

IMAGINING AN AFFIRMATIONAL REPUBLIC

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This article explores the idea of an affirmational republic which, both structurally and symbolically, affirms rather than rejects Australia's British history and heritage while equally celebrating the nation's Indigenous inheritance and multicultural achievements. Part II explores the history of republican advocacy to unpack the common, predominantly symbolic, justifications for republican reform. It then elucidates dual, separate but connected, purposes – one small and practical and one big and symbolic – to show that each purpose may entail a different solution. Part III discerns lessons from the failed 1999 referendum, to help guide what an affirmational republic could involve. The proposed approach is developed further in Part IV. Addressing the practical purpose, I suggest the title 'Governor-General' could be retained (instead of 'President') and provide arguments against direct election. Addressing the symbolic purpose, I suggest an inspiring national Declaration could be better achieved extra-constitutionally, as the Referendum Council recommended in 2017.

I INTRODUCTION

In 2010, Aboriginal leader Noel Pearson argued that a republic would be meaningless without reconciliation.¹ This statement holds true today: it would be unjust to pursue a republic before first achieving Indigenous constitutional recognition through a First Nations constitutional voice, as called for by the Uluru Statement from the Heart.² Australia must resolve our domestic relationship with the First Nations before we can hope to resolve our relationship with Britain.³ That a republic cannot proceed without meaningful and substantive reconciliation is morally important, but Pearson also emphasised a reciprocal insight: in pursuing

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1 Noel Pearson, 'Reconciliation Must Come with the Republic', *The Australian* (online, 14 January 2010) <<https://www.theaustralian.com.au/opinion/reconciliation-must-come-with-the-republic/news-story/868b1c3ee3843019002ea3c6439fef24>> ('Reconciliation').

2 See Megan Davis, 'The Republic Is an Aboriginal Issue' (April 2018) *The Monthly*.

3 See also Mark McKenna, *This Country: A Reconciled Republic?* (University of New South Wales Press, 2004) 17 ('*A Reconciled Republic?*').

a republic, Australia should not simply reject British historical contributions. Pearson advocated the idea of an ‘affirmational’ Australian republic that affirms, rather than repudiates, Australia’s British institutional inheritance. Reflecting on the failed 1999 referendum, he argued that:

A principled, and inclusive argument for a Republic must win over many of those who have opposed a Republic [that has been] perceived as a break with our heritage ... I believe that a stable majority of Australians would support the idea that our country should not repudiate its British heritage but affirm it, not only as a historical fact but as the basis for the continued development of our nation.⁴

Pearson therefore contended that:

There are not just two options: the existing situation versus a repudiational republic. In reality there are three models: the one in the middle is the affirmational republic that does not repudiate the [country’s] British heritage and indeed affirms the special place of the crown in our country.⁵

No one has fleshed out what such a middle way, affirmational republic might entail. Here I seek to fill that gap. I explore the idea of a republic which, both structurally and symbolically, affirms rather than repudiates Australia’s British history and heritage, while equally celebrating the nation’s ancient Indigenous inheritance and multicultural achievements.

While affirmation of British inheritance may seem oxymoronic for a reform project that aims to remove the monarchy, the lessons of the failed 1999 referendum indicate that an affirmational approach is strategically and politically important, and perhaps the only way to transcend and defuse the culture wars that have long hampered progress on nation-building issues. To win a referendum, a republic must unite the electorate rather than divide it. The republic therefore cannot only be a progressive cause; it must also speak to conservative concerns, including attitudes which may still value British traditions as a fundamental part of Australian identity.

The article proceeds in three Parts. Part II explores republican advocacy from the 1990s to today, to grapple with the notoriously elusive problem of purpose: why is republican reform needed? What problem does it seek to fix? It unpacks common, predominantly symbolic, justifications for republican reform, then shows that there are actually dual, separate but closely connected, purposes – one small and practical, the other one big and symbolic. For clarity, I suggest that symbolic drivers should be separated from practical drivers. Though conceptual overlap unavoidably remains, increased clarity on the dual purposes driving republican reform makes it easier to see that each problem may require a different solution.

The first problem is practical and much smaller than grand republican rhetoric usually suggests.⁶ Australia is already an independent nation, having evolved substantially from colonial beginnings to independent nationhood. Australia is already almost, but not quite, a republic.⁷ Under the *Constitution*, the Queen remains

4 Pearson, ‘Reconciliation’ (n 1).

5 Ibid.

6 See also Brian Galligan, ‘Regularising the Australian Republic’ (1993) 28(4) *Australian Journal of Political Science* 56, 61 (‘Regularising’).

7 See Mark McKenna, *The Captive Republic: A History of Republicanism in Australia 1788–1996* (Cambridge University Press, 1996) 256–7 (‘The Captive Republic’).

Australia's head of state (though her role is practically diminished), and she still appoints and dismisses the Governor-General (our de facto head of state)⁸ on the advice of the Prime Minister. The last, small step of removing the (now minor) role of the Queen in Australia's constitutional arrangements should be taken as a matter of constitutional closure – a final, formal tick off. This is necessary because Australia should not have to ask the British Queen to appoint and dismiss our Governor-General – the requirement is inefficient, impractical, and outdated for an independent nation. This is the small, practical problem that needs to be fixed.

The second problem is symbolic, and its resolution can be as ambitious and aspirational as our imaginations allow. Republican arguments suggest Australia should affirm and declare our national independence, maturity and unity, to rally Australians around shared symbols, narratives and values. This second symbolic purpose drove the misguided proposal for a new constitutional preamble, which failed alongside the republic question in 1999. Here I argue that a symbolic and unifying declaration of Australian history, aspirations and values would better be achieved extra-constitutionally.

Part III of the article discerns key lessons from the failed 1999 referendum, to guide future republican strategy and inform the imagined affirmational republic. Insights arising include the centrality of republican consensus, the importance of bipartisanship and the related need to pursue strategies that defuse, rather than inflame, contemporary culture wars.

Drawing on these insights, Part IV makes the case for a republic that, both structurally and symbolically, affirms rather than rejects Australia's British institutional inheritance while equally celebrating the Indigenous and multicultural parts of Australia's national story. Addressing the paradoxical practical problem of removing the Queen from Australia's constitutional affairs in a way that nonetheless embraces British institutional traditions, I suggest the republican model should value constitutional continuity and stability by changing only that which needs to be changed to achieve the stated practical purpose. Presenting a refinement of minimalist structural approaches to republican reform, I further propose that not all the language and forms of Britain must be rejected. Given evident preferences for maintaining an apolitical head of state with much the same powers and role as the current Governor-General, I suggest the title 'Governor-General' could be retained (instead of 'President'). I also provide arguments against pursuing direct election simply because it may be the most instinctively attractive option for the public.

Addressing the symbolic purpose, I suggest that an inspiring, unifying national Declaration can be achieved extra-constitutionally as was proposed by the Referendum Council in 2017.⁹ An extra-constitutional Declaration could poetically capture the nation's history, aspirations, and values, equally affirming

8 George Winterton, *Monarchy to Republic: Australian Republican Government* (Oxford University Press, 1994) 31 ('*Monarchy to Republic*'); Peter Boyce, *The Queen's Other Realms: The Crown and Its Legacy in Australia, Canada and New Zealand* (Federation Press, 2008) 29 ('*The Queen's Realms*').

9 See Referendum Council, 'Final Report of the Referendum Council' (Report, 30 June 2017) 2 <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf> ('Final Report').

the Indigenous, British and multicultural strands to Australia's national story – but without uncertain constitutional consequences. Its poetry could even affirm the special place of the Crown in Australian history. Reciprocally, the Declaration should build on substantive reforms for Indigenous constitutional recognition, including a First Nations constitutional voice (which should be achieved before any republic referendum), by celebrating Australia's Indigenous history and heritage, as well as our multicultural diversity. The Declaration could be enacted by all Australian parliaments as the Referendum Council recommends, but also with the assent of the First Nations voice, imbuing it with enduring historic gravitas.¹⁰ This could be Australia's 'Declaration of Independence', but with special reconciliatory significance. If not enacted alongside the referendum on a First Nations voice, this could be part of republican reform.

II UNDERSTANDING THE PURPOSE OF AN AUSTRALIAN REPUBLIC

Before delving into discussion about models, republicans must get clear on what they are trying to achieve. No coherent strategy can proceed without answering the preliminary question of purpose: what problem does a republic seek to fix? Unless a clear answer to the 'why' question can be articulated, agreement on the 'how' strategy will remain confused.

A A Predominantly Symbolic, Rather than Structural, Purpose?

An Australian republic means different things to different people.¹¹ As a concept, it is notoriously 'elastic and emotional',¹² largely because advocates consistently articulate a primarily symbolic, rather than structural, purpose.¹³ A survey of Australian republican advocacy from the 1990s to today reveals an argument about the suitability of current constitutional symbols, rather than the need for systemic or operational reform.¹⁴ As McKenna described, the debate of the 1990s seemed less about 'altering the *Constitution*' and more about 'who should be the most appropriate symbol of its defence – an Australian president or a British monarch'.¹⁵ Hirst explained that '[o]ur dissatisfaction is not with the working of

10 Shireen Morris, 'An Australian Declaration of Recognition: The Case for Semi-entrenched Symbolism' (2020) 44(1) *Melbourne University Law Review* 267, 269 ('Declaration of Recognition').

11 See McKenna, *The Captive Republic* (n 7) 4–5.

12 Jane Lydon, 'The Republican Debate and Popular Royalism: "A Strange Reluctance to Actually Shout at the Queen"' in *Imperial Emotions: The Politics of Empathy across the British Empire* (Cambridge University Press, 2019) 164.

13 See, eg, Paul Keating, 'An Australian Republic: The Way Forward' (Speech, House of Representatives, 7 June 1995) 2–4 <http://www.keating.org.au/persistent/catalogue_files/products/19950607austrepublic.pdf>; Bede Harris, 'Nine Things You Should Know about a Potential Australian Republic', *The Conversation* (online, 22 January 2018) <<https://theconversation.com/nine-things-you-should-know-about-a-potential-australian-republic-89759>>; Boyce, *The Queen's Realms* (n 8) 210, 212.

14 As McKenna explains, republicans argued a republic would involve no systemic change: McKenna, *A Reconciled Republic?* (n 3) 25.

15 McKenna, *The Captive Republic* (n 7) 258.

our present *Constitution*. Our dissatisfaction is with the British monarchy as a symbol of the Australian nation. We need to deal with the *Constitution* only as a consequence of the removal of that symbol'.¹⁶

Republican justifications are thus usually couched in the need to symbolically declare an independent national identity¹⁷ through removing the largely symbolic role of the Queen from Australia's constitutional arrangements.¹⁸ Why do republicans say that this is necessary? Advocates consistently rely on symbolic reasons: it would be a national declaration of patriotism,¹⁹ autonomy,²⁰ maturity and modernity.²¹ Change is necessary because monarchical symbols have become outdated and irrelevant for Australia.²²

The highly symbolic content of republican arguments is not unique in debates about constitutional reform. Constitutional referendums always carry symbolic power and amendments usually entail symbolic meanings.²³ Constitutions reflect national identity, values, and symbols,²⁴ regardless of whether they contain aspirational words.²⁵ Yet republican justifications appear distinct in style to other constitutional reform campaigns, because the problem in need of resolution is consistently described by advocates as *predominantly* symbolic, rather than structural.²⁶

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- 16 John Hirst, 'The Republic and Our British Heritage' (Conference Paper, Conference of the Samuel Griffith Society, 30 July – 1 August 1993) 19.
- 17 See Winterton, *Monarchy to Republic* (n 8) 3.
- 18 See, eg, Benjamin T Jones, *This Time: Australia's Republican Past and Future* (Schwartz Publishing, 2018) 128, 189 ('*This Time*'); John Hirst, *Sense and Nonsense in Australian History* (Black Inc Agenda, 2009) 257–8 ('*Sense and Nonsense*').
- 19 Malcolm Turnbull, *A Bigger Picture* (Hardie Grant Books, 2020) 95 ('*Bigger Picture*').
- 20 Winterton, *Monarchy to Republic* (n 8) 3.
- 21 See Keating (n 13); Mark McKenna, 'The Australian Republic: Still Captive after All These Years' in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 145, 158–9 ('Australian Republic: Still Captive').
- 22 See, eg, Greg Craven, 'The Republican Debate and the True Course of Constitutional Conservatism' (Conference Paper, Conference of the Samuel Griffith Society, 9–11 July 1999) ('Constitutional Conservatism'); Jones, *This Time* (n 18) 128, 189; Malcolm Turnbull, 'Foreword' in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) ix ('Foreword'); Keating (n 13) 2–3; Benjamin T Jones and Mark McKenna, 'Rekindling the Fire: The Republic and Australia's Future' in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 1, 1, 6 ('Rekindling').
- 23 Jeremy Webber, 'Constitutional Poetry: The Tension between Symbolic and Functional Aims in Constitutional Reform' (1999) 21(2) *Sydney Law Review* 260, 262. See also Eric Ghosh, 'The Australian Constitution and Expressive Reform' (2012) 24(2) *Giornale di Storia Costituzionale* [*Journal of Constitutional History*] 95.
- 24 JHH Weiler, 'On the Power of the Word: Europe's Constitutional Iconography' (2005) 3(2–3) *International Journal of Constitutional Law* 173, 184; Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press, 2010) 10–11.
- 25 See Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60.
- 26 Notably, the approach stands in contrast to the Indigenous recognition debate, which is cast by advocates as seeking practical and substantive reform rather than symbolism alone. See Shireen Morris and Noel Pearson, 'Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success' (2017) 91(5) *Australian Law Journal* 350 ('Indigenous Constitutional Recognition'); Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publishing, 2020) ('*First Nations Voice*'); Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous

Accordingly, republicans regularly assert that their objective can be realised without much systemic change. As the 1993 Turnbull report argued, ‘a republic is achievable without threatening Australia’s cherished democratic traditions’.²⁷ Paul Keating similarly emphasised that a republic was not a ‘radical undertaking’, but a small step involving ‘very limited implications for the design of Australia’s democracy’.²⁸ Suri Ratnapala was therefore correct to observe that ‘a majority of leading republicans’ saw the aim of a republic as preserving ‘the current constitutional system while replacing the monarch with a locally selected and largely ceremonial President’.²⁹ For Ratnapala, the republican movement had ‘turned its back on substantial constitutional reform’ in favour of ‘cosmetic republicanism which leaves the constitution pretty much as it is’.³⁰ This characterisation is fair. As Mark McKenna notes, most republicans have ironically been ‘just as intent on preserving “British” institutions as Australian monarchists’.³¹

Such observations reveal that there is more common ground between the polarities of the republican debate than is usually assumed, which similarly helps elucidate possible ‘middle way’ paths to an affirmational republic: in line with republican justifications, reforms should maintain the basic fabric of our inherited British institutions.

B Unpacking the Symbolic Rhetoric

1 *Australia Is Already Almost a Republic*

The symbolic framing of republican arguments becomes easier to comprehend when one considers how many important steps Australia has already taken towards legal and political independence.³² There is not much left to do to become a republic. The last step is updating remnant monarchical symbols³³ and removing the small ways in which the Queen still signs off on our domestic constitutional affairs.

Peoples when Making Laws for Indigenous Affairs’ (2015) 26 *Public Law Review* 166, 170–3 (‘Laws for Indigenous Affairs’).

27 Republic Advisory Committee, ‘An Australian Republic: The Options’ (Report, 1993) vol 1, quoted in Ian McAllister, ‘Elections without Cues: The 1999 Australian Republic Referendum’ (2001) 36(2) *Australian Journal of Political Science* 247, 248. See also Turnbull, *Bigger Picture* (n 19) 97.

28 Keating (n 13) 2, 3.

29 Suri Ratnapala, ‘The Case for Adopting the American Model in an Australian Republic’ (1999) 20(2) *University of Queensland Law Journal* 242, 242.

30 Ibid. See also Harry Evans, ‘The Australian Head of State: Putting Republicanism into the Republic’ (1996) 3(2) *Agenda* 143.

31 McKenna, *The Captive Republic* (n 7) 257.

32 See John Warhurst, ‘Nationalism and Republicanism in Australia: The Evolution of Institutions, Citizenship and Symbols’ (1993) 28(4) *Australian Journal of Political Science* 100; Cheryl Saunders, ‘Insights from the Experience of the Constitutional Centenary Foundation’ in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 204 (‘Insights’); Cheryl Saunders, ‘Beyond Minimalism’ in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic, Essays in Honour of Professor George Winterton* (Federation Press, 2010) 55, 56–8 (‘Beyond Minimalism’); Alan Fenna, ‘The Incremental Republic’ in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic, Essays in Honour of Professor George Winterton* (Federation Press, 2010) 132.

33 Ben Wellings, ‘Britishness and the Failure of Australian Republicanism’ (2003) 3(2) *Studies in Ethnicity and Nationalism* 35, 38; Keating (n 13) 6.

Many extra-constitutional symbols have already been updated. In 1977, Australia abandoned ‘God Save the Queen’ and chose ‘Advance Australia Fair’ for its new national anthem³⁴ (though the Australian flag remains mostly unchanged since 1901 and still bears the Union Jack).³⁵ Citizenship oaths have evolved to reflect Australia’s independent character.³⁶ The nation’s cultural ties to Britain have diminished as we grow more ‘republican in sentiment’.³⁷ As Turnbull describes, the monarchy has correspondingly become ‘less visible’ and ‘less significant’, so ‘[o]nly the words of the *Constitution* remain – as much a reminder of our inability to agree on change as they are of a colonial status now long past’.³⁸ ‘Australia has [therefore] become republic-like’, Benjamin Jones argues, without constitutional amendment³⁹ and without having a ‘republican moment’.⁴⁰

Legally, too, Australia has taken important incremental steps towards independence. In 1931, the *Statute of Westminster* legally recognised the independence of the dominions.⁴¹ In 1942, Australia adopted the statute, ratifying the free and equal status of its government and Parliament,⁴² while the 1986 *Australia Acts* severed most remaining legal links with the United Kingdom.⁴³ The Governor-General is now appointed by the Queen on the advice of Australia’s Prime Minister, instead of British ministers.⁴⁴ The practical involvement of the monarch in Australian affairs has similarly diminished,⁴⁵ while the functions of her domestic representatives have accordingly expanded⁴⁶ and become Australianised.⁴⁷

A republic may therefore be described as the final step in a ‘natural evolutionary track’ consolidating our independent national identity.⁴⁸ Though under the

34 Jones, *This Time* (n 18) 72–4.

35 ‘Australian National Flag’, *Department of the Prime Minister and Cabinet* (Web Page) <<https://www.pmc.gov.au/government/australian-national-flag>>.

36 Deirdre McKeown, ‘Changes in the Australian Oath of Citizenship’ (Research Note No 20, Parliamentary Library, Parliament of Australia, 19 November 2002) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1VW76/upload_binary/1vw766.pdf;fileType=application%2Fpdf#search=%22library/prspub/1VW76%22>.

37 Richard Fidler, ‘The Great Hall of the People: Symbolism and the Coming Republic’ in Glenn Patmore (ed), *The Big Makeover: A New Australian Constitution* (Pluto Press, 2002) 207.

38 Turnbull, ‘Foreword’ (n 22) xv.

39 Jones, *This Time* (n 18) 15.

40 *Ibid* 16.

41 Anne Twomey, *The Australia Acts 1986: Australia’s Statutes of Independence* (Federation Press, 2010) 21–3 (‘*Australia Acts 1986*’).

42 See *Statute of Westminster Adoption Act 1942* (Cth) s 2(1).

43 Twomey, *Australia Acts 1986* (n 41).

44 DR Elder and PE Fowler (eds), *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 1–2; Turnbull, *Bigger Picture* (n 19) 96.

45 Keating (n 13) 2.

46 Saunders, ‘Beyond Minimalism’ (n 32) 75.

47 Galligan, ‘Regularising’ (n 6) 59; Boyce, *The Queen’s Realms* (n 8) 33, 45–6.

48 John Warhurst, ‘Monarchist Myths Debunked’ in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 133, 134 (‘Myths Debunked’); David Morris, ‘It’s All About Our Identity’ in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 184, 190–1 (‘Identity’); Richard McGarvie, ‘The Wisdom of Hindsight: The 1999 Republic Referendum’ (2001) 3 *University of Notre Dame Australia Law Review* 11, 13 (‘Wisdom of Hindsight’).

Constitution, the Queen remains Australia's head of state,⁴⁹ in practice, the monarch is the symbolic or 'titular' head of state,⁵⁰ while the Governor-General is the de facto or 'virtual' head of state,⁵¹ as the Queen's domestic representative. Australia has therefore been described as a 'crowned republic',⁵² 'barely disguised' by remnant 'monarchic trappings'.⁵³ This helps explain the predominantly symbolic rather than structural framing: all that is required for the republic to be revealed is for the veil to be lifted, adorning symbols updated, and Australia's evolved national character finally expressed.

If Australia is already almost republic, then the scope of the required reform becomes smaller.⁵⁴ As Brian Galligan argued in 1993:

[T]he real republican character of Australia's constitutional system needs to be recognised. Once that is done, much of the current agitation by republican activists is undercut and the general apathy of most Australians explained. The real issues remain more modest, but nevertheless important, ones of switching formal symbols, sorting out the office of head of state and tidying up constitutional formulations.⁵⁵

What might such a tidying up involve? At minimum, it requires reform to remove the practical involvement of the British Queen in our domestic constitutional affairs. Taking seriously the idea that a republic should involve minimal structural disruption, this could be as simple as making the Governor-General our actual head of state, instead of just de facto, and ensuring he or she is appointed and removed by Australians in Australia, rather than by the Queen.⁵⁶

49 Saunders, 'Beyond Minimalism' (n 32) 75.

50 Tony Abbott, *The Minimal Monarchy: And Why It Still Makes Sense for Australia* (Wakefield Press, 1995) 57.

51 McGarvie, 'Wisdom of Hindsight' (n 48) 13; George Winterton, 'Reserve Powers in an Australian Republic' (1993) 12(2) *University of Tasmania Law Review* 249, 253 ('Reserve Powers'); George Winterton, 'Who is Our Head of State?' (2004) 48(9) *Quadrant* 60 ('Head of State'); Zelman Cowen, 'Reflections on an Australian Republic' (1994) 38(12) *Quadrant* 14, 17 ('Reflections'); Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) 737 ('*Veiled Sceptre*'); Saunders, 'Insights' (n 32) 204; Justice Michael Kirby, 'The Australian Referendum on a Republic: Ten Lessons' (Menzies Memorial Lecture, King's College, 4 July 2000). Though Sir David Smith and other monarchists have argued that the Governor-General is the head of state: see David Smith, 'Australia's Head of State: The Definitive Judgment' (2017) 61(4) *Quadrant* 43.

52 Glenn Patmore, *Choosing the Republic* (University of New South Wales Press, 2009) 105 ('*Choosing Republic*'); John Howard, 'Queen Indeed or Simply Quaint?', *The Australian* (Sydney, 15 February 1992), quoted in Carolyne Hide, Karen Davis and Ian Ireland, 'The Recent Republic Debate: A Chronology 1989–1998' (Background Paper No 9, Parliament of Australia, 25 June 1996); Michael Millett, 'Stick with "Crowned Republic": Howard', *The Sydney Morning Herald* (Sydney, 12 November 1997) 3, quoted in Carolyne Hide, Karen Davis and Ian Ireland, 'The Recent Republic Debate: A Chronology: 1989–1998' (Background Paper No 9, Parliament of Australia, 25 June 1996).

53 Galligan, 'Regularising' (n 6) 56–9. See also Cowen, 'Reflections' (n 51) 15.

54 Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995) 4.

55 Galligan, 'Regularising' (n 6) 56. See also Cowen, 'Reflections' (n 51) 16.

56 Richard McGarvie, 'Our Democracy in Peril: The Safe Way to a Democratic Republic' (1997) 101 *Victorian Bar News* 31 ('Democracy in Peril').

2 *The Predominantly Symbolic Role of the Queen*

The symbolic framing of republican arguments is influenced by, and consistent with, the Queen's primarily ceremonial role in Australia's constitutional arrangements. As Greg Craven argued in 1999:

[T]he Monarchy is the only element of the *Constitution* which is fundamentally symbolic. It exists, not as some logically unavoidable practical component of Australian constitutionalism ... but as a powerfully symbolic presence floating above (or perhaps across) the entire document ... The real question is what we are entitled to demand of constitutional symbols, and whether the Monarchy can meet those just claims.⁵⁷

The main republican argument for removing or changing this symbol is therefore cultural: the Queen has 'lost her civic personality'⁵⁸ and is now a too 'remote and inadequate symbol' to reflect the affections of contemporary Australians.⁵⁹ As Richard Fidler colourfully argued, '[w]e are, after all, republicans precisely because the symbolism of the Crown – remote, undemocratic, aristocratic, sexist, sectarian and closed – is so completely wrong for a new world nation like Australia'.⁶⁰ Republican reform is therefore needed for 'national renewal', because '[t]here is no true affinity between the Queen and the contemporary Australian Commonwealth she allegedly represents'.⁶¹ Instead, there is 'ever-widening incompatibility' exposing a 'symbolic vacuum at the core of our system of executive government'.⁶²

Such arguments critique the suitability of the Queen's 'ceremonial and personal' role as 'a focus of national unity', as distinct from the Crown's institutional role as constitutional guardian (performed through the Governor-General).⁶³ Notably, however, the complaint of cultural disconnect is generally directed at the distant Queen, not her domestic representative, which begs the question as to whether a republican head of state can realistically fill the symbolic and cultural void. Despite her diminishing status, many Australians probably have more hope of naming the Queen than the Governor-General.⁶⁴ Expecting an Australian head of state to act as a unifying 'symbol of national identity',⁶⁵ maintaining the 'derivative atmosphere of Royalty'

57 Craven, 'Constitutional Conservatism' (n 22).

58 John Hirst, 'The Conservative Case for an Australian Republic' (1991) 35(9) *Quadrant* 9, 9 ('Conservative Case'). See also Jones, *This Time* (n 18) 128.

59 Keating (n 13) 2. See also Jones and McKenna, 'Rekindling' (n 22) 6. But for the continuing role played by the monarch in Australian life, see Luke Mansillo, 'Loyal to the Crown: Shifting Public Opinion towards the Monarchy in Australia' (2016) 51(2) *Australian Journal of Political Science* 213.

60 Fidler (n 37) 205 (emphasis omitted). On vanishing monarchical symbols, see also Boyce, *The Queen's Realms* (n 8) 17–19.

61 Jones and McKenna, 'Rekindling' (n 22) 6.

62 Ibid. See also Judith Brett, 'From Monarchy to Republic: Into the Symbolic Void?' (1996) 20(47) *Journal of Australian Studies* 17, 29.

63 George Winterton and David Flint, 'The Election of an Australian President' (Papers on Parliament No 28, Department of the Senate, November 1996) 12. Institutional functions will be discussed further below.

64 Boyce, *The Queen's Realms* (n 8) 137–8.

65 Winterton, *Monarchy to Republic* (n 8) 11, 19.

once encouraged by Menzies,⁶⁶ or embodying the kind of ceremonial mystique that Bagehot described,⁶⁷ may be ill-fitting in the Australian republican context.

For Judith Brett, the weakness in Australian republicanism was that it could ‘appeal to no broadly accepted and emotionally rich symbols of the people or the nation which can match the Crown as a symbol of impersonal service, of leadership, beyond politics’.⁶⁸ Indeed, the difficulty of replacing the ancient symbolism of the Crown in a republican head of state may be why republicans have searched elsewhere for symbolic fulfilment, looking to a constitutional preamble for expression of national identity and values.⁶⁹ Ideas about direct election also seemed an attempt to imbue the republican head of state with greater popular charisma and legitimacy,⁷⁰ perhaps seeking deeper symbolic clout for the role. Below I argue that both efforts at adding symbolic power to republican reforms are misguided.

While Brett underestimates the potential for developing a uniquely Australian national symbolism, the observation that Australia *currently* lacks the necessary unifying ‘symbolic capital’⁷¹ seems fair: traditional symbols were forged in the image of white Australia.⁷² The contemporary challenge, therefore, is to articulate a national symbolism that reflects the totality of Australian cultural and historical contributions,⁷³ without inflaming the culture wars that regularly derail efforts at consensus.⁷⁴

3 *Modernisation, Maturation, Merit, and Multiculturalism*

Punctuating the overarching theme of national independence, the recurring four ‘M’s’ of republican justifications entwine in symbolic arguments for republican reform: modernisation, maturation, merit, and multiculturalism. The modernisation argument contends that Australia must ‘cut the ties that bind us to an old idea of the world’,⁷⁵ to ‘shed the Imperial garb of a time long gone and stand alone as a proud

66 Boyce, *The Queen’s Realms* (n 8) 7.

67 Walter Bagehot, *The English Constitution*, ed Miles Taylor (Oxford University Press, 2001) 44.

68 Brett (n 62) 27.

69 As *ibid* 18 explained:

Questions about the relative strength of symbolic support for Australia continuing as a monarchy as against becoming a republic are inevitably questions about how Australia imagines itself as a political community, both how it symbolises the basis of its national unity and how it understands what is distinctive about it as a nation among other nation states.

See also McKenna, *A Reconciled Republic?* (n 3) 119; Pearson, ‘Reconciliation’ (n 1); Mark McKenna, ‘First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991–99’ (Research Paper No 16, Parliament of Australia, 4 April 2000) (‘First Words’).

70 George Winterton, ‘A Directly Elected President: Maximising Benefits and Minimising Risks’ (2001) 3 *University of Notre Dame Australia Law Review* 27, 30 (‘Maximising Benefits’).

71 Brett (n 62) 28.

72 Tim Watts, *The Golden Country: Australia’s Changing Identity* (Text Publishing, 2019) 50–62.

73 McKenna, *The Captive Republic* (n 7) 260 thus asks: ‘[h]ow does a multicultural society with predominantly European roots situated close to Asia manage to define itself?’.

74 Shireen Morris, ‘Don’t Change the Date, Change Its Meaning’, *Meanjin Quarterly* (Blog Post, 24 January 2018) <<https://meanjin.com.au/blog/dont-change-the-date-change-the-date/>> (‘Meaning’).

75 Mark Tredinnick, ‘A Peaceable Revolution: The Republic We Have to Have’ in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 35.

and independent people'.⁷⁶ The maturity argument asserts that a republic would be 'us growing up'⁷⁷ and taking 'responsibility for our own affairs', moving from a 'parent-child relationship' with Britain, to a modern, mature relationship.⁷⁸

The merit argument highlights the incongruence of hereditary succession with Australian democracy,⁷⁹ because it is 'totally un-Australian to have any hereditary element in our system of government'.⁸⁰ Former Attorney-General Michael Lavarch argued that monarchical hereditary rules breached human rights to gender equality and religious freedom, because succession favours male descendants and requires the monarch to belong to the Church of England.⁸¹ More recently, republicans called for an Australian head of state on the basis that all Australians should be able to aspire to hold the position.⁸² In 2020, the Australian Republican Movement ('ARM') ran an advertisement featuring a sleeping white baby, with the caption: 'You're hired!' followed by, 'Australians earn jobs with hard work and effort – we're not born into them'. Twitter commentators promptly refuted the 'myth of meritocracy'.

A republic is regularly equated with rejection of colonialism and embrace of multiculturalism and reconciliation. Echoing Keating, Wayne Swan argued that a republic would declare Australian independence in the Asia-Pacific region.⁸³ Combining preceding arguments, Jones contends as follows:

Elizabeth II holds a symbolic and ceremonial position in Australia. So does it really matter, then, that she is not Australian, and merely an occasional visitor? Yes. If Kevin Rudd's 2008 Apology to Indigenous Australians taught us anything, it is that symbols do matter. Symbols are powerful. ... The message sent to the world in this dynamic Asian Century is that Australia still identifies as a small, white, colonial outpost, rather than as an independent, multicultural nation, an active member of the region, and the home of the oldest continuing cultures on Earth.⁸⁴

Others forcefully argue that maintaining the Queen retains a "'colonialist" structure ... inappropriate for a modern multicultural, independent and ... progressive nation',⁸⁵ or legitimises the 'racist and xenophobic attitudes of white Australians', which is why the monarchy, as 'a symbol of our past and a tradition

76 Benjamin T Jones, 'The Meaning of a Republic' in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 194, 206.

77 Senate Legal and Constitutional References Committee, Parliament of Australia, *The Road to a Republic* (Report, August 2004) 5 [2.12] ('*Road to Republic*').

78 Keating (n 13) 2.

79 Saunders, 'Insights' (n 31) 204; Winterton, *Monarchy to Republic* (n 8) 22–4.

80 Senate Legal and Constitutional References Committee, *Road to Republic* (n 77) 5 [2.14].

81 Farah Farouque, 'Rift over Monarchy Comments', *The Age* (Melbourne, 15 April 1994), quoted in Carolyne Hide, Karen Davis and Ian Ireland, 'The Recent Republic Debate: A Chronology: 1989–1998' (Background Paper No 9, Parliament of Australia, 25 June 1996).

82 'Frequently Asked Questions', *Australian Republic Movement* (Web Page) <<https://www.republic.org.au/faq>>.

83 Wayne Swan, 'Foreword' in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) xvi, xvii–xviii.

84 Jones, *This Time* (n 18) 23 (emphasis omitted).

85 James Terrie, 'Our Republic: The Next Step' in Glenn Patmore (ed), *The Big Makeover: A New Australian Constitution: Labor Essays 2002* (Pluto Press, 2002) 198.

of whiteness, needs to be severed'.⁸⁶ For Thomas Keneally, too, a republic would signify that 'we are no longer white-supremacists afflicted with delusion'.⁸⁷

Such rhetoric shows the breadth and passion of justifications and language justifying republican change. The latter examples also demonstrate how republican arguments have tended to identify their cause as predominantly 'progressive', in a way that may inadvertently exclude Australians of more conservative or middle-ground dispositions, or those who feel continuing attachments to Britain. The language sometimes succumbs to simplistic ideological dichotomies, positioning republicanism on one side of the culture wars.

C Australians Need to Understand the Small Practical Problem

The republican emphasis on symbolism and commitment to existing constitutional structures leads to a dilemma: it enabled monarchists to argue that genuine change is not needed nor wholeheartedly desired – even by republicans. As monarchist Lloyd Waddy contended: '[t]he "minimalist" myth, therefore, is the republicans' confession that there is no real passion in the cause'.⁸⁸ Alleged lack of passion misstates the issue, however. The passion is there, but it yearns for a better symbolic articulation of the Australian nation more than for structural reform. This does not make a republic less important; but it makes its importance harder to convey to politicians and a public potentially more concerned with practical problems,⁸⁹ leading to 'indifference and silence'⁹⁰ and relegation of the republic to a second or third tier issue.⁹¹ After all, if republicans say the Queen is already irrelevant,⁹² why bother with reform?⁹³ It is unsurprising the 'irrelevance of the Queen' argument has been wielded by monarchists and republicans alike.⁹⁴ For Behrendt, the public reaction to tepid symbolism and 'government business as usual' was 'a collective yawn'.⁹⁵

86 Erika K Smith, 'The Australian Republic: Love It or Leave It!' in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 82, 86 ('Love It or Leave It').

87 Thomas Keneally, 'Reflections on the Old Australian Republican Movement' in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 24, 33.

88 Lloyd Waddy, 'Time To Put the Genie Back in the Bottle', *The Canberra Times* (Canberra, 6 October 1993) 15, quoted in Brett (n 62) 17 (quote amended to reflect original source).

89 As Galligan explained, the fact that we are already almost a republic renders it 'difficult to sustain the necessary enthusiasm of elites and people for making the change': Galligan, 'Regularising' (n 6) 65. See also Jones and McKenna, 'Rekindling' (n 22) 3–4; John Warhurst, 'The Trajectory of the Australian Republic Debate' (Speech, Australian Senate, 6 March 2009) 2 ('Trajectory').

90 Jones and McKenna, 'Rekindling' (n 22) 4.

91 See Warhurst, 'Trajectory' (n 89) 2.

92 See *ibid* 12.

93 Wellings (n 33) 45. See also Brian Galligan, 'Rethinking the Australian Republic: A Radical Alternative' (2001) 3 *University of Notre Dame Australia Law Review* 45, 46 ('Rethinking').

94 See Cowen, 'Reflections' (n 51) 17.

95 Larissa Behrendt, 'Beyond Symbolism: Indigenous Peoples in an Australian Republic' in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 62, 62.

While some contend that symbolic arguments prolific in the 1990s should now be replaced by substantive democratic justifications,⁹⁶ such justifications have not yet emerged or come to prominence.⁹⁷ The dilemma thus remains: republicans need to inspire voters to remove the irrelevant anachronism – which would have predominantly symbolic but (depending on the model) probably minimal practical effect – however, this may be insufficient to justify constitutional reform and galvanise the polity.⁹⁸ Conversely, going to the other extreme – towards more transformative constitutional reform – may not be the answer either. Firstly, republicans have largely not explained why more transformative change is needed,⁹⁹ rather sticking to symbolic justifications premised on minimal structural disruption. Secondly, history demonstrates that proposals fundamentally altering Australia's constitutional balance of powers – like the insertion of new rights guarantees, for example¹⁰⁰ – have failed when put to referendum.¹⁰¹

Successful referendum proposals have been modest yet practical in nature.¹⁰² The 1946 'social services' referendum conferred upon the Commonwealth the power to legislate for welfare and social matters.¹⁰³ The 1967 'Aboriginals' referendum conferred upon the Commonwealth the power to legislate for Indigenous affairs and removed section 127 which prevented Indigenous people from being counted as part of the population.¹⁰⁴ The remaining six successful referenda varied in nature but all resolved practical issues of government: the timing of Senate elections in 1906,¹⁰⁵ state debts in 1909¹⁰⁶ and the further management of state debts in 1928,¹⁰⁷ and the management of Senate vacancies,¹⁰⁸ Territory voting in referenda¹⁰⁹ and the

96 McKenna, 'Australian Republic: Still Captive' (n 21) 159–60; Tim Southphommasane, 'The New Republic' (November 2009) *The Monthly*.

97 More recent advocacy still centres on symbolism: see, eg, Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) ('*Project Republic*'); Jones, *This Time* (n 18); Warhurst, 'Trajectory' (n 89); Harris (n 13); Turnbull, *Bigger Picture* (n 19) 94–5.

98 Jeff Sparrow, 'There Are Obvious Democratic Reasons for Australia to Become a Republic', *The Guardian* (online, 29 January 2016) <<https://www.theguardian.com/commentisfree/2016/jan/29/there-are-obvious-democratic-reasons-for-australia-to-become-a-republic>>.

99 Cf Ratnapala (n 29).

100 George Williams, 'The Federal Parliament and the Protection of Human Rights' (Research Paper No 20, Parliamentary Library, Parliament of Australia, 11 May 1999).

101 See Morris, *First Nations Voice* (n 26) 50.

102 For the track record, see 'Referendum Dates and Results', *Australian Electoral Commission* (Web Page, 24 October 2012) <http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm> ('Referendum Results').

103 *Constitution Alteration (Social Services) 1946* (Cth). Note, however, the civil conscription qualification: *Australian Constitution* s 51(xxiiiA).

104 *Constitution Alteration (Aboriginals) 1967* (Cth).

105 *Constitution Alteration (Senate Elections) 1906* (Cth).

106 *Constitution Alteration (State Debts) 1909* (Cth).

107 *Constitution Alteration (State Debts) 1928* (Cth).

108 *Constitution Alteration (Senate Casual Vacancies) 1977* (Cth).

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

retirement age of judges in 1977.¹¹⁰ These “‘machinery’” amendments¹¹¹ resolved practical problems of government. No constitutional reform has been particularly structurally transformative, yet none has been wholly symbolic (though the 1967 referendum was sold as a highly symbolic reform).¹¹² Instructively, the one wholly symbolic argument for reform, which included an attempt at injecting symbolic language into the *Constitution*, was the republic and preamble propositions, which both failed in 1999.

That Australians vote to fix practical problems fits with the largely practical and functional nature of the *Australian Constitution*.¹¹³ The political challenge, therefore, is in properly explaining the modest, practical constitutional change necessary to remove the Queen from Australia’s constitutional arrangements, but also relaying why this minor updating of Australian constitutional machinery is worthwhile. Arguably, it cannot just be about symbolism. Australians also need to understand that there is a small, practical problem worth fixing.

D Dual Purposes: Conceptually Separating the Symbolic from the Practical

The symbolic framing of republican arguments also lends itself to confusion once advocates delve into technicalities of models. Confusion arises because the predominantly symbolic answer to the ‘why’ question usually does not explain the need for the small (but sometimes complicated) practical changes involved in answering the ‘how’ question. Rather than relying on wholly symbolic justifications, a better approach is to identify the dual, separate but connected, purposes driving republican reform. The first problem is practical, and smaller and potentially simpler than grand republican rhetoric usually suggests. The second problem is symbolic and can be as bold as our imaginations allow. For clarity, these dual purposes should be separated. Though conceptual overlap will inevitably remain, separation helps demonstrate that each driving purpose may require a different solution.

110 *Constitution Alteration (Retirement of Judges) 1977* (Cth).

111 Scott Bennett, ‘The Politics of Constitutional Amendment’ (Research Paper No 11, Parliamentary Library, Parliament of Australia, 23 June 2003) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0203/03rp11> (‘Constitutional Amendment’). See also Enid Campbell, ‘Southey Memorial Lecture 1988: Changing the Constitution’ (1989) 17(1) *Melbourne University Law Review* 1, 4.

112 For the positive symbolism that attended the 1967 referendum, see Sean Brennan and Megan Davis, ‘First Peoples’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 27, 48–50; Larissa Behrendt, ‘The 1967 Referendum: 40 Years On’ (2007) 11(Special Edition) *Australian Indigenous Law Review* 12, 14–15; Lael K Weis, ‘Constituting “the People”’: The Paradoxical Place of the Formal Amendment Procedure in Australian Constitutionalism’ in Richard Albert, Xenophon Contiades and Alkmene Fontiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, 2017) 266, 267.

113 See Sir Anthony Mason, ‘The Australian Constitution in Retrospect and Prospect’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 7, 7–8; Jeffrey Goldsworthy, ‘Constitutional Cultures, Democracy, and Unwritten Principles’ [2012] (3) *University of Illinois Law Review* 683, 685; Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004) 9–10 (‘Conversations’).

1 A Small, Practical Purpose: Australianising the Head of State

Under the *Constitution*, the British Queen is Australia's head of state, but she is represented by the Australian Governor-General as the de facto head of state,¹¹⁴ who performs domestic institutional functions according to written and unwritten constitutional rules and conventions.¹¹⁵ The office of head of state in Australia is therefore divided,¹¹⁶ comprising both Australian and British faces.¹¹⁷ Its nature has also evolved – as noted, the Queen's role in Australia over time has faded, while the functions of her domestic representatives have expanded and become Australianised.¹¹⁸ The Queen now supplies distant and diminishing historic symbolism, while the Governor-General does the domestic institutional work in service of the *Australian Constitution*.

As the de facto head of state, the Governor-General performs the important role of 'constitutional umpire'.¹¹⁹ As Anne Twomey explains, the symbolism of the office is 'given substance' by the rarely exercised reserve powers, which 'uphold and maintain the fundamental constitutional principles of the system of government that the head of state represents'.¹²⁰ The most crucial feature of the Governor-General's role, these reserve powers are used only exceptional circumstances and can be exercised contrary to the advice of responsible ministers.¹²¹ They can include power to appoint¹²² or dismiss a Prime Minister,¹²³ or dissolve Parliament where there has been a loss of confidence.¹²⁴ The Governor-General also has more regularly exercised operational functions, generally considered 'mere formalities'¹²⁵

114 Winterton, 'Head of State' (n 51) 61–2.

115 See Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2nd ed, 2014) 175–8.

116 Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) 263–71. See also Cheryl Saunders, 'The Concept of the Crown' (2015) 38(3) *Melbourne University Law Review* 873, 883.

117 David Hamer, *Can Responsible Government Survive in Australia?* (Department of the Senate, 2nd ed, 2004) 154 argues that we have two heads of state: 'Canada, Australia and New Zealand have two heads of state, the Queen as the symbolic head of state and the Governor-General as the constitutional head of state' ('*Responsible Government*'). See also Sir David Smith's arguments in Winterton, 'Head of State' (n 51) 60.

118 Galligan, 'Regularising' (n 6) 59; Boyce, *The Queen's Realms* (n 8) 33, 45–6.

119 Patmore, *Choosing Republic* (n 52) 167. See also Glenn Patmore, 'The Head of State as the Guarantor of Democratic Government' in Glenn Patmore (ed), *The Big Makeover: A New Australian Constitution* (Pluto Press, 2002) 174, 183 ('Guarantor'); George Winterton, 'Choosing a Republican Head of State' (1995) 2(2) *Agenda: A Journal of Policy Analysis and Reform* 135, 135 ('Republican Head of State'); Boyce, *The Queen's Realms* (n 8) 118.

120 Twomey, *Veiled Sceptre* (n 51) 1.

121 Brian Galligan, 'Executive Conventions' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, 2015) 51, 52.

122 See Twomey, *Veiled Sceptre* (n 51) ch 3.

123 *Ibid* ch 4. For an explanation of the 1975 Whitlam dismissal, see Nicholas Barry and Narelle Miragliotta, 'Australia' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, 2015) 204.

124 Twomey, *Veiled Sceptre* (n 51) 10, 232–3, 257–8, 270–1.

125 *Ibid* 1.

or ‘rubber stamp’ functions,¹²⁶ exercised on the advice of the government.¹²⁷ These include giving assent to Bills¹²⁸ and summoning or proroguing Parliament.¹²⁹

In Australia, the Governor-General performs these institutional functions; the one obvious exception being the appointment and dismissal of the Governor-General,¹³⁰ which is undertaken by the Queen on the advice of the Prime Minister.¹³¹ Arguably, then, all that is needed to fully Australianise the dual-faceted office of head of state is to singularise and patriate it by removing the Queen’s (merely formalistic) role in appointing and dismissing the Governor-General. The Governor-General’s role and functions could remain the same, but he or she would be appointed and dismissed by Australians. The Governor-General would then become Australia’s actual head of state, rather than just the *de facto* head, formalising the practical reality.

So understood, the practical problem a republic seeks to solve is small. As noted, Australia has evolved into an independent nation,¹³² hence the scope of the required constitutional reform is narrow.¹³³ The final step to full independence lies in removing the now minor role of the Queen from Australia’s domestic constitutional arrangements. This would be a small but necessary constitutional closure: a final, formal tick off. It is necessary because the fact that the *Constitution* still requires the Australian government to ask the British Queen to appoint and dismiss our Australian Governor-General is inappropriate for an independent nation. Australia should not have to seek the British Queen’s approval for any domestic decisions: we should accordingly remove the bureaucratic requirement of the Queen’s assent to this domestic appointment. The present procedure is also arguably inefficient (particularly given the Queen’s tick-off is just a rubber stamp), requiring Letters Patent to be issued by Her Majesty, which must then be published in the official gazette of the Commonwealth.¹³⁴ The appointment procedure should be simplified and patriated: this is the practical problem that needs to be solved. It is a simpler and smaller pitch, focussed on practicality, efficiency, and domestic responsibility over domestic matters. Yet given the Australian proclivity to vote ‘yes’ to constitutional reforms that solve practical problems of government, this approach may prove more persuasive. The problem is small enough to be fixable, but not so big as to require far-reaching transformation. Republicans need to explain the small, practical problem and why it is *worth* fixing.

126 Hamer, *Responsible Government* (n 117) 157.

127 See Twomey, *Veiled Sceptre* (n 51) ch 2.

128 *Ibid* ch 9.

129 *Ibid* 5.

130 Winterton, ‘Head of State’ (n 51) 61.

131 Though, the *Constitution* confers her more powers: see Appleby, Reilly, and Grenfell (n 115) 175; Hamer, *Responsible Government* (n 117) 169.

132 Boyce, *The Queen’s Realms* (n 8) 24.

133 See Brian Galligan, ‘Regularising’ (n 6).

134 Elder and Fowler (n 44).

2 *A Big, Symbolic Purpose: Declaring and Uniting the Australian Nation*

The secondary problem is symbolic and its resolution can be as expansive and ambitious as our imaginations allow. A republic should affirm and declare our nation in a way that unites Australians. It should deal constructively with unresolved aspects of our past – including matters of reconciliation – while articulating shared values and aspirations. In 1999, John Howard put to the Australian people a symbolic preamble,¹³⁵ alongside the republic referendum. Many Indigenous leaders opposed it,¹³⁶ various legal scholars raised concerns,¹³⁷ and most Australians voted ‘no’ – only 39.34% approved. This mistake should not be repeated: a new constitutional preamble is arguably not the best way to achieve a symbolic declaration of our country. The words would be whittled down to pointlessness in constitutional drafting discussions, because of concerns about legal implications. This was a problem identified in Indigenous constitutional recognition discussions, which is why the Referendum Council in 2017 recommended an ‘extra-constitutional Declaration’ instead.¹³⁸

A Declaration outside the *Constitution* could more fulsomely articulate our national identity, values, and aspirations, poetically bringing together the three parts of our national story – the Indigenous, the British, and the multicultural. That would be more inspiring than an inevitably minimalistic and legally cautious constitutional preamble – which in 1999 came complete with a disingenuous ‘no legal effect’ clause.¹³⁹ Enacted by all Australian parliaments with the assent of the First Nations, this could be Australia’s ‘Declaration of Independence’, but with special reconciliatory significance.¹⁴⁰ This will be discussed further below.

III THREE LESSONS FROM THE FAILED 1999 REPUBLIC REFERENDUM

A republic requires constitutional change, which necessitates a referendum under section 128. That means a majority of voters in a majority of states, and a majority overall, must vote ‘yes’. It presents a difficult threshold: the *Constitution* has only been successfully amended eight times out of 44 attempts.¹⁴¹ The unique political challenges this entails were evident in 1999. Three key political lessons emerge from analysis of this referendum failure.

135 Constitution Alteration (Preamble) Bill 1999 (Cth).

136 See McKenna, ‘First Words’ (n 69).

137 Stephen Gageler and Mark Leeming, ‘An Australian Republic: Is a Referendum Enough?’ (1996) 7(3) *Public Law Review* 143, 145–7; George Winterton, ‘A New Constitutional Preamble’ (1997) 8(3) *Public Law Review* 186, 187–8 (‘Constitutional Preamble’); Julian Leaser, ‘Uphold and Recognise’ in Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016) 83–4 (‘Uphold’).

138 Referendum Council, ‘Final Report’ (n 9) 38–9.

139 Constitution Alteration (Preamble) Bill 1999 (Cth) s 125A.

140 Shireen Morris, ‘Declaration of Recognition’ (n 10).

141 For the track record, see ‘Referendum Results’ (n 102).

A Republicans Must Unite to Achieve Success

To muster support across the political spectrum, republicans must unite and co-operate. Despite the Constitutional Convention producing a compromise model (two-thirds parliamentary appointment), the campaign faltered because of lack of consensus among republicans.¹⁴² Key direct electionists formed an ‘unholy alliance’¹⁴³ with monarchists¹⁴⁴ to run a republican ‘no’ case.¹⁴⁵ The alliance had impact. Although ‘a large majority of the electorate were actually in favour of the introduction of a new system of government’,¹⁴⁶ a significant number voted ‘no’ probably because they preferred direct election.¹⁴⁷ The model was also attacked by structural minimalists.¹⁴⁸ It was derided both by republicans who thought it was too radical, and republicans who thought it was not radical enough.¹⁴⁹ The lesson is that, though some disagreement is inevitable, major public division among key advocates can be death in a referendum campaign.¹⁵⁰

The 1998 Constitutional Convention did not help: it evidently did not foster genuine solidarity or commitment to the chosen model. The process was adversarial¹⁵¹ and included monarchists which, as Jones observes, was like ‘a coach inviting opposing players to discuss team tactics before a grand final’.¹⁵² It did not allow republicans to organise their internal position and strategy.

Advocates must learn from this strategic error. In this respect, they can take cues from the First Nations dialogues conducted by the Referendum Council, which resulted in the Uluru Statement: the process enabled Indigenous advocates to organise and consolidate Indigenous consensus.¹⁵³ Republican reformers

142 Warhurst, ‘Trajectory’ (n 89) 9; Paul Pickering, ‘Confronting the Good Monarch: Searching for a Democratic Case for a Republic’ in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 118, 125; John Warhurst and Malcolm Mackerras, ‘Constitutional Politics: The 1990s and Beyond’ in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 1, 23 (‘The 1990s and Beyond’); Jones, *This Time* (n 18) 93; Greg Craven, ‘Australian Constitutional Battlegrounds of the Twenty-First Century’ (1999) 20(2) *University of Queensland Law Journal* 250, 254 (‘Constitutional Battlegrounds’).

143 Galligan, ‘Rethinking’ (n 93) 45.

144 See also Patmore, *Choosing Republic* (n 52) 25; Jones, *This Time* (n 18) 87; Hirst, *Sense and Nonsense* (n 18) 266; Fidler (n 37) 206–7; McKenna, ‘Australian Republic: Still Captive’ (n 21) 145.

145 Wellings (n 33) 47.

146 McAllister (n 27) 256. Yet, while the direct electionists argued that Australians should hold out for a direct election referendum down the track, the promise of a subsequent referendum on their favoured model turned out to be ‘mere vapour’ – after the referendum’s failure, they never pushed for a second try: Keneally (n 87) 31; Turnbull, *Bigger Picture* (n 19) 103.

147 David Charnock, ‘National Identity, Partisanship and Populist Protest as Factors in the 1999 Australian Republic Referendum’ (2001) 36(2) *Australian Journal of Political Science* 271, 272.

148 McGarvie, ‘Democracy in Peril’ (n 56).

149 Craven, ‘Constitutional Battlegrounds’ (n 142) 253–4.

150 Kerry Jones, ‘Why Australians Voted No in the 1999 Republican Referendum’ in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 41, 46 (‘Why Australians Voted No’).

151 Hirst, *Sense and Nonsense* (n 18) 260.

152 Jones, *This Time* (n 18) 85.

153 Although 7 of the 250 delegates dissented and walked out of the Uluru Convention, citing a preference for ‘sovereign treaties’, the majority position was powerful, and reflected views expressed at every dialogue

must similarly unite to achieve success,¹⁵⁴ facilitated through a process enabling advocates to genuinely agree on a model, in light of legal, political, and strategic considerations.¹⁵⁵ Dissenters then would need to get on board or acquiesce with principled silence after consensus is reached. It will not be possible to please everyone, but a ‘circular firing squad’,¹⁵⁶ where every republican advocates a ‘no’ vote unless her preferred model is adopted, will ensure defeat.

In 2020, the ARM took steps in this direction, resolving to form consensus on the model amongst advocates instead of pursuing advisory public plebiscites.¹⁵⁷ If it works, this will allow a more coherent republican campaign, though Labor policy is still to hold an indicative plebiscite before working out the model.¹⁵⁸ Arguably, this just defers difficult questions. No campaign can be effective if advocates are unclear what they are arguing for.

B The Republic Must Be Progressive and Conservative

In deciding their preferred model, republicans must bear in mind that bipartisan support is generally considered a prerequisite for referendum success.¹⁵⁹ This ingredient was missing in 1999.¹⁶⁰ Saunders explained that the ‘[b]elief in political bipartisanship as a mechanism for securing constitutional change stems from the observation that referendums have failed in the past when they are opposed by one side of politics’. Saunders further observed that:

calling for a constitutional voice: Claudiana Blanco, ‘“We Won’t Sell Out our Mob”: Delegates Walk Out of Constitutional Recognition Forum in Protest’, *NITV News* (online, 25 May 2017) <<https://www.sbs.com.au/nitv/nitv-news/article/2017/05/25/breaking-delegates-walk-out-constitutional-recognition-forum-protest>>; Referendum Council, ‘Final Report’ (n 9) 9–16.

154 Jones, *This Time* (n 18) 76–7. See also Brian Galligan, ‘Rethinking’ (n 93) 47.

155 See David Donovan, ‘How to Achieve an Australian Republic’ in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 166, 169–72.

156 Malcolm Mackerras and William Maley, ‘1999 Republic Referendum Results: Some Reflections’ in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 89, 111.

157 ‘Australian Republic Movement Adopts New National Strategy to Build National Consensus’, *Australian Republic Movement* (Media Post, 21 January 2020) <<https://www.republic.org.au/media/2020/1/20/australian-republic-movement-adopts-new-national-strategy-to-build-national-consensus>>:

The strategy proposes the ARM adopt a clearly articulated proposal for constitutional reform by building on the common ground that already exists between supporters of a republic. A national consultation over the next 18–24 months will inform the development of the reform model and work to build consensus among supporters, the broader community and the Federal Parliament. Once that consensus has been achieved, the ARM will campaign for the model proposal to be taken directly to a referendum. The strategy supersedes the ARM’s previous position which sought to generate majority support for a republic and model through a series of advisory national plebiscite vote questions.

158 Mark Kenny, ‘If Labor Wins Government, Will an Australian Republic Finally Take the Crown?’, *The Conversation* (online, 4 March 2019) <<https://theconversation.com/if-labor-wins-government-will-an-australian-republic-finally-take-the-crown-110723>>.

159 According to Kirby (n 51), a republic campaign needs to be ‘scrupulously bipartisan’ to build the necessary coalition of support. See also George Williams, ‘Mission Impossible? Achieving Social Justice through Constitutional Change’ in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 94, 108.

160 Warhurst and Mackerras, ‘The 1990s and Beyond’ (n 142) 22.

As the Australian Labor Party can be relied upon to support most proposals for constitutional change which achieve passage through the Commonwealth Parliament, an ironic consequence is that most textual amendment has taken place when non-Labor parties are in government.¹⁶¹

While Labor in opposition supported a republic in 1999, the Liberal government was split and the then Prime Minister John Howard was a monarchist.¹⁶² A referendum has never succeeded in Australia without solid prime ministerial support.¹⁶³

The republic was criticised as a progressive and elitist agenda.¹⁶⁴ Part of the problem may have been that Keating ‘effectively claimed the republic for himself and for his party’.¹⁶⁵ In 1999, more Labor supporters voted ‘yes’, Liberals were split, and more Nationals voted ‘no’. High-income, urban, educated Australians tended to vote ‘yes’ in higher numbers, while low-income, less-educated, rural and regional Australians were more likely to vote ‘no’.¹⁶⁶ After the May 2019 election, this is a familiar fault line:¹⁶⁷ the republic appealed most to post-materialist progressives.¹⁶⁸ Notably, however, the cause was not always perceived this way. As McKenna explains, Australian republicanism has historically been promulgated from both the left and the right, bearing ‘as much relevance to the conservative traditions of Australian politics as they do to our radical and socialist traditions’.¹⁶⁹

To succeed in the future, republican arguments must reconnect with these diverse philosophical roots and find ways to speak to progressive and conservative values. By contrast, contemporary republicans have tended to come across as ideologically one-sided.¹⁷⁰ As shown above, the advocacy tends to paint Australia as a ‘modern’, ‘multicultural’, ‘independent’, ‘progressive’,¹⁷¹ and ‘pluralistic’¹⁷² nation, in need of

161 Cheryl Saunders, ‘The Australian Experience with Constitutional Review’ (1994) 66(3) *Australian Quarterly* 49, 53. See also John McMillan, ‘Constitutional Reform in Australia’ (Papers on Parliament No 13, Parliamentary Library, Parliament of Australia, November 1991). The ‘Labor urge to reform’ and the Liberal tendency to protect the Constitution is also discussed in Bennett, ‘Constitutional Amendment’ (n 111) 17.

162 Charnock (n 147) 274–5; McAllister (n 27) 248.

163 Jones, *This Time* (n 18) 5.

164 Galligan, ‘Rethinking’ (n 93) 45; Boyce, *The Queen’s Realms* (n 8) 217; McKenna, *The Captive Republic* (n 7) 250.

165 Kirby (n 51); McGarvie, ‘Wisdom of Hindsight’ (n 48) 15–16.

166 Jones, *This Time* (n 18) 90–1; Warhurst and Mackerras, ‘The 1990s and Beyond’ (n 142) 21–2; Kirby (n 51).

167 See, eg, Matt Wade, “‘We Have Two Australias’: Election Results Show a Growing Divide within the Nation”, *Sydney Morning Herald* (online, 25 May 2019) <<https://www.smh.com.au/federal-election-2019/we-have-two-australias-election-results-show-a-growing-divide-within-the-nation-20190524-p51qu8.html>>.

168 For a discussion of the difference between progressive and conservative attitudes in Australia, see Matthew Lesh, *Democracy in a Divided Australia* (Connor Court Publishing, 2018).

169 McKenna, *The Captive Republic* (n 7) 3.

170 Though, as Turnbull notes, there were conservative republicans in 1999: *Bigger Picture* (n 19) 96.

171 Terrie (n 85) 198.

172 Jones and McKenna, ‘Rekindling’ (n 22) 21.

constitutional ‘renovation’ and ‘liberation’¹⁷³ in ‘the spirit of reform’.¹⁷⁴ The language is coloured by a confident, open, optimistic,¹⁷⁵ reformist zeal perhaps naturally appealing to progressives, but potentially less appealing to those with risk-averse and conservative dispositions,¹⁷⁶ who may be more anxious about change and concerned to protect stability and continuity with the past.¹⁷⁷ For the conservative, inherited institutions and traditions embody the wisdom of experience and should not be lightly disregarded.¹⁷⁸ Yet as Keneally reflected on the 1999 campaign, republicans tended to ‘buoyant[ly] and exuberant[ly]’ dismiss monarchist ‘pleas for constitutional stability’, which was ‘not the best way to win a referendum’.¹⁷⁹

Republican arguments must more deeply grapple with conservative concerns, attachments and values if the cause is to resonate more broadly.¹⁸⁰ A revised republican strategy should be progressive *and* conservative in making the case and proposing solutions. Symbolically, this means finding ways to deploy language, rhetoric, symbols, and values that appeal across the political spectrum. Structurally, it means finding ways to maintain constitutional stability and affirm the institutional value in what we have, while pursuing republican aims. This may be especially important given Australians are arguably ‘innately conservative’ on constitutional change.¹⁸¹ As Kirby J explains, ‘[c]onstitutionally speaking, Australia is, and has always been, a most cautious and conservative country’, which is perhaps why Australia’s *Constitution* ‘is one of the oldest continuously operating written constitutions in the world’.¹⁸²

C Transcending the Culture Wars

Zelman Cowen predicted that ‘symbolic constitutional battles are usually more divisive and diverting than their proponents expect’.¹⁸³ He turned out to be right. In Australia, debates about national symbols – be it a republic, flags, monuments, or the date we celebrate Australia¹⁸⁴ – tend to ignite vicious culture wars.

173 Keneally (n 87) 33.

174 Mark McKenna, ‘The Search for a Meaningful Republic’ in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 10, 23.

175 Turnbull, *Bigger Picture* (n 19) 94–5.

176 See also Jonathan Haidt and Jesse Graham, ‘When Morality Opposes Justice: Conservatives Have Moral Intuitions That Liberals May Not Recognize’ (2007) 20(1) *Social Justice Research* 28; Hillary Brueck, ‘These Key Psychological Differences Can Determine whether You’re Liberal or Conservative’, *Business Insider* (online, 27 February 2018) <<https://www.businessinsider.com.au/psychological-differences-between-conservatives-and-liberals-2018-2?r=US&IR=T>>.

177 See description of conservative attitudes in Jones, *This Time* (n 18) 122–4.

178 See Irving Kristol, *Neo-Conservatism: The Autobiography of an Idea* (Free Press, 1995) 191; Jerry Z Muller (ed), *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present* (Princeton University Press, 1997) 7.

179 Keneally (n 87) 26–7. See also Morris, ‘Identity’ (n 48) 188.

180 James Curran, ‘Republican Reset: The Lessons of History and a Way Ahead’ in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 141, 150–1.

181 Greg Craven, ‘The Republic: Is the 1999 Proposal beyond Repair?’ (2001) 3 *University of Notre Dame Australia Law Review* 59, 62; McAllister (n 27) 262.

182 Kirby (n 51).

183 Cowen, ‘Reflections’ (n 51) 21.

184 Morris, ‘Meaning’ (n 74).

The republic has become a vehicle through which to seek diversification of Australian national symbols¹⁸⁵ and severance from the distasteful legacy of the White Australia Policy. But some republican rhetorical flourishes in this regard are not conducive to consensus. Characterising Australia as ‘a small, white, colonial outpost’,¹⁸⁶ clinging to a monarch who legitimises the ‘racist and xenophobic attitudes of white Australians’,¹⁸⁷ for example, may not win many white votes in rural Australia. Similarly, calling for a republic as a way of demonstrating that ‘we are no longer white supremacists afflicted with delusion’¹⁸⁸ may turn some people off.¹⁸⁹ Though Keating later sought to create a more unifying narrative,¹⁹⁰ such framing positions Australian republicanism unhelpfully on one side of the culture wars.¹⁹¹ It enabled Tony Abbott, the then leader of Australians for Constitutional Monarchy, to capitalise by accusing republicans of promoting a ‘black armband’ view of Australian history. ‘[R]epublicans cite our ethnic diversity and multi-cultural achievements as the high points of Australian life – without mentioning the Anglo-Celtic heritage’, Abbott complained.¹⁹² Such comments express fear that inherited British traditions and institutions will be swept away by republican change.¹⁹³ To win wide consensus, however, such concerns cannot be dismissed; they should be reconciled with republican aims. This means transcending our usual ideological tribalisms to defuse this polarising dynamic.

Pearson’s insight that Australian affinities for Britain should be reconciled with republicanism,¹⁹⁴ is bolstered by evidence of voting patterns in 1999. Many direct electionists who voted ‘no’ were found to ‘mildly favour change, but not at the risk of undermining Australia’s traditional symbols of nationhood and ... British heritage’,¹⁹⁵ which confirms that Australians with republican leanings may nonetheless retain affections for Britain.¹⁹⁶ In 1999, nativism and parochialism amongst direct electionist voters translated into a vote against republicanism.¹⁹⁷ For

185 McKenna, *The Captive Republic* (n 7) 260.

186 Jones, *This Time* (n 18) 15.

187 Smith, ‘Love It or Leave It’ (n 86) 90.

188 Keneally (n 87) 47.

189 James Curran similarly notes that ‘[Paul] Keating’s invocation of Henry Lawson’s division of the country into the “young green tree” of Australian nationalism and the “old dead tree” of British philistinism drew an arbitrary faultline across the country, and was hardly going to foster unity or mobilise the people’: Curran (n 180) 151.

190 See Cowen, ‘Reflections’ (n 51); Jones, ‘Why Australians Voted No’ (n 150) 46; Ted Mack, ‘The “Real Republic” and the Referendum’ in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 63, 63; Boyce, *The Queen’s Realms* (n 8) 213–14.

191 See Stuart Macintyre and Anna Clark, *The History Wars* (Melbourne University Press, 2004); Jim George, *The Culture Wars: Australian and American Politics in the 21st Century* (Palgrave Macmillan, 2009).

192 Tony Abbott, ‘Charles Visit Shows Republic’s Shortfalls’, *Sydney Morning Herald* (Sydney, 28 January 1994) 11, quoted in McKenna, *The Captive Republic* (n 7) 260.

193 See also Shireen Morris, ‘A Warning to Conservative Elites’ in Damien Freeman (ed), *Today’s Tyrants: Responding to Dyson Heydon* (Connor Court Publishing, 2018).

194 Pearson, ‘Reconciliation’ (n 1).

195 McAllister (n 27) 265. See also Charnock (n 147) 280.

196 Lydon (n 12) 183.

197 As Charnock (n 147) 280 explains, assessing the differences between those direct electionists who voted ‘yes’ and those who voted ‘no’ in 1999:

David Charnock, this suggests ‘a protest vote, because prima facie one would have expected strong nativists to be most in support of having an Australian as head of state’.¹⁹⁸ As Keating argued, appealing to nativist sentiment, a republic was not driven by lack of ‘respect for the British monarchy ... or our British heritage’,¹⁹⁹ but by recognition of ‘*Australian* heritage’ and commitment to ‘*Australia’s* future’.²⁰⁰ Despite such efforts at evoking nationalistic feeling, research suggests this message did not resonate enough with nativist voters.

Part of the reason may be that, for many, Australian nationalism is infused with Britishness.²⁰¹ Kelly et al identified an ‘emotional current’ driving views about a republic in 1999: the relevant emotion was actually about Britain, not Australia. They explain that:

Hostility towards Britain was an important source of republican support; conversely, people who have warm, positive feelings about Britain were less keen on a republic. By contrast, positive feelings about Australia had no influence on republican attitudes.²⁰²

The resonates with Pearson’s instinct that republican support included those ‘who oppose a repudiation of Australia’s British heritage’.²⁰³ The evidence shows that conservative and nativist voters were more likely to consider Australia’s British heritage as fundamental to Australia’s national identity.²⁰⁴

It need not be ‘either-or’. Australia can become a republic *and* affirm our British inheritance. We can do this structurally and symbolically. Structurally, we should not reject all the institutional systems, language and forms of Britain, which are part of our institutional inheritance and could be incorporated into an Australian republic.²⁰⁵ Symbolically, we can affirm the equal importance of the Indigenous, British, and multicultural parts of Australia’s national identity through an inclusive Declaration of Australia.²⁰⁶

The largest differences involve those who are more conservative on constitutional ties with Britain and the Queen and on symbols such as the flag. Such people are considerably more common among the direct electionists who voted ‘No’ than among those who voted ‘Yes’, and this seems to be one of the most significant factors differentiating the two groups of direct electionists.

198 Ibid 289.

199 Keating (n 13) 1. See also Turnbull, *Bigger Picture* (n 19) 95.

200 Keating (n 13) 2 (emphasis in original).

201 Wellings (n 33) 35; Boyce, *The Queen’s Realms* (n 8) 12–13.

202 Jonathan Kelley et al, ‘Public Opinion on Britain, a Directly Elected President, and an Australian Republic’ in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 113, 119.

203 See above n 1.

204 As McAllister (n 27) 265 explains, the ‘British connection has remained an important national symbol for many Australians, despite mounting evidence of the irrelevancy of the British monarchy to Australia’s system of government’. See also Wellings (n 33) 44.

205 As Michael English argued, ‘[i]t would be obtuse to attempt to erase the Queen from our constitutional history, and the *Constitution* itself should recognise, rather than reject, its imperial origins’: Michael English, ‘The Republican Succession: Two Heads (of State) Are Better than One’ (2004) 48(12) *Quadrant* 40, 41.

206 Morris, ‘Declaration of Recognition’ (n 10).

IV IMAGINING AN AFFIRMATIONAL REPUBLIC

This Part considers how an affirmational republic might be achieved. First, I consider how Australia might address the practical constitutional problem by removing involvement of Queen in the selection and dismissal of the Governor-General. Second, I consider how the symbolic purpose of an Australian republic might be fulfilled through an extra-constitutional Declaration.

A Addressing the Practical Constitutional Problem

A republic that affirms, rather than rejects, Australia's British institutional traditions suggests a constitutionally conservative approach to constitutional reform. Craven argued in 1999 that:

the essential difference between the conservative and the innovator in an Australian constitutional context is that the constitutional conservative is determined to preserve, not the incidents and detail of the constitutional order, but its fundamental essence; while the innovator favours transforming change to its basic fabric.²⁰⁷

Distinct from Craven's dichotomy between constitutional 'innovator' and 'conservative', however, a prudent constitutional reformer should strive to be both innovative and conservative as circumstances require. The reformer should seek to change what needs to be changed, to fix the problems they intend to solve. But in doing so, they should preserve what is worthy of protection.²⁰⁸ They should not pursue change for change's sake. An affirmational republic suggests reform should be in keeping with the culture, history, and design of the *Australian Constitution*. It does not suggest transformative structural change; rather, it suggests implementation of the final, formal tick-off necessary to confirm Australia's full independence, in a way that retains the basic fabric of Australia's *Constitution* and our inherited British institutions.

1 Valuing Constitutional Continuity and Stability

The case against disruptive structural change in the name of a republic is bolstered by the fact that the present system works relatively well. In comparative perspective, Australia is considered a healthy and stable constitutional democracy.²⁰⁹ Most Australians enjoy relative economic prosperity and respect for their rights.²¹⁰

207 Craven, 'Constitutional Conservatism' (n 22).

208 But see Fenna (n 32) 133–4.

209 See Rosalind Dixon and Anika Gauja, 'Australia's Non-populist Democracy? The Role of Structure and Policy' in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018) 395, 397–400; Sir Gerard Brennan, 'The Parameters of Constitutional Change' (2009) 35(1) *Monash University Law Review* 1, 1. See also Richard E McGarvie, 'Safe Constitutional Change at the Turn of the Millenium' in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (Univeristy of Queensland Press, 2002) 67 ('Safe Constitutional Change').

210 Leaving aside the historical treatment of Indigenous peoples. See Cheryl Saunders, 'The Australian Constitution and Our Rights' in Helen Sykes (ed), *Future Justice* (Future Leaders, 2010) 117, 118. The treatment of Indigenous Australians is a clear exception.

Australia ranks highly in the Economic Intelligence Unit's 'Democracy Index'²¹¹ and compares well in Transparency International's 'Corruption Perceptions Index'.²¹² That said, Australia arguably faces risks of democratic decline.²¹³ Trust in government has reached historic lows, satisfaction with democracy is at its lowest level since the 1970s,²¹⁴ and there is increasing inequality and political polarisation.²¹⁵ Australia is therefore not immune to the kind of constitutional decline experienced by other nations.

While signs of possible decline may suggest the system needs rejuvenation, it also highlights the need for caution and vigilance in protecting what works. There need to be compelling reasons justifying structural change, which have not been presented in relation to a republic. By contrast, Australia's history is marked by frontier wars,²¹⁶ genocide, and discrimination,²¹⁷ which presents ongoing evidence of the urgent need for substantive reform to the relationship between Indigenous peoples and the state – hence persistent arguments for structurally reforming Indigenous constitutional recognition.²¹⁸ Indigenous peoples are the one clear group who have not benefitted fairly from Australia's prosperous democracy, which in a real sense was built on Indigenous losses.²¹⁹ However, while a republic cannot proceed without reconciliation, republican aims appear different in scope and

211 Economic Intelligence Unit, 'Democracy Index 2020', *The Economist* (Web Page) <<https://www.eiu.com/topic/democracy-index>>.

212 'Corruption Perceptions Index 2019', *Transparency International* (Web Page) <<https://www.transparency.org/cpi2019>>.

213 Shireen Morris and Andrew Ball, 'Technology, Inequality and Democratic Decline: Is Australia at Risk?', *Roundtable* (Blog Post, 11 November 2020) <<https://www.iacl-democracy-2020.org/blog/2016/3/23/blog-post-sample-9wntn-6ye75-hwawc-72lh6>>.

214 Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study* (Research Report, Australian National University, December 2019) 3 <<https://australianelectionstudy.org/wp-content/uploads/The-2019-Australian-Federal-Election-Results-from-the-Australian-Election-Study.pdf>>.

215 Lachlan Harris and Andrew Charlton, 'The Fundamental Operating Model of Australian Politics is Breaking Down', *Sydney Morning Herald* (online, 2 April 2018) <<https://www.smh.com.au/politics/federal/the-fundamental-operating-model-of-australian-politics-is-breaking-down-20180322-p4z5o9.html>>.

216 See Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Allen and Unwin, 1987); Henry Reynolds, *Dispossession: Black Australians and White Invaders* (Allen and Unwin, 1989); Bain Attwood, *Telling the Truth about Aboriginal History* (Allen and Unwin, 2005); Henry Reynolds, *The Other Side of the Frontier* (University of New South Wales Press, 2006); John Connor, *The Australian Frontier Wars 1788–1838* (University of New South Wales Press, 2005); Henry Reynolds, *Forgotten War* (NewSouth Publishing, 2012); Maurice French, *Conflict on the Condamine: Aborigines and the European Invasion* (University of Southern Queensland Press, 1989).

217 See A Dirk Moses (ed), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, 2004); Rosalind Kidd, *The Way We Civilise: Aboriginal Affairs* (University of Queensland Press, 1997). Noel Pearson also writes of the attempted genocide of Indigenous Tasmanians: Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay* 1, 16–23.

218 See Shireen Morris, 'The Torment of Our Powerlessness: Indigenous Constitutional Vulnerability and the Uluru Statement's Call for a First Nations Voice' (2018) 41(3) *University of New South Wales Law Journal* 629; Morris, 'Laws for Indigenous Affairs' (n 26); Morris, *First Nations Voice* (n 26).

219 As Brennan J described, Indigenous dispossession 'underwrote the development of the nation': *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 69.

character to reconciliatory aims. As shown, a republic (though it necessitates minor updating of constitutional machinery) tends not to envisage substantive structural reform and is more focussed on symbolism, whereas Indigenous constitutional recognition demands substantive structural reform over mere symbolism.²²⁰ Given this framing by republicans, there appears little justification for seeking transformative structural change in the name of a republic. I therefore proceed on the basis that a republic can and should be achieved in a way that effects minimal structural disruption.

2 *Getting Clear on the Purpose of an Australian Head of State*

Before discussing methods of appointment or removal of an Australian head of state, clarity is needed on the purpose a republican head of state is to fulfil.²²¹ Do we want the role to be fundamentally changed, or do we want the position to remain substantially the same as the current Governor-General – our de facto head of state?

In parliamentary systems like Australia, the political and ceremonial power of the executive are separated into two different offices. The Prime Minister and ministers wield political executive power, with the Prime Minister acting as the head of government. The Queen and Governor-General, as well as the state Governors, wield mostly ceremonial and symbolic power – though, as previously explained, the Governor-General also performs important institutional functions. This separation of the ‘dignified’ and the ‘efficient’ functions of government²²² arguably prevents excessive accumulation of political power and symbolic prestige in one person or office,²²³ providing (some argue) a useful ‘check on the egomania of politicians’.²²⁴

Unlike the United States (‘US’) President, therefore, the Australian Governor-General is not supposed to wield political power. Neutrality is especially important given the Governor-General is also a ‘constitutional umpire’.²²⁵ The constitutional founders therefore considered election of this position inappropriate,²²⁶ because it may politicise the office and create conflict.²²⁷ The push for an elected Governor-

220 See Morris and Pearson, ‘Indigenous Constitutional Recognition’ (n 26).

221 As Saunders, ‘Beyond Minimalism’ (n 32) 79 points out, too often ‘wrangling’ over models for selection of an Australian head of state has proceeded without adequate engagement on the nature of the office.

222 Bagehot, *English Constitution* (n 67) 7; Boyce, *The Queen’s Realms* (n 8) 2.

223 George Winterton, ‘Presidential Power in Republican Australia’ (1993) 28(4) *Australian Journal of Political Science* 40, 43. See also Republic Advisory Committee, ‘An Australian Republic: The Options’ (n 27) 50, quoted in Senate Legal and Constitutional References Committee, *Road to Republic* (n 77) 53.

224 Dennis Altman, ‘A Radical Thought: Could Constitutional Monarchies Be Important Aids to Democracy?’, *The Conversation* (online, 14 May 2018) <<https://theconversation.com/a-radical-thought-could-constitutional-monarchies-be-important-aids-to-democracy-96342>>.

225 See above n 119.

226 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1 April 1891, 572 (Sir John Downer) (‘April 1 Debate’).

227 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, 24 (Edmund Barton); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 996–7.

General was accordingly defeated during the Constitutional Conventions.²²⁸ Discussing the nature of the position, Alfred Deakin remarked that:

To make it an object of ambition you must change its character altogether, and make it an office like that of the President of the United States – a high executive office in which a man can carry out his ideas and give effect to his principles. If you do that, you must consider his election. We should insist upon it. If he becomes a personage in the political life of the country, his office must be elective. We cannot afford to have in our constitution any man exercising authority, unless he derives it from the people of Australia.²²⁹

Deakin's conclusion was that 'the governor-general exercises no such authority'.²³⁰ The position was intended to be apolitical, neutral and largely ceremonial.

In the lead up to the 1999 referendum, the views of elites on this crucial question had not changed much since the 1800s. Most have opposed direct election of a head of state,²³¹ probably because of their knowledge of the Australian constitutional system and the nature of the office. As George Winterton explained in 1995, echoing Deakin:

The most appropriate method for choosing the head of state ... obviously depends upon the role to be performed by, and the powers conferred on, the office. Thus, a head of state with substantial executive power requires the legitimacy and popular mandate conferred by popular election as, for example, in the United States, Latin America and France. Conversely, a head of state exercising few independent powers except, perhaps, that of ultimate constitutional guardianship, requires above all political neutrality and bipartisan acceptance, and should not possess an independent popular 'mandate' for anything other than constitutional guardianship. Hence, popular election would not be ideal for such an officer, although Ireland demonstrates that it is not incompatible with a head of state with very limited powers.²³²

Similarly, many submissions to the 2002 Senate Inquiry favoured the Australian head of state maintaining the same powers as the current Governor-General²³³ and fulfilling an apolitical, neutral and ceremonial role.²³⁴ Neutrality and independence aligns with an understanding of the role of head of state as an unbiased 'guardian', 'umpire', 'guarantor' or 'custodian' of the *Constitution*.²³⁵ Any kind of neutral umpire role is inconsistent with politicisation. I thus proceed on the basis that the weight of informed republican opinion seeks to keep the nature, role and powers of the Australian head of state substantially the same as the present Governor-General.

228 Anne Twomey and Rosemary Bell, 'Methods of Choosing a Head of State' (Background Paper No 12, Parliamentary Library, Parliament of Australia, 25 January 1998) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/Background_Papers/bp9798/98bp12> ('Choosing a Head of State').

229 *April 1 Debate* (n 226) 571.

230 *Ibid.*

231 Keating (n 13) 6; Cowen, 'Reflections' (n 51) 20; Helen Irving, 'Amending the Constitution: Achieving a Democratic Republic' in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2010) 155, 156 ('Amending the Constitution'); Turnbull, *Bigger Picture* (n 19) 98–9.

232 Winterton, 'Republican Head of State' (n 119) 135.

233 Senate Legal and Constitutional References Committee, *Road to Republic* (n 77) 56; Turnbull, *Bigger Picture* (n 19) 97.

234 Senate Legal and Constitutional References Committee, *Road to Republic* (n 77) 56, 80–1.

235 Winterton, 'Republican Head of State' (n 119) 135–6; Patmore, *Choosing Republic* (n 52) 167–70; Patmore, 'Guarantor' (n 119) 183; Boyce, *The Queen's Realms* (n 8) 118.

3 Interrogating the Instinctive Popularity of Direct Election

In light of the nature and role of the head of state, republicans will be faced with a strategic dilemma: direct election of an Australian head of state might be most instinctively popular with the public, but it also cuts against preferences for an apolitical umpire. It might be popular, but is it wise?

Ben Wellings argues that republicans erred in 1999 by sticking to a minimalist model (though it was not the *most* minimalist model) which stripped the republic of its populist appeal.²³⁶ Galligan agrees that the republic's crippling features were minimalism and elitism – the elites preferred minimalism, whereas most of the public wanted direct election.²³⁷ Even Winterton, a previous proponent of minimalist approaches, after the 1999 defeat, conceded that direct election should be considered to respond to public preferences.²³⁸

I respectfully offer a contrary opinion. There is no doubt direct election was most favoured by the public in 1999.²³⁹ Yet this may have been an instinctive, rather than informed, preference.²⁴⁰ It may have been prompted by use of the word 'president' in republican advocacy and explanations, which arguably raises expectations of direct election along the lines of the US,²⁴¹ as well as a lack of detailed consideration of the constitutional implications.²⁴² Conversely, the public were clear that they did not favour a US-style executive presidency,²⁴³ which may indicate a lack of public understanding.²⁴⁴ Deliberative polling suggests that, while support for a republic increases with information, support for direct election decreases once participants consider potential problems, including the risk that the head of state may become politicised.²⁴⁵ The popularity of direct election may therefore dwindle under scrutiny

236 Wellings (n 33) 45.

237 Galligan, 'Rethinking' (n 93) 45.

238 George Winterton, 'Appendix: The Resurrection of the Republic' in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2010) 207, 226 ('Resurrection'); Winterton, 'Maximising Benefits' (n 70) 30.

239 Winterton, 'Reserve Powers' (n 51) 259; Winterton, 'Resurrection' (n 234) 209; McAllister (n 27) 256; Warhurst and Mackerras, 'The 1990s and Beyond' (n 160) 13; Kelley et al (n 202) 125, 129.

240 As Winterton (n 51) 260 suggested in 1993: '[T]he practicalities of popular election suggest that the public has not really thought the matter through, for there are also strong indications that many people would prefer a non-politician as head of state. ... [P]opular election would almost guarantee the election of a politician'.

241 Irving, 'Amending the Constitution' (n 231) 157; McGarvie, 'Democracy in Peril' (n 56).

242 Winterton, 'Republican Head of State' (n 119) 142–3.

243 Ratnapala (n 29) 242; Winterton, 'Reserve Powers' (n 51) 249, 251; George Winterton, 'Presidential Power in Republican Australia' (1993) 28(4) *Australian Journal of Political Science* 40, 42 ('Power in Republican Australia'); Winterton, 'Republican Head of State' (n 119) 136; Malcolm Turnbull, 'The Best Republic for Australia: Why the Bipartisan Model Works' (1997/1998) 4(1) *Deakin Law Review* 21, 24 ('Best Republic').

244 For general comments on the lack of public education in the leadup to 1999, see Senate Legal and Constitutional References Committee, *Road to Republic* (n 77) 14–18, 133–4. See also Boyce, *The Queen's Realms* (n 8) 3, 117–18, 216.

245 Luskin et al, 'Deliberation and Referendum Voting' (Working Paper, Center for Deliberative Democracy, Stanford University, 2005) 5 <<https://cdd.stanford.edu/2005/deliberation-and-referendum-voting/>>.

and debate,²⁴⁶ in line with usual referendum patterns.²⁴⁷ It cannot simply be assumed that direct election will entail referendum success.

The resulting dilemma is described accurately by Kirby: though opinion polls indicated most Australians preferred direct election, such reform could render the office of head of state ‘fundamentally different from any in our present system’, thus increasing ‘chances of political instability’ and enlivening ‘popular distaste for radical change’ – factors which may ultimately reduce prospects of electoral success.²⁴⁸ The hesitance of most elites in adopting direct election²⁴⁹ is also part of the political landscape which must be negotiated. Parliament as the initiator is also the gatekeeper of constitutional change.²⁵⁰ In devising their strategy, republicans must therefore consider the concerns of parliamentarians who will need to initiate the reform. In 1999, most parliamentarians opposed direct election. This would likely remain so today.

As Malcolm Turnbull reflected in 2020, given that the head of state is a ‘non-political ceremonial’ position and ‘occasional impartial constitutional umpire’, a ‘rowdy political contest’ is not ideal.²⁵¹ Though direct election of a ceremonial head of state seems to work in some countries,²⁵² it is a feature arguably ill-suited to Australia’s constitutional culture – in our parliamentary system, even the Prime Minister is not directly elected. As Twomey explains, ‘[p]opular election of the head of state is a feature usually associated with a presidential system, where the head of state is also the head of government, and there is a complete separation of powers between the executive and the legislature’.²⁵³

This does not seem to fit with an Australian republic that does not envisage disruptive structural change. Direct election would alter the basic fabric of Australia’s *Constitution*, which arguably risks creating internal competition and instability.²⁵⁴ Many have warned against investing an Australian head of state with a popularly

246 Irving, ‘Amending the Constitution’ (n 231) 155–6; McKenna, ‘Australian Republic: Still Captive’ (n 21) 161.

247 See Kelley et al (n 202) 121. But see also at 125 for prediction of referendum success of direct election.

248 Kirby (n 51).

249 Irving, ‘Amending the Constitution’ (n 231) 156; Turnbull, *Bigger Picture* (n 19) 98–9.

250 Parliament has also been described as the ‘sponsor’ of constitutional reform proposals: see John McMillan, ‘Constitutional Reform – Or Constitutional Delusion?’ (2003) 14(1) *Public Law Review* 5, 5. See also Patmore, *Choosing Republic* (n 52) 33.

251 Turnbull, *Bigger Picture* (n 19) 99. See also Turnbull, ‘Best Republic’ (n 243) 24.

252 Winterton cites Ireland, Austria and Iceland as examples, but in 1994, argued against popular election: see Winterton, *Monarchy to Republic* (n 8) 109.

253 Twomey, ‘Choosing a Head of State’ (n 228).

254 Winterton, ‘Republican Head of State’ (n 119) 143–4; Senate Legal and Constitutional References Committee, *Road to Republic* (n 77) 54; George Winterton, ‘Presidential Powers under Direct Election’ in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 227, 230–1 (‘Presidential Powers’). See also the discussion in Patmore, *Choosing Republic* (n 52) 146–52.

elected mandate,²⁵⁵ which could imbue the candidate with the ‘glow of legitimacy’,²⁵⁶ providing an even ‘greater electoral mandate than the Prime Minister’.²⁵⁷

Direct election of the head of state would mix ceremonial and political power in a way that may begin to shift the Australian system towards a more powerful presidentialism.²⁵⁸ For Juan Linz, ‘the basic characteristic of presidentialism is the full claim of the president, to democratic legitimacy’.²⁵⁹ This popular legitimacy, if combined with executive power, imbues an elected president with a ‘very different aura and self-image and creates very different popular expectations than those redounding to a prime minister with whatever popularity he might enjoy after receiving the same number of votes’.²⁶⁰ In a presidential system, both the parliament and the president enjoy democratic legitimacy due through popular election – “‘dual democratic legitimacy’”.²⁶¹ This can result in tension which, according to Linz, creates conflict ripe for dramatic eruption. Linz argues that this style of government has proven uncondusive to democratic stability,²⁶² especially in Latin American countries. Though Australia enjoys a more stable political and constitutional culture than those countries, and measures could be implemented to ensure a directly elected president could not wield real political power, we should nonetheless be cautious of inadvertently creating ‘dual democratic legitimacy’ through direct election – even if this may not be the aim.

Ackerman similarly warns against the ‘cult of personality’ that can be encouraged in a popularly elected president. For Ackerman, there is:

something disturbing ... about the kind of politics generated by an independently elected presidency ... presidential systems do not merely allow strong leaders to rise above the fray of ordinary politics from time to time. They manufacture them on a regular basis, creating a platform upon which a single leader constantly struts high above the political plane inhabited by ordinary mortals. Is this really healthy?²⁶³

255 Winterton, *Monarchy to Republic* (n 8) 109.

256 Donald Horne et al, *The Coming Republic* (Sun Australia, 1992) 112.

257 McGarvie, ‘Safe Constitutional Change’ (n 209) 76. See also Keating (n 13) 5–6; Turnbull, *Bigger Picture* (n 19) 98–9.

258 As Linz articulated:

In parliamentary systems the only democratically legitimated institution is the parliament and the government deriving its authority from the confidence of the parliament ... Presidential systems are based on the opposite principle. An executive with considerable powers in the constitution and generally with full control of the composition of his cabinet ... is elected by the people (directly or by an electoral college elected for that purpose) ... and is not dependent on a formal vote of confidence by the democratically elected representatives in parliament; the president is not only the holder of executive power but the symbolic head of state ...

Juan J Linz, ‘Presidential or Parliamentary Democracy: Does it Make a Difference?’ in Juan J Linz and Arturo Valenzuela (eds), *The Failure of Presidential Democracy: Comparative Perspectives Volume 1* (John Hopkins University Press, 1994) 3, 5–6.

259 Ibid 6.

260 Ibid 6–7.

261 Ibid 6.

262 Ibid 7. See also Bruce Ackerman, ‘The New Separation of Powers’ (2000) 113(3) *Harvard Law Review* 633, 647. For an alternative view, see José Antonio Cheibub, *Presidentialism, Parliamentarism, and Democracy* (Cambridge University Press, 2007).

263 Ackerman (n 262) 657–60.

The US presidential system, Ackerman argues, encourages citizens to focus on the personality, popularity and charisma of the presidential candidate, rather than principles and policy.²⁶⁴ Australian political elections are already becoming more like popularity contests between personalities, rather than contests between policies – witness the 2019 election in which Scott Morrison, on some views, ran the ‘most presidential campaign run by a single party in Australian history’.²⁶⁵ Do Australians want to create another public personality and popularity contest in selection of their head of state – particularly given the neutral ‘umpire’ position this role is supposed to fulfil?²⁶⁶ As the first Part of this article demonstrated, republican advocacy does not seek far-reaching systemic reform.²⁶⁷ While the popularity of direct election is a strategic consideration, such instinctive popularity alone seems insufficient justification for a substantial change to Australia’s successful constitutional system.

4 Can We Keep the Governor-General?

In addition to retaining the basic structural fabric of Australia’s British institutional inheritance, an affirmational republic need not reject all the titles and forms of Britain. Perhaps we can keep the title, ‘Governor-General’. In an affirmational republic, the Governor-General could become Australia’s actual head of state, instead of just our de facto head of state, while leaving remaining constitutional machinery substantially the same.²⁶⁸ The Governor-General can be appropriately chosen by Australians in Australia, rather than by the British Queen. This seems the simplest way of solving the practical problem at hand.

Keeping the title ‘Governor-General’ may also assist in alleviating confusion about the appropriateness of direct election. In 1999, most Australians understandably wanted a directly elected President, but would they necessarily want a directly elected Governor-General? As noted above, republicans usually emphasise that they do not want a US-style executive presidency,²⁶⁹ and though the public in 1999 preferred direct election, there was no evidence the people favoured a presidency with real political power.²⁷⁰ Given this, the head of state should not be artificially dubbed a ‘President’, as this (especially to non-lawyers) arguably

264 Ibid 657, 659–61.

265 Marija Taflaga, ‘Morrison Has Led the Coalition to a “Miracle” Win, but How Do They Govern from Here?’, *The Conversation* (online, 19 May 2019) <<https://theconversation.com/morrison-has-led-the-coalition-to-a-miracle-win-but-how-do-they-govern-from-here-117184>>.

266 See also Craven, ‘Constitutional Conservatism’ (n 22).

267 Warhurst, ‘Myths Debunked’ (n 48) 137.

268 Winterton, *Monarchy to Republic* (n 8) 8.

269 Senate and Legal Constitutional References Committee, *Road to Republic* (n 77) 122–4; Winterton, ‘Reserve Powers’ (n 51) 249; Winterton, ‘Resurrection’ (n 238) 212–13. Though some have argued the opposite: see, eg, Senate and Legal Constitutional References Committee, *Road to Republic* (n 77) 121; Ratnapala (n 29); David Solomon, ‘Elect the Government’ in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 49; David Solomon, ‘Parliament and Executive in a Republic’ (1994) 8(2) *Legislative Studies* 42; Colin Howard, *The Constitution, Power and Politics* (Fontana/Collins, 1980).

270 Ratnapala (n 29) 242; Winterton, ‘Reserve Powers’ (n 51) 249, 251; Winterton, ‘Power in Republican Australia’ (n 243) 42; Winterton, ‘Republican Head of State’ (n 119) 136.

implies a US-style presidency²⁷¹ and could misleadingly create a public *expectation* of direct election,²⁷² which was a common assumption in 1999.²⁷³ ‘President’ implies political power.²⁷⁴ Given the strong influence of American culture on Australia,²⁷⁵ when most Australians hear the word ‘President’, it is unsurprising we imagine a position like that filled by Donald Trump or Joe Biden.

So why confuse the issue? Rather than adopt the distracting title of ‘President’ for a position that aims to keep powers and functions essentially the same as the Governor-General, we could keep the title ‘Governor-General’ in an Australian republic, so long as he or she was chosen and removed by Australians, rather than the British Queen. As Hirst argued in 1991, ‘our present system of government can be kept along with the names “Commonwealth” and “Governor-General” because the ‘last step to the republic should be as small as those that have brought us to the brink’.²⁷⁶ This also aligns with an affirmational approach to Australia’s British heritage, because it avoids unnecessarily shedding remnant marks of Australia’s British history from our constitutional system. It is an open question as to whether people would feel the need to elect their Governor-General, whose title and role are more local and familiar. If experts and leaders properly explain the role and make clear their efforts to keep the selection process substantially the same (just removing the role of the Queen), perhaps direct election of the Governor-General would not be considered appropriate.

I do not here attempt to present a conclusive argument as to what model for appointing the Governor-General should be adopted, nor to solve complicated questions about codifying the reserve powers. However, I would make several brief observations. First, if it can be accepted that the practical purpose of republican reform is simply to remove the role of the Queen in appointing and removing the Governor-General, while keeping his or her powers and role substantially the same, then perhaps we should not seek to substantially alter the appointment and removal procedure. Currently, appointment and dismissal of the Governor-General is signed off by the Queen, on the advice of the Prime Minister. In practice, the Prime Minister makes such decisions. The Queen acts on this advice. Perhaps a republic can be achieved while changing the present procedure as little as possible. In other words, we should not automatically assume that allowing the Prime Minister or the government to directly appoint the Governor-General, instead of using the Queen as symbolic go-between, is unworkable. Winterton disagreed, however, arguing that this ‘[w]ould demean the office at its inception, and contradict the democratic and egalitarian motivation inevitably accompanying the establishment of a republic if the new head of state were merely the old appointive Governor-General under

271 Irving, ‘Amending the Constitution’ (n 231) 157. See also Winterton, ‘Presidential Powers’ (n 254) 228.

272 But see Kelley et al (n 202) 123.

273 John Hirst, ‘The Danger of Consultation’ in Benjamin T Jones and Mark McKenna (eds), *Project Republic: Plans and Arguments for a New Australia* (Black Inc, 2013) 176, 183.

274 Senate and Legal Constitutional References Committee, *Road to Republic* (n 77) 51.

275 Winterton, *Monarchy to Republic* (n 8) 68.

276 Hirst, ‘Conservative Case’ (n 58) 10. McGarvie also wanted to keep the title ‘Governor-General’: see McGarvie, ‘Safe Constitutional Change’ (n 209) 78–9.

a new name'.²⁷⁷ Yet, if the aim is to keep the present system largely the same, as republic arguments usually indicate, appointment by government should not be automatically dismissed without further consideration.

Similarly, it should not be assumed that a Governor-General appointed directly by the Prime Minister or government would be politically biased or beholden to the Prime Minister's will. If the Governor-General enjoyed a set tenure, for example, they would be independent.²⁷⁸ After all, the government appoints High Court judges on the recommendation of the Attorney-General,²⁷⁹ and they are not usually accused of political bias aligned with the party that appointed them: they act independently.²⁸⁰ If we trust Australian governments to directly appoint judges, why would we not trust governments to appoint the Governor-General who, similar to a judge, is supposed to be a neutral 'constitutional umpire'? If this is considered unsuitable, however, perhaps the Chief Justice of the High Court could rubber stamp the Governor-General's appointment on the recommendation of the Prime Minister, replacing the British Queen as formalistic go-between. Further thought must be given as to how the existing appointment and removal system needs to be changed, and how changes may alter power dynamics. But given the intended small scope of this practical reform, the aim should be to remove the role of the Queen in the appointment and removal procedure with as little systemic disruption as possible.

If the *Constitution* were altered to remove the role of the Queen in appointing and dismissing the Governor-General, this would solve the practical problem in need of resolution. The Governor-General would then be our Australian head of state.

B Addressing the Symbolic Problem

The second issue is how to enact a symbolic declaration of national identity, values and unity. As McKenna argues, removing the Queen necessitates some kind of declaration of Australian sovereignty, independence and the creation of a 'new foundational language'.²⁸¹ Rather than a new constitutional preamble, which has been the most common suggestion in republican discussions, here I propose the Referendum Council's recommendation for an extra-constitutional Declaration,²⁸² which, as well as functioning as an antecedent to a constitutionally guaranteed First Nations voice in the Indigenous constitutional recognition discussion, could equally function as Australia's extra-constitutional Declaration

277 Winterton, *Monarchy to Republic* (n 8) 108.

278 Ibid 4. See also Zelman Cowen, 'The Office of Governor-General' (1985) 114(1) *Daedalus* 127, 140.

279 'Court Appointments', *Australian Government Attorney-General's Department* (Web Page) <<https://www.ag.gov.au/legalsystem/Courts/Pages/Courtappointments.aspx>>.

280 Note the criticism that Liberal-National governments have historically (and ironically) appointed the most progressive judges: Olivia Caisley and Nicola Berkovic, "'Activism" Puts Focus on High Court Vacancies', *The Australian* (online, 20 February 2020) <<https://www.theaustralian.com.au/nation/politics/activism-puts-focus-on-high-court-vacancies/news-story/9cb395e022d2950d638b5e303d0d9c0c>>.

281 McKenna, 'The Search for a Meaningful Republic' (n 174) 22.

282 Referendum Council, 'Final Report' (n 9) 2.

of our nation in the republic discussion. Such a Declaration could be Australia's 'Declaration of Independence'.

The 2017 recommendation for a symbolic 'Declaration outside the *Constitution*'²⁸³ was an innovative shift away from past approaches to symbolic recognition. It is distinctly different from the 1999 approach which proposed a new symbolic new preamble to the *Constitution*,²⁸⁴ which failed at referendum. This followed disagreement about whether the *Constitution* is the appropriate place for symbolic statements, and constitutional experts raising concerns about the incorporation of ambiguous words into what is essentially a structural rulebook.²⁸⁵ In the 1990s, Stephen Gageler and Mark Leeming urged caution regarding the insertion of values statements, noting that uncertain judicial use of the preamble in constitutional interpretation was increasing.²⁸⁶ Winterton warned of unintended consequences that may result from Indigenous recognition in a preamble, including unforeseen legal implications potentially 'deleterious to Aboriginal rights'.²⁸⁷ Indeed, Howard's inclusion of a 'no legal effect' clause²⁸⁸ in the 1999 preamble proposal was, as Julian Leaser points out, an implicit admission that the preamble would have legal effect and an attempt to circumvent this possibility.²⁸⁹ But a 'no legal effect' clause does not conclusively answer concerns about legal uncertainty. Leslie Zines suggested that such a clause may be legally ineffective,²⁹⁰ while others rightly observe it would render the recognition statements 'disingenuous'.²⁹¹

Apart from the 1999 referendum, 'no legal effect' clauses have also been adopted in most state constitutions²⁹² to confirm the recognition statements are not

283 Ibid 2, 12, 103, 154.

284 Constitution Alteration (Preamble) Bill 1999 (Cth).

285 For this kind of description of the *Australian Constitution*, see Mason (n 113) 8.

286 Gageler and Leeming (n 137) 145–7. See also Jeffrey Goldsworthy, 'The Preamble, Judicial Independence and Judicial Integrity' (2000) 11(2) *Constitutional Forum* 60, 62–3 ('Preamble, Judicial Independence and Integrity'); Dan Himmelfarb, 'The Preamble in Constitutional Interpretation' (1991) 2(1) *Seton Hall Constitutional Law Journal* 127, 203.

287 Winterton, 'Constitutional Preamble' (n 137) 188.

288 The proposal included a new section 125A which stated that 'the Preamble to this *Constitution* has no legal force and shall not be considered in interpreting this *Constitution* or the law interpreting the Commonwealth or any part of the Commonwealth': Explanatory Memorandum, Constitution Alteration (Preamble) Bill 1999 (Cth) 5.

289 Leaser, 'Uphold' (n 137) 83–4.

290 Leslie Zines, 'Preamble to a Republican Constitution' (1999) 10(1) *Public Law Review* 67, 68. See also Webber (n 23) 269–70.

291 Megan Davis and Zrinka Lemezina, 'Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?' (2010) 33(2) *University of New South Wales Law Journal* 239, 261; Leaser, 'Uphold' (n 137) 84; Alex Reilly, 'Preparing a Preamble: The Timorous Approach of the Convention to the Inclusion of Civic Values' (1998) 21(3) *University of New South Wales Law Journal* 903, 904; Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the Australian Constitution' (2001) 24(2) *University of New South Wales Law Journal* 382, 396.

292 Eg, the *Constitution Act 1975* (Vic) recognises Indigenous peoples in section 1A, and section 1A(3) provides: 'The Parliament does not intend by this section – (a) to create in any person any legal right or give rise to any civil cause of action; or (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria'. The *Constitution Act 1902* (NSW) recognises Indigenous peoples in section 2, and section 2(3) provides: 'Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales'. The *Constitution of Queensland 2001* (Qld) recognises Indigenous

intended to have operational impact.²⁹³ However, concerns about legal uncertainty on one hand and resulting insincerity of sentiment on the other raise serious strategic questions about the wisdom and efficacy of inserting symbolic statements into the *Constitution*. The common resort to ‘no legal effect’ clauses as an attempted way around the difficulty reflects paradoxical logic.²⁹⁴ It seems a contradictory and tokenistic way to assert our national values: why put something in a *Constitution* – a practical, working document – if it is not intended to have practical effect?

To address this problem, alongside its proposal for a constitutionally guaranteed First Nations voice following the Uluru Statement, the Referendum Council recommended that ‘an extra-constitutional Declaration be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians’.²⁹⁵ This Declaration would contain ‘inspiring and unifying words articulating Australia’s shared history, heritage and aspirations’, bringing together ‘the three parts of our Australian story: our ancient First Peoples’ heritage and culture, our British institutions, and our multicultural unity’.²⁹⁶ Being extra-constitutional, it would avoid the problem of unintended judicial interpretations of a new preamble, which may affect the operation of the whole *Constitution*.²⁹⁷ While some may argue that removing the symbolic language from the *Constitution* would rob the poetry of this special status, others have observed that Australia’s *Constitution* is a dull and ‘prosaic document expressed in lawyer’s language’²⁹⁸ – arguably it is not the best place for inspiring, poetic language. Free from legalistic considerations, however, an extra-constitutional Declaration could more expansively and poetically declare the values, sentiments and aspirations desired, without worries about unintended constitutional consequences.²⁹⁹

If not achieved alongside a First Nations constitutional voice as part of reforms for Indigenous constitutional recognition (which should be the first priority), such a Declaration could be part of an affirmational Australian republic. Like America’s

peoples in its preamble, and provides a ‘no legal effect clause’ in relation to the preamble in section 3A. The *Constitution Act 1934 (SA)* recognises Indigenous peoples in section 2, and section 2(3) provides a ‘no legal effect’ clause. Western Australia and Tasmania are the only States to have recognised Indigenous peoples in the preambles to their Constitutions without a ‘no legal effect’ clause: see *Constitution Act 1889 (WA)*; *Constitution Act 1934 (Tas)*.

293 Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 106–11.

294 See also Dylan Lino, ‘Written Constitutions and the Politics of Recognition: Symbolism and Substance’ (Conference Paper, World Congress of Constitutional Law, 22 July 2014) 9–10.

295 Referendum Council, ‘Final Report’ (n 9) 2.

296 *Ibid*.

297 See Gageler and Leeming (n 137) 145–7. See also Goldsworthy, ‘Preamble, Judicial Independence and Integrity’ (n 286) 62; Himmelfarb (n 286) 203; Winterton, ‘Constitutional Preamble’ (n 137) 187–8; Leeson, ‘Uphold’ (n 137) 83–4; Zines (n 290) 68; Webber (n 23) 269–70.

298 Mason (n 113) 7–8. See also Craven, *Conversations* (n 113) 9–10; Jeffrey Goldsworthy, ‘Against a Constitutional Bill of Rights in Australia’ in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 1st ed, 2019) 393, 393–4.

299 But note that legislation has sometimes been interpreted by the High Court as creating ‘constitutional baselines’ that affect constitutional interpretation: see Lael K Weis, ‘Legislative Constitutional Baselines’ (2019) 41(4) *Sydney Law Review* 481.

Declaration of Independence, the Australian Declaration need not be a document entailing enforceable rights and obligations.³⁰⁰ Nonetheless, the Declaration could be poetically and rhetorically expansive. It could richly affirm the importance of our British institutional inheritance – including the continuing historic significance of the British Crown – while equally celebrating the continent’s ancient Indigenous heritage and multicultural contributions, thus articulating an explicitly inclusive vision of Australian national identity that seeks to defuse and transcend the culture wars. As well as being assented to by all Australian parliaments, as the Referendum Council recommends, it could be assented to by the First Nations voice (if this institution were already in operation) adding to the document’s reconciliatory significance.³⁰¹ If we wanted to think especially laterally, the Declaration could even secure the blessing of the Queen in addition to the blessing of the First Nations – her last formal farewell as the nation finalises its independence. That would be a moment of historic significance, potentially creating a symbolic affirmation of enduring reconciliatory power.

The resulting package for republican reform would thus have a neatness: minor practical reform inside the *Constitution*; inspiring and expansive symbolism outside the *Constitution*.

V CONCLUSION

Properly understood, there are dual driving purposes of republican reform. An affirmational Australian republic can address both purposes, but each may require a different solution.

The first problem is practical and the constitutional change required to formalise and finalise Australia’s independence is arguably small. Australia should not have to ask the British Queen to appoint our Australian Governor-General. We need to change the *Constitution* to ensure we can appoint the Governor-General ourselves in Australia. Republicans should determine the simplest way to remove the role of the British Queen in the appointment and dismissal of the Governor-General, while effecting minimal structural disruption. The second problem is symbolic, and its resolution can be as inspiring and aspirational as our imaginations allow. Australia lacks a unifying declaration of national values, history, aspirations and identity. We have yet to poetically articulate our national story in a way that defuses and transcends, rather than inflames, contemporary culture wars. But reformers should

300 Damien Freeman and Julia Leeser, ‘The Australian Declaration of Recognition: Capturing the Nation’s Aspirations by Recognising Indigenous Australians’ (Monograph, Uphold and Recognise, April 2014) 5; Noel Pearson, ‘The Uluru Statement from the Heart’ (Lowitja O’Donoghue Oration, University of Adelaide, 29 May 2018) 7. Note, however, that while the Referendum Council report describes the Declaration as ‘symbolic’, its non-legal status is not specifically mentioned: see Referendum Council, ‘Final Report’ (n 9) 2.

301 Morris, ‘Declaration of Recognition’ (n 10). Note, I do not suggest that a Declaration should be sufficient in terms of Indigenous people’s claims for recognition. I only suggest that it could be a worthwhile addition to substantive constitutional recognition through a First Nations constitutional voice.

not seek to insert this symbolic declaration into a new constitutional preamble, as they did in 1999. We should not repeat past mistakes.

Addressing the practical purpose, this article proposed that a republic can be achieved in a way that structurally affirms rather than repudiates Australia's British constitutional inheritance. The aim should be a minor updating of constitutional machinery to formalise and finalise Australia's independence, while structurally affirming, rather than repudiating, Australia's British institutional inheritance. Such an approach would be in keeping with republican advocacy, which usually asserts that a republic does not entail substantive structural transformation. First, we can remove the role of the British Queen in the appointment and dismissal of the Governor-General, while effecting minimal structural disruption to the institutions and procedures we have inherited. This would make the Governor-General our actual head of state, instead of just *de facto*. Second, in becoming a republic, we need not reject all the language and forms of Britain. The title 'Governor-General' can be retained – for this is the best descriptor of an office whose character republicans wish to keep fundamentally the same. Reformers should also be wary of the instinctive popularity of direct election, which may have been prompted by misleading use of the word 'President' in the 1990s.

Addressing the symbolic purpose, I propose that an extra-constitutional Declaration (if not achieved as part of Indigenous constitutional recognition alongside a First Nations constitutional voice – which should be the first priority) could more poetically and expansively articulate national values and aspirations, without the constraining legal consequences of a new constitutional preamble. Republicans should take up the Referendum Council's 2017 recommendation for a Declaration outside the *Constitution* which equally affirms and celebrates the three parts of Australia's national story – the Indigenous, the British and the multicultural. This would entail symbolic affirmation of Australia's British inheritance, including the historic role of the Crown, to complement the structural affirmation. Assented by all Australian parliaments and the First Nations voice (if this institution is in operation), and perhaps even enacted with the final blessing of the Queen if this can be arranged, such a Declaration could be Australia's 'Declaration of Independence', but with special reconciliatory significance.