provision would entrench that race is not a criterion for Australian identity.

There is also ‘our law’ thinking involved in the Expert Panel’s proposals to delete section 25 and the races power from the *Constitution*. Those deletions are a ‘necessary complement’⁹⁵ to the other proposals put forward by the Expert Panel. It would be somewhat less than coherent to adopt the other provisions proposed by the Expert Panel that are intended to make race irrelevant to Australian identity whilst retaining provisions that expressly contemplates (adverse) discrimination on the basis of race.

IV CLAIM TWO: THE EXPERT PANEL BELIEVES THE AUSTRALIAN CONSTITUTION CAN BE MADE MORE LEGITIMATE

A The *Australian Constitution* is Not Higher Law or Our Law

A preliminary step in showing that the Expert Panel is critiquing the legitimacy of the *Australian Constitution* and suggesting that it can be made more legitimate is to refute the idea that the *Australian Constitution* currently functions as higher law and our law.

The notion that the *Australian Constitution* functions as higher law, in Balkin’s sense, does not sit comfortably with Australian political and legal reality. During a symposium on *Living Originalism*, the contributions to which were later published, Jeffrey Goldsworthy stated bluntly that ‘The *Australian Constitution* is a basic but not a higher law’.⁹⁶ Goldsworthy explained ‘[c]onsisting almost entirely of structural and power-conferring provisions, [the *Australian Constitution*] lacks the grand and inspirational declarations of national values or principles that are found in a “higher law”’.⁹⁷

True though this description may be, the plain text of a constitution is not necessarily determinative of whether a constitution functions as higher law. Much of the *United States Constitution* consists of structural and power-conferring provisions and some of the provisions of its Bill of Rights have analogues in the *Australian Constitution*.⁹⁸ What appears in Balkin’s analysis to be of much greater importance in determining whether a constitution functions as higher law is the way in which ordinary people look to it as a

⁹³ Balkin notes that the various functions of a written constitution are ‘overlapping’: Balkin, *Living Originalism*, above n 2, 59.

⁹⁴ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 168.

⁹⁵ *Ibid* 167.

⁹⁶ Goldsworthy, above n 25, 685.

⁹⁷ *Ibid* .

⁹⁸ Cf *Australian Constitution* s 116; *United States Constitution* amend I; *Australian Constitution* s 51(xxxi) and *United States Constitution* amend V; *Australian Constitution* s 80 and *United States Constitution* amend VI.

repository of values and aspirations. Indeed, the *United States Constitution* almost certainly did not become higher law until some time after its ratification. As one American constitutional scholar has written, ‘After ratification, most Americans promptly forgot about the first ten amendments [ie the Bill of Rights] to the *Constitution*.’⁹⁹

Balkin explains that, in its higher law function, ‘Americans view their Constitution as a source of important values’.¹⁰⁰ Most ordinary Americans, one might fairly assume, have only a cursory familiarity with the substance of the *United States Constitution*. Indeed, many Americans (including legal scholars) make contradictory claims about the substance of that document, a point Balkin acknowledges and explains as a feature of his theory of constitutionalism.¹⁰¹ The legal truth of such claims is irrelevant to the *United States Constitution’s* function as higher law. As explained above, political movements make claims in the name of the constitution to critique the status quo and advocate for change. It does not matter whether values and aspirations are stated in the text of a constitution or are read in or imagined. A constitution functions as higher law when people look to it as embodying important values and aspirations and those values and aspirations are used to critique the status quo and advocate for change.

It is difficult to find many examples in Australian history of social movements making political claims in the name of the *Australian Constitution* or in the name of values or aspirations supposed to be embodied in it. As Goldsworthy explained:

In Australia, public commitment to and debate over principles of political morality are largely left to the political realm. Historically, social movements have rarely appealed to values they supposed to be embedded in the Constitution, except for those inspired by the structural principle of “states’ rights.” For the most part, the Constitution merely provides a framework within which debates over political morality take place, and only lawyers appeal to constitutional principles.¹⁰²

This analysis should be uncontroversial. The *Australian Constitution* does not function as higher law in the same sense that the *United States Constitution* does. As Balkin acknowledges in his response to Goldsworthy:

Many constitutions may not serve as higher law in the same way that America’s Constitution does; the idea of political aspiration may come from different features of a political culture and its history. People in other countries may not point to their constitutions as the symbol or embodiment of their political ideals and aspirations.¹⁰³

⁹⁹ Gordon S Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (Oxford University Press, 2009) 72.

¹⁰⁰ Balkin, *Living Originalism*, above n 2, 59.

¹⁰¹ *Ibid* 280–2.

¹⁰² Goldsworthy, above n 25, 685.

¹⁰³ Balkin, ‘Nine Perspectives on *Living Originalism*’, above n 21, 847; See also Balkin, *Living Originalism*, above n 2, 359 ; Balkin, ‘The American Constitution as “Our Law”’, above n 21, 114.

Indeed, the Expert Panel commissioned qualitative research, which was conducted in 2011, that indicated Australians do not look to the *Australian Constitution* as a repository of values or ideals. That research found:

Focus group participants were aware that Australia has a written constitution. However, most said they did not know much about the *Constitution* ... some felt they knew more about the *American Constitution* than they did about their own ... Those who knew something about it believe that the *Australian Constitution* is primarily a description of, or formula for, federalism; that is, the respective roles of the states and the Federal Government, and not a statement of beliefs or ideals. Respondents believed it to be different in tone and content from the *American Constitution*...¹⁰⁴

It is also the case that the *Australian Constitution* does not function as our law. At the symposium mentioned above, Goldsworthy also described the idea that the *Australian Constitution* functions as our law as ‘dubious because, in 1992, no less than one-third of Australians were found not to know that they even had a written constitution, let alone anything about its contents.’¹⁰⁵ If there is a widespread lack of awareness of the existence of a constitution or, as the 2011 research noted above suggests, any perceived awareness of a constitution’s contents, that document can hardly be taken to serve as any sort of locus of national identity.

What is most interesting about Goldsworthy’s explanation of why the *Australian Constitution* is not our law is that the Expert Panel seems to entirely agree. In its report, the Expert Panel wrote:

Qualitative research conducted for the Panel in August 2011 by Newspoll and a separate study by Reconciliation Australia found there is little knowledge among Australian voters of the *Constitution’s* role and importance, or about the processes involved in moving towards and achieving success at a referendum. A 1987 survey for the Constitutional Commission found that 47 per cent of Australians were unaware that Australia has a written constitution. The 1994 report of the Civics Expert Group, *Whereas the People ... Civics and Citizenship Education*, found that only one in five people had some understanding of what the Constitution contains.

Consultations and submissions confirmed this widespread lack of education on and awareness of the *Constitution* among Australians.¹⁰⁶

The Expert Panel also wrote in its report that its consultations ‘revealed limited understanding among Australians of our constitutional history’.¹⁰⁷ In other words, the Expert Panel acknowledges a lack of knowledge of the *Constitution* on the part of Australians.

¹⁰⁴ Newspoll, *Recognition of Aboriginal and Torres Strait Islander Peoples in the Australian Constitution – Qualitative Research* (30 August 2011) 10
<www.fahcsia.gov.au/sites/default/files/files/foi_disclosure_log/document_1_1.pdf>.

¹⁰⁵ Goldsworthy, above n 25, 685.

¹⁰⁶ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 222.

¹⁰⁷ Ibid 42.

If, as the Expert Panel explains, Australians do not understand the what ‘the *Constitution* contains’ or its ‘role’ and ‘importance’, Goldsworthy must be right when he says that:

Australians, on the other hand [ie compared to Americans], seem perfectly able to identify themselves as a historically continuing people, characterized by some basic shared values and commitments, without their *Constitution* playing a large part in the narrative, except as the essential legal device by which Federation was attained. The common values and commitments that define them as a people can be left unwritten – the *Constitution* can take them for granted, and vice versa – while serving the functions that Balkin emphasizes (providing a collective narrative, binding different generations together, and so on).¹⁰⁸

B The Expert Panel and Constitutional Legitimacy

In engaging in ‘higher law’ and ‘our law’ thinking, the Expert Panel has offered an interesting critique of the legitimacy of the *Australian Constitution*.

In *Living Originalism*, Balkin argues that a constitution’s functions as basic law, higher law and our law serve to give a constitution democratic legitimacy. Balkin argues that each of these functions contributes to a constitution’s democratic legitimacy in different, albeit related, ways.¹⁰⁹ The ‘basic law’ function of a constitution gives it procedural legitimacy, the ‘higher law’ function moral legitimacy and the ‘our function’ sociological legitimacy.¹¹⁰

Balkin explains that a constitution is procedurally legitimate ‘to the extent that people clothed with state power (which might include government officials, jurors and voters) make decisions according to official legal rules and procedures.’¹¹¹ This is essentially a ‘thin’ version of the rule of law. It is legalism, and indeed Balkin puts the words ‘or legally’ after the word ‘procedurally’ in his explanation of this form of legitimacy: ‘It is *procedurally* (or legally) legitimate to the extent that...’¹¹² Balkin explains that if a constitution fails to succeed as basic law it will not be procedurally legitimate.¹¹³ It should be uncontroversial that the *Australian Constitution* is procedurally legitimate in this sense and that it succeeds as basic law. It does in fact establish and provide the legal framework for governance in Australia. The Expert Panel accepts that the *Australian Constitution* is procedurally legitimate.

Where the Expert Panel’s critique of the *Australian Constitution* is apparent is in terms of moral and sociological legitimacy. Balkin explains that a constitution is morally legitimate ‘to the extent that the system is just or morally admirable.’¹¹⁴ The Expert Panel is quite plain that the *Australian Constitution* has multiple failings in this regard. It

¹⁰⁸ Goldsworthy, above n 25, 686, citing above n 2, 61.

¹⁰⁹ Balkin, *Living Originalism*, above n 2, 64–7.

¹¹⁰ Ibid.

¹¹¹ Ibid 64.

¹¹² Ibid.

¹¹³ Ibid 66.

¹¹⁴ Ibid 64.

expressly contemplates racially discriminatory laws and expressly contemplates race-based exclusion from voting. The Expert Panel explained that this is a source of embarrassment for many Australians¹¹⁵ and a blemish on Australia's nationhood.¹¹⁶ This is not just or morally admirable. It fails to acknowledge the history and cultures of Aboriginal and Torres Strait Islander peoples. It is 'silent'¹¹⁷ in regard to an important part of Australia and fails to declare 'an important truth'.¹¹⁸ This too is not just or morally admirable.

The third type of legitimacy essential to democratic legitimacy, Balkin argues, is sociological legitimacy. A constitution is sociologically legitimate, Balkin explains, 'to the extent that people accept the system as having the right and the authority to rule them.'¹¹⁹ A constitution's success as our law in reflecting and being responsive to a people's needs, ideals and values, Balkin writes, promotes sociological legitimacy.¹²⁰ In important respects, the Expert Panel believes that the *Australian Constitution* has flaws in its sociological legitimacy. For the Expert Panel there is a sense in which the *Australian Constitution* does not belong to Indigenous Australians in the way it does for non-Indigenous Australians. The Expert Panel's Report quotes an unnamed participant in a community consultation meeting saying 'We [Indigenous people] should be in the Constitution'.¹²¹ There is a clear theme throughout the Report that Indigenous Australians are excluded from the *Constitution*. The Expert Panel wrote of the need 'for moving on from the history of constitutional non-recognition of Aboriginal and Torres Strait Islander peoples'¹²² and seizing a 'historic opportunity to recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, to affirm their full and equal citizenship, and to remove the last vestiges of racial discrimination from the Constitution'.¹²³ Without taking this step, the *Australian Constitution* will 'in one important respect'¹²⁴ remain 'incomplete'.¹²⁵

It is important to emphasise that the suggestion here is not that the Expert Panel believes the *Australian Constitution* to be illegitimate. The suggestion is not that the Expert Panel believes the *Australian Constitution* to be morally illegitimate or sociologically illegitimate, in the senses explained by Balkin. Rather, the suggestion is that the Expert Panel believes that the *Australian Constitution* can be made *more* legitimate – it can be made *more* morally legitimate and *more* sociologically legitimate – by adopting the proposed amendments.

¹¹⁵ See, eg, Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 42.

¹¹⁶ Ibid xii.

¹¹⁷ Ibid 42.

¹¹⁸ Ibid 11.

¹¹⁹ Balkin, *Living Originalism*, above n 2, 64.

¹²⁰ Ibid 67.

¹²¹ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 112.

¹²² Ibid xiv.

¹²³ Ibid 10.

¹²⁴ Ibid 42.

¹²⁵ Ibid.

This is entirely consistent with how Balkin understands constitutional legitimacy. In *Living Originalism*, Balkin writes ‘*Legitimate* is also a relative term, a bit like the word *tall*. A system is more or less legitimate, although at some point we would say that the system is illegitimate.’¹²⁶ Adopting the Expert Panel’s proposals will help the *Australian Constitution* succeed as higher law and as our law and enhance its moral and sociological legitimacy. The parts of the *Australian Constitution* that are not just and morally admirable can be fixed. Adopting the Expert Panel’s recommendations will make the *Constitution* overall more just and morally admirable. The exclusion of Aboriginal and Torres Strait Islander people that the Expert Panel believes to be inherent in the body of the *Constitution* can be transformed into inclusion by adopting the Expert Panel’s recommendations. This inclusion will enhance the *Constitution*’s sociological legitimacy because ‘changing the Constitution will contribute to a sense of belonging ... for so many Indigenous people’.¹²⁷ So, in other words, the Expert Panel has in its Report offered a critique of the legitimacy of the *Australian Constitution* and in its proposals for constitutional amendment a way to make it more legitimate.

Whatever the merits of this critique, if the *Australian Constitution* is not higher law or our law, then it may not be immediately obvious why should it matter if the *Australian Constitution* has failings in terms of moral and sociological legitimacy. The critique matters because it is a preliminary step in a much larger and more profound project in which the Expert Panel is engaged. That project is one of constitutional redemption, which is the third claim made in this article.

V CLAIM THREE: THE EXPERT PANEL IS ENGAGED IN A PROJECT OF CONSTITUTIONAL REDEMPTION

A The Expert Panel and Constitutional Redemption

In seeking to have the *Australian Constitution* function, at least in some way, as higher law and as our law and to thereby enhance its moral and sociological legitimacy, the Expert Panel has bought into another of Balkin’s ideas: constitutional redemption.

1 *Constitutional Redemption*

In *Living Originalism*, Balkin distinguishes between what he calls the Constitution-in-practice and the Constitution. The ‘Constitution’ is the document whereas the ‘Constitution-in-practice’ is the constitutional text ‘plus the constructions, institutions, understandings, and practices that have grown up around it’.¹²⁸ Balkin gives two reasons why it is important to distinguish between the Constitution and the Constitution-in-practice. The first is that it is necessary to distinguish between the way a constitution has been implemented and the various ways it could be implemented. The Constitution-in-practice ‘includes statutory frameworks, judicial glosses, traditions of practice, cultural

¹²⁶ Balkin, *Living Originalism*, above n 2, 64.

¹²⁷ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 67 quoting an unnamed participant at a public consultation.

¹²⁸ Balkin, *Living Originalism*, above n 2, 69.

understandings, and political institutions.’¹²⁹ It is a particular implementation of the Constitution’s plan for politics. The Constitution-in-practice, therefore, can change over time even if there is no amendment to the constitutional text.¹³⁰ The second reason Balkin gives is this:

Second, viewed from the perspective of a particular person, the Constitution-in-practice may be unjust and unfaithful to the best understanding of the Constitution. Hence it is useful to have a way of talking about the ‘true’ or ‘ideal’ Constitution that is distinct from the Constitution as a currently instantiated institution. When people critique the Constitution-in-practice in the name of the Constitution – or in the name of what the Constitution truly stands for – they implicitly make this distinction. They are advocating a restoration or a redemption of an ideal or true Constitution that may never have existed fully or completely in practice, but that they view as their goal.¹³¹

In other words, it is necessary to distinguish between the two so that it is possible to understand redemptive constitutionalism.

For Balkin, ‘Redemptive constitutionalism is the claim that our Constitution is always a work in progress – imperfect and compromised, but directed towards its eventual improvement.’¹³² More fully:

The belief that the Constitution is a collective project of many generations, that it makes promises to the future that are only imperfectly realized in the present, that we should have faith that the Constitution will become better over time, and that we should work for the eventual redemption of its promises in history I call *redemptive constitutionalism*.¹³³

Constitutional redemption is not just an important part of *Living Originalism*. It is the focus of a companion work *Constitutional Redemption: Political Faith in an Unjust World*.¹³⁴ In order to explain what it seems the Expert Panel is doing it is only necessary to give a brief sketch of what is a very complex concept.

Constitutional redemption is not the same thing as constitutional reform, although constitutional reform can be a part of constitutional redemption. Balkin explains:

Redemption is not simply reform, but change that fulfils a promise of the past. Redemption does not mean discarding the existing Constitution and substituting a different one, but returning the Constitution we have to its correct path, pushing it closer to what we take to be its true nature, and discarding the dross of past moral compromise.¹³⁵

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid 75.

¹³³ Ibid 73.

¹³⁴ Balkin, *Constitutional Redemption*, above n 4.

¹³⁵ Ibid 5–6.

It is important to emphasise that constitutional redemption is an imaginative and creative process. It is not about redeeming what was always there. It is about redeeming what it is popularly imagined ought to have been there:

Redemption does not conform our practices to a preestablished template. It does not realize a nature that was foreordained, like an acorn naturally turning into an oak. It is inevitably an exercise in imagination – envisioning what the Constitution always should have meant in an alien time for which it was not prepared.¹³⁶

Constitutional redemption is a narrative process and storytelling is central to its process. Indeed, Balkin speaks of a ‘national narrative of redemption.’¹³⁷ But it is not a descriptive narrative of the kind an historian might engage in. It is a storytelling that is ‘partial and incomplete.’¹³⁸ It is less an attempt ‘at accurate description of the past than justification of the present and articulations of hopes for the future.’¹³⁹ The storytelling device is important:

Stories are more than simply true or false descriptions of the world, or simply sets of embedded values and agendas. They are also ways of making things true and false in practice. By having a story about the direction of the country, and believing in that story, people can help make the story true over time.¹⁴⁰

It is also essential to recognise that when Balkin speaks of constitutional redemption, the constitution to which he refers is not simply the Constitution as the constitutional text but the Constitution-in-practice.¹⁴¹

2 *The Expert Panel’s Project of Redemption*

The Expert Panel’s Report tells a story. It is a partial and selective story and its purpose is very plainly to articulate hope for the future. The aim, of course, is to make that story come true.

It is necessary to begin by considering the content of the story being told. Chapter 1 of the Expert Panel’s Report is titled ‘Historical background’ and does the bulk of the story telling.¹⁴² The chapter does indeed deal with matters that can be fairly described as background to any referendum on constitutional recognition of Indigenous Australians. It discusses the drafting of the *Constitution* and the purposes for which the races power, section 25 and the now repealed section 127 (excluding ‘aboriginal natives’ from being

¹³⁶ Ibid 6.

¹³⁷ Ibid 25.

¹³⁸ Ibid 3.

¹³⁹ Ibid.

¹⁴⁰ Ibid 4.

¹⁴¹ ‘The message of *Constitutional Redemption* is that the American Constitution, and its associated institutions, traditions, readings, and practices, are not incorrigible, and that there is always the possibility – although not the certainty – of political redemption’: Jack Balkin, ‘The Distribution of Political Faith’ (2012) 71 *Maryland Law Review* 1144, 1145.

¹⁴² Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 13–48.

counted in reckoning the numbers of people of the Commonwealth and of the States) were included.¹⁴³ It discusses the 1967 Referendum,¹⁴⁴ which repealed section 127 and deleted the exclusion of Indigenous Australians from the races power. It discusses the interpretation of the races power following the 1967 Referendum.¹⁴⁵

The chapter also discusses matters that seem, at least from a *Constitution-as-basic-law* perspective, somewhat disconnected from the *Constitution*. There is a section titled ‘Colonisation and Aboriginal resistance’.¹⁴⁶ There is a section discussing the White Australia Policy.¹⁴⁷ There is a section discussing *Mabo v Queensland (No 2)* (‘*Mabo*’).¹⁴⁸ There is a section discussing approaches to Indigenous policy issues since 1972.¹⁴⁹ Under the heading ‘Closing the Gap’ there is a discussion of the disparities between Indigenous and non-Indigenous Australians in terms of social and economic disadvantage.¹⁵⁰ In the conclusion to the chapter, the Expert Panel writes:

The Panel examined the history of the *Australian Constitution* and law and policy relating to Aboriginal and Torres Strait Islander peoples since Federation in order to fully address its terms of reference. This chapter has detailed the most relevant aspects of that history, which have informed the Panel’s consideration of the substantive matters in this report.¹⁵¹

The content of the narrative reveals a number of things. First, it reveals that the Expert Panel is interested in the Constitution-in-practice not just the constitutional text. This is how it makes sense for the Expert Panel to discuss the matters described above as somewhat disconnected from the Constitution.

The narrative also adopts a modified version of Balkin’s idea that in constitutional law there exists a canon and an anti-canon. Balkin writes:

The constitutional canon tells us which cases and doctrines are salient, correct, and central to our understanding, and which are forgotten, incorrect, and peripheral. Constitutional law, unlike the academic study of literature, always has both a canon and an anti-canon, and the anti-canon may be just as important to professional judgments. It tells us what legal performances stand as examples of how not to do constitutional argument and constitutional law.¹⁵²

Whereas Balkin’s canon/anti-canon analysis is closely focused on constitutional law per se, the Expert Panel is somewhat looser in adopting Balkin’s analysis. It applies the notion more broadly to legal policy. For the Expert Panel, the White Australia Policy and the now repealed section 127, for example, are part of the Australian anti-canon. They are

¹⁴³ Ibid.
¹⁴⁴ Ibid 31.
¹⁴⁵ Ibid 38.
¹⁴⁶ Ibid 22.
¹⁴⁷ Ibid 23.
¹⁴⁸ (1992) 175 CLR 1; Ibid 35.
¹⁴⁹ Ibid 38–9.
¹⁵⁰ Ibid 40–1.
¹⁵¹ Ibid 42.
¹⁵² Balkin, *Constitutional Redemption*, above n 4, 14.

bad and not to be repeated. *Mabo* and the 1967 Referendum are part of the canon. They are good and should be embraced.

Indeed, the 1967 referendum appears for the Expert Panel to be so self-evidently good it can be the subject of discussion without its nature first being explained. In the Report's introductory chapter, which precedes the chapter on the historical background, is a heading 'A historic opportunity'. The first paragraph under that heading reads:

The 1967 referendum was held 45 years ago. Current multiparty support has created a historic opportunity to recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, to affirm their full and equal citizenships, and to remove the last vestiges of racial discrimination from the *Constitution*.¹⁵³

The first sentence seems rather disconnected from the second. That first sentence is itself odd. Nowhere in the chapter is there an explanation of what the 1967 referendum was about. This is not just bad drafting. It is evidence of how important the 1967 Referendum is in the Expert Panel's view. It is so much part of the canon of what is good in constitutional law and legal policy regarding Aboriginal and Torres Strait Islander Australians that it does not need an explanation and its symbolism can be invoked to add weight to other claims.¹⁵⁴

The third thing the content of the Expert Panel's narrative reveals is a belief in the possibility of constitutional redemption in Australia. This is apparent from the Expert Panel's adoption of the canon/anti-canon analysis in the historical chapter of its Report. It is also apparent from the importance with which the Expert Panel views the 1967 Referendum. In this regard, it quoted this analysis of the effect of the 1967 Referendum offered by Indigenous leader Noel Pearson:

The original Constitution of 1901 established a negative citizenship of the country's original peoples. The reforms undertaken in 1967, which resulted in the counting of Indigenous Australians in the national census and the extension of the races power to Indigenous Australians, can be viewed as providing a neutral citizenship for the original Australians. What is still needed is a positive recognition of our status as the country's Indigenous peoples, and yet sharing a common citizenship with all other Australians.¹⁵⁵

The 1967 Referendum represented important progress, but the promise of that progress is not yet fully realised. Further constitutional amendment is necessary.

For Balkin, constitutional redemption is a process that occurs most often by means other than by formal constitutional amendment, but it can involve constitutional amendment. As Balkin explains, one of the ways in which people can change the *Constitution*-in-

¹⁵³ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 10.

¹⁵⁴ On the mythologising of the 1967 Referendum see Bain Attwood and Andrew Markus, '(The) 1967 (Referendum) And All That: Narrative and Myth, Aborigines and Australia' (1998) 29(111) *Australian Historical Studies* 267.

¹⁵⁵ Noel Pearson, 'Aboriginal Referendum a Test of National Maturity', *The Australian* (Canberra), 26 January 2011, 14.

practice is by working to amend the *Constitution* through the procedure it provides for this process; in Australia's case by the s 128 referendum mechanism. The Thirteenth Amendment, abolishing slavery, and the citizenship clause of the Fourteenth Amendment, allowing black citizenship, are American examples Balkin gives of this.¹⁵⁶ This is precisely what the Expert Panel is doing. The Expert Panel is working not simply to amend the *Australian Constitution's* text, it is also working to improve the *Australian Constitution-in-practice*. It is therefore engaged in redemptive constitutionalism. The result of constitutional recognition of Aboriginal and Torres Strait Islander peoples will be a more ready basis on which to make claims the name of the *Constitution* to remedy injustice, a core feature of redemptive constitutionalism.¹⁵⁷

It is also important to recognise that Balkin's constitutional redemption is never achieved. The point is never reached where it can be said the Constitution is redeemed: 'The Constitution, and therefore the Constitution-in-practice, always exists in a fallen condition ... It is an unfinished building, and perpetually in need of repair and renovation.'¹⁵⁸ Likewise, the Expert Panel does not suggest that its proposals amount to complete redemption. Its report speaks of 'this round of reform'¹⁵⁹ indicating that more than what it recommends may be necessary for redemption. Balkin's description of constitutional redemption as an ongoing task is reflected in the foreword to the Expert Panel's report which tells a story of the constitutional redemption achieved so far in Australia's history and what should come next:

The consultations the Panel undertook were a reminder of how far Australia has come since the nation's legal and political foundations were laid down in the late nineteenth century. Then, in line with the values of the times, Aboriginal and Torres Strait Islander peoples were excluded from the deliberations that led to the adoption of the *Constitution*. The text of the *Constitution* excluded them. It was not until two-thirds of the way through the nation's first century that the exclusion was removed and the *Constitution* shifted closer to a position of neutrality. The logical next step is to achieve full inclusion of Aboriginal and Torres Strait Islander peoples in the *Constitution* by recognising their continuing cultures, languages and heritage as an important part of our nation and by removing the outdated notion of race.¹⁶⁰

Noting 'how far Australia has come' is a statement that some redemption has occurred. The proposals presented in the Expert Panel's report are 'the next logical step ... to achieve full Aboriginal and Torres Strait Islander peoples in the *Constitution*'. But the Expert Panel never suggests that the task of constitutional redemption would be completed in taking that step. That step achieves one goal and possibly paves the way for the achievement of others. The Expert Panel is alive to the potential that further redemption may be possible.

¹⁵⁶ Balkin, *Constitutional Redemption*, above n 4, 144.

¹⁵⁷ Ibid 75.

¹⁵⁸ Ibid 249.

¹⁵⁹ Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, above n 1, 212.

¹⁶⁰ Ibid v.

VI CONCLUSION: IT'S THE VIBE OF THE THING

The thesis of this article is that Balkinian constitutionalism pervades the Expert Panel's analysis and its recommendations. The Expert Panel's report is not, however, the first attempt to view the *Australian Constitution* as higher law and as our law. It is not the first attempt to critique the *Australian Constitution*-in-practice and demand constitutional redemption. Indeed, there is a High Court case on the subject, but it is not a case reported in the Commonwealth Law Reports. It is the case of *Kerrigan v Commonwealth*. In concluding his oral submissions before the High Court that the constitutional prohibition against acquisition of property otherwise than on just terms¹⁶¹ prevented the Commonwealth from acquiring Darryl Kerrigan's home, the hapless suburban lawyer Dennis Denuto said:

In summing up, it's the *Constitution*, it's *Mabo*, it's justice, it's law, it's the vibe.¹⁶²

The reference to *The Castle*¹⁶³ is not intended to mock either the Expert Panel or Balkin's analysis. Indeed, Balkin would likely welcome the reference as it serves to emphasise his point that it is ordinary people who look to the *Constitution* as higher law and our law and who make the *Constitution* higher law and our law. There really does appear to be an element of 'it's the vibe'¹⁶⁴ to the notion of a constitution as higher law and our law. The vibe is not real, of course. And nor, in one sense, really is the *United States Constitution*'s function as higher law or our law. There is nothing about the text of the *United States Constitution*, or any constitution for that matter, that necessitates its functioning as higher law or our law. As Balkin shows in *Living Originalism*, the *United States Constitution* certainly does function as higher law and our law, but only because, as discussed above, Americans look to it as higher law and our law. Ordinary people made it higher law and our law and ordinary people continue it as higher law and our law. They need not, but they do.

The reference to *The Castle* and the vibe is intended to draw attention to the fact that it is *possible* for Australians to think in such terms too. It is such thought that creates a constitution as higher law and our law and opens the possibility to a politics of constitutional redemption in Balkin's sense. Perhaps Dennis Denuto is on the same page as the Expert Panel: *Mabo* is part of the constitutional canon. Its name can be invoked to lend moral credence to other political projects. Perhaps the *Australian Constitution* might one day be higher law. Perhaps one day the *Australian Constitution* might be our law. Perhaps the Expert Panel is seeking, whether consciously or not, to take a step in that direction. It certainly looks like it.

¹⁶¹ *Constitution* s 51(xxxi).

¹⁶² *The Castle* (Directed by Rob Sitch, Village Roadshow, 1997).

¹⁶³ Ibid.

¹⁶⁴ Ibid.