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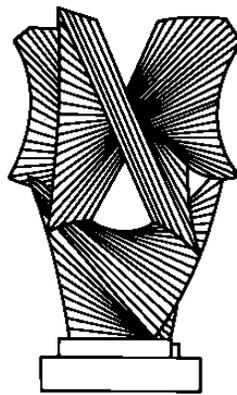
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## AMENDING CONSTITUTING IDENTITY

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## AMENDING CONSTITUTING IDENTITY

Rosalind Dixon\*

### Abstract

*Constitutional amendment procedures can create constitutional change in two ways: by providing evidence of popular support for constitutional change, and by changing the textual basis for subsequent acts of constitutional interpretation. Both mechanisms have clearly also succeeded, in various countries, in creating changes in the domain of constitutional identity. The question the essay investigates is whether there is nonetheless something peculiar about this domain that makes it especially difficult to succeed in using both these amendment mechanisms, simultaneously, in the quest for constitutional change. To explore this question, the essay draws on two distinct attempts to “amend” constitutional identity in Australia and the US in the 1960’s and 70’s, involving the 1967 amendments to the Australian Constitution and proposed 1972 Equal Rights Amendment (ERA).*

### INTRODUCTION

In his wonderful new book, *Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community*,<sup>1</sup> Michael Rosenfeld touches briefly on the possibility that formal procedures for constitutional amendment may be able to play a role in reconstituting the identity of the constitutional subject, or people’s collective constitutional identity. Constitutional identities, Rosenfeld notes, “are dynamic ...and bound to evolve after they are initially formed”.<sup>2</sup> Formal constitutional amendment procedures are also clearly one of way in which such evolution can occur.<sup>3</sup>

In this short essay, I investigate this connection between formal constitutional amendment procedures and changes in constitutional identity by considering two distinct attempts to “amend” constitutional identity in Australia and the US in the 1960’s and 70’s, via the 1967 amendments to the Australian Constitution and the proposed 1972 Equal Rights

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<sup>1</sup> MICHAEL ROSENFELD, *IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY* (2009).

<sup>2</sup> *Id.* at 209.

<sup>3</sup> *Id.*

Amendment (ERA).<sup>4</sup> Both amendment events were directed toward creating a more inclusive constitutional identity – in one case, based on race, and the other, based on gender. Even though the 1967 amendments passed, and the ERA failed, at the ratification stage, both amendment events are best viewed as a partial success, and failure, from the perspective of those in the two countries who were seeking to achieve a more inclusive constitutional identity.

In Australia, the 1967 race-power amendments created a clear *text-based* change in the definition of constitutional identity, but no meaningful evidence of popular attitudes toward different notions of equal citizenship. In the U.S., by contrast, the ERA helped change notions of constitutional gender equality by supplying clear *evidence* of emerging of national majority understandings about the meaning of equal citizenship for women, without creating any change to the language of the Equal Protection Clause.

Both forms of “amendment gap” also had a clear potential to undermine changes in constitutional identity. In general, constitutional amendment procedures provide more reliable information than other sources about both the strength and breadth of “democratic constitutional understandings”.<sup>5</sup> Text-based constitutional changes can also do far more than other constitutional sources to *reset the analogical baseline* for subsequent constitutional developments. Where evidence- or text- based amendment gaps exist, therefore, courts may be more reluctant than otherwise to develop common constitutional meaning in response to majoritarian demands for constitutional change.

If we engage in a Rosenfeld-style act of “counterfactual imagination”, it also seems quite plausible to think that amendment gaps of this kind did in fact limit the pace of subsequent court-led change in Australia and the U.S. in the context of norms of constitutional equality.<sup>6</sup> In Australia, a number of High Court justices have explicitly suggested that the evidentiary gap behind the 1967 amendments was a reason to reject a transformed reading of the Commonwealth’s “race power” in Australia.<sup>7</sup> In the U.S., though scholars such as David Strauss

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<sup>4</sup> The Australian amendments repealed from s. 51(xxvi) the words “other than the aboriginal race in any State” and repealed entirely the language in s. 127. The consequence of this was to confer certain additional powers on the Commonwealth Parliament to make special laws with respect to indigenous Australians, and to include indigenous Australians in the census, in a way that had some impact on districting practices in Western Australia and Queensland. Another more arguable consequence was to redefine the scope of the Commonwealth’s existing powers in respect of racial minorities, so as to ensure that such powers could only be used for the benefit of such minorities. *Equal Rights Amendment*, House Joint Res. No. 208 (1972). See also 117 Cong. Rec. 25815; 118 Cong Rec. 9598.

<sup>5</sup> On this concept, see e.g. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L. J. 1 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L. J. 1943 (2003); Robert Post, *Foreword – The Supreme Court 2002 Term: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4 (2003)

<sup>6</sup> Compare ROSENFELD, *supra* note 1 at 44.

<sup>7</sup> See note 40, *infra*. On the race power and the relevant amendments more generally, see e.g., Arthur Glass, *Interpretation/Application/Decisionmaking*, 25 AUSTL. J. LEG. PHIL. 97 (2000); Justin Malbon, *The Race Power Under the Australian Constitution: Altered Meanings*, 21 SYDNEY L. REV. 80 (1999); Nicholas Pengelley, *Before the High Court*, 20 SYDNEY L. REV. 145 (1998); Alexander Reilly, *Reading the Race Power: A Hermeneutic Analysis*, 23 MELB. U. L. REV. 476 (1999).

have famously argued otherwise,<sup>8</sup> it also plausible to think that the text-based failure of the ERA may have had important consequences for constitutional equality jurisprudence, by contributing to the reluctance, on the part of some justices, to extend heightened scrutiny to classifications other than those based on race (or national origin) or gender.

An important question this raises for comparative constitutional scholars is whether there are in fact general limits on the capacity of formal amendment procedures to affect changes in constitutional identity. One possibility is, of course, that the Australian and U.S. constitutional experience is merely particularistic or the product of the specific requirements governing amendment in each country, or the way in which the two amendment campaigns was conducted.<sup>9</sup> The other possibility, however, is that the countries' experience points to a more general or universal tension between the evidencing and text-based functions of constitutional amendment procedures in the context of issues of constitutional identity; and it is this possibility that the essay addresses by way of conclusion.<sup>10</sup>

The essay is divided into three parts. Part I sets out the argument that the 1967 race-power amendments in Australia and 1972 ERA were both partial successes, and failures, from the perspective of those seeking to create a more inclusive national constitutional identity, in the two countries. Part II makes the case that these amendment failures, or gaps, had potential important substantive, not just formal, consequences or flow-on effects from the perspective of constitutional definitions of identity, or equal citizenship, in the two countries. And part III considers the way in which the success and failure, of particular amendments, may be related when it comes to the evidencing and text-based functional of constitutional amendments.

## I. TWO TALES OF AMENDMENT SUCCESS & FAILURE

As originally drafted, the Australian Commonwealth Constitution 1901 contained two provisions expressly discriminating against indigenous Australians. The original race power in s. 51(xxvi) of the Constitution provided that the Commonwealth parliament had power to power to make laws with respect to “the people of any race, *other than the Aboriginal race in any State*, for whom it is deemed necessary to make special laws”. And s. 127 of the Constitution provided that “[in reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, Aboriginal natives shall not be counted”.

In 1967, the Labor government proposed repealing both these discriminatory provisions by passing legislation seeking to delete the words “other than the Aboriginal race of any State” from s. 51 (xxvi) and to repeal s. 127 in its entirety.<sup>11</sup> The proposed amendments were then

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<sup>8</sup> David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1475 (2000-2001)..

<sup>9</sup> See Rosalind Dixon, *Partial Constitutional Amendments*. U. PA. J. CONST. L. (forthcoming 2011).. For a general exploration of the particularistic versus more universalistic dimensions to comparative constitutional learning, see further ROSENFELD at 6-12 (on the centrality of the clash between particularistic and universalist accounts of constitutionalism in constitutional theory and discourse).

<sup>10</sup> Compare ROSENFELD, *supra* note 1 at 6-12

<sup>11</sup> *Constitution Alteration (Aboriginal Peoples) Act 1967*. For discussion, see BAIN ATTWOOD & ANDREW MARKUS. *THE 1967 REFERENDUM: RACE, POWER, AND THE AUSTRALIAN CONSTITUTION* (2d ed 2007).

passed by voters at a national referendum by a wide margin: s. 128 of the Australian Constitution requires that amendments be approved by a majority voters, in a majority of states, and the amendments were approved by 90.77% of voters nationally, and a majority of voters in all six states.<sup>12</sup>

The government, therefore, succeeded in using the formal constitutional amendment procedures in s. 128 to create two quite clear *text-based* changes in the Australian Constitution's treatment of indigenous identity: one, involving the explicit recognition of indigenous communities as a collective identity under the Constitution, at least for the purposes of the exercise of federal legislative power, and the other, the recognition of individual indigenous people for national census purposes.

At the same time, the 1967 amendments also failed to provide subsequent decision-makers with almost any meaningful evidentiary trail about contemporary attitudes toward the relationship between indigenous and broader constitutional identity.<sup>13</sup>

One important question about the amendments, for example, was whether they simply sought to create formal equality among different racial groups for the purposes of the race power, or rather to transform the race power into a power designed to allow the federal government to remedy historical discrimination against particular races (and most notably, indigenous Australians).<sup>14</sup> The former view was supported by those who advocated the idea that indigenous Australians should be recognized as “part and parcel of the [Australian] community” as a whole, while the latter view was advocated by a smaller number of government figures, and aboriginal activists, who sought to define indigenous equality as more closely linked to the remedying of historical disadvantage, and the recognition of a distinct collective, cultural identity.<sup>15</sup>

None of this, however, was clearly surfaced in the 1967 referendum campaign. The text of the 1967 amendments themselves in no way spoke to this issue. The formal “YES” case made by the government in favor of the amendments was also equivocal on the issue. On the one hand, the purpose of the amendments, the government suggested, was to “make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race...if the Parliament considers it necessary”, and “the Commonwealth's object [would] be to co-operate with the States to ensure that together we act in the best interests of the Aboriginal people of Australia”. But on the other hand, the government also suggested that a key aim of the amendments was simply to “remove words from our Constitution that many people think are discriminatory against the Aboriginal people” and to create *consistent* Commonwealth power in

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<sup>12</sup> ATTWOOD & MARKUS, *supra* note 11 at 55.

<sup>13</sup> As I have suggested elsewhere, they clearly had some evidentiary value: see Rosalind Dixon, *Constitutional Amendment Rules: a Comparative Perspective*, in THE RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW (Rosalind Dixon & Tom Ginsburg, eds, forthcoming 2011). The evidence in question, however, was also quite limited: see note 39, *infra*.

<sup>14</sup> ATTWOOD & MARKUS, *supra* note 11 at 124.

<sup>15</sup> *Id.*

respect of indigenous Australians living in the two territories and the states.<sup>16</sup> It is therefore difficult to draw almost any inference at all, from the referendum campaign itself, as to what Australian electors at the time believed about the proper scope of the race power.<sup>17</sup>

In the U.S., by contrast, the story of the ERA has been one of significant evidentiary success, accompanied by clear textual failure.

As early as 1973, in *Frontiero v. Richardson*,<sup>18</sup> a plurality of the Supreme Court suggested that the mere passage of the ERA was evidence of “an increasing sensitivity to sex-based classifications” on the part of Congress, and also a view that “classifications based upon sex are inherently invidious”.<sup>19</sup> The plurality also gave clear weight to this evidence in developing its own common law-based approach to constitutional gender equality. As co-equal branch of government, the plurality held, Congress’ attitudes on the question were not “without significance”. By itself, the mere act of Congress proposing the ERA was therefore sufficient, it suggested, to provide support for a decision to adopt heightened scrutiny to classifications based on gender.<sup>20</sup>

The effect of this reasoning has also arguably carried over in a number of subsequent cases following the plurality in *Frontiero* in adopting heightened scrutiny to classifications based on gender.<sup>21</sup> There has also been a striking parallel, in a number of subsequent cases, between the Court’s approach to classifications based on gender, and public attitudes toward gender evidenced in the course of the ERA ratification debates.

Two widely held concerns during the ERA ratification debates, for example, were that the ERA would prevent the military from assigning draftees to frontline combat roles on the basis of sex, or further restrict states from regulating access to abortion (such as by limiting their ability to restrict access to public funding for abortion).<sup>22</sup> In subsequent cases involving the military and abortion funding, the Supreme Court has also shown a remarkably consistent

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<sup>16</sup> Chief Electoral Officer Commonwealth, *The Arguments For and Against the Proposed Alterations Together with a Statement Showing the Proposed Alterations*, 6 April 1967 at 11 (Explaining that the purpose of the amendments was to ensure Commonwealth power “to make special laws for the people of the Aboriginal race, *wherever they may live*” and that at present the Commonwealth Parliament has no [such] power).

<sup>17</sup> Compare *Kartinyeri v. Commonwealth*, 195 CLR 337 (1998) (Gaudron J. at [29-30]) (suggesting that the evidence is ambiguous, though if anything more favorable to the formal equality view); Gummow and Hayne JJ. at [91] (suggesting that the only way to infer such intentions is by reference to the broader context).

<sup>18</sup> 411 U.S. 677 (1973).

<sup>19</sup> 411 U.S. at 687.

<sup>20</sup> *Id.* at 687-88.

<sup>21</sup> See e.g. *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>22</sup> JANE J. MANSBRIDGE, WHY WE LOST THE ERA 60-66, 127-28 (1986). While prominent in various debates, concerns about the fate of single-sex toilets were not, as Jane Mansbridge has shown, ultimately nearly as significant to actual voting behavior on the ERA.

willingness to ‘incorporate’ these concerns, by applying a more deferential version of the heightened scrutiny test to relevant forms of state action.<sup>23</sup>

At the same time, at a text-based level, the ERA was also a clear *failure*. While it passed by Congress in 1972 by a vote of 354-24 in the House and 84-8 in the Senate,<sup>24</sup> and was ultimately ratified by 35 states,<sup>25</sup> it never achieved the further three ratifications necessary to become part of the text of the Constitution. In dealing with questions of constitutional equality generally, the Supreme Court therefore continues to operate exclusively under the original – un-amended – text of the Fourteenth Amendment.

## II. TWO AMENDMENT GAPS

In the U.S. in particular, scholars such as David Strauss have argued that amendments “gaps” of this kind are nonetheless largely irrelevant to the substance of constitutional law, and thus, one might infer, to constitutional identity in the legal rather than purely symbolic sense.<sup>26</sup> This is especially true, according to Strauss, when it comes to text-based amendment gaps such as those created by the ERA, because the U.S. Supreme Court, at least, tends to develop common law constitutional meaning in line with majority constitutional understandings even absent text-based constitutional change; and conversely, to ignore text-based change that does not reflect such shifts.<sup>27</sup> A similar argument could also be made, however, about evidence-based amendment gaps, on the basis that courts have a range of other sources they can look to, besides amendment, if they choose to look to such national majority understandings.

I argue, however, that both these versions of the amendment irrelevance argument substantially downplay the potential significance of amendments – and thus also amendment gaps – to substantive constitutional law, and thus the legal regulation of constitutional identity.

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<sup>23</sup> See e.g., *Rostker v. Goldberg*, 453 US 57 (1981) (upholding the Military Selective Service Act (MSSA) authorizing the President to require the registration of males, and not females, for the draft on the basis that such a distinction “realistically reflect[ed] the fact that the sexes [were] not ‘similarly situated’” in respect of eligibility for active service); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding Connecticut law prohibiting public funding for abortions that were not medically necessary); *Harris v. McRae*, 440 U.S. 297 (1980) (upholding provisions of the Hyde Amendment limiting access to federal medicaid funding for medically necessary abortions, except in cases of threat to a woman’s life, rape or incest). I do not purport to claim that the Court was necessarily conscious of any connection between these decisions and the record provided by the ERA ratification debates – but simply that there was a striking consistency between the two.

<sup>24</sup> MANSBRIDGE, *supra* note 22 at 11-12.

<sup>25</sup> *Id.* at 13

<sup>26</sup> Reva Siegel argues, and David Strauss concedes, that text-based constitutional change can have an important symbolic significance in many cases: see Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323 (2006); Strauss, *supra* note 7.

<sup>27</sup> Strauss also cites the ERA as itself a leading example this: because the Court has applied the Equal Protection Clause so as to require “an exceedingly persuasive justification” for all classifications based on sex, “[i]t is difficult to identify any respect” Strauss argues “in which the law is different from what it would have been if the ERA had been adopted”. Strauss, *supra* note 7 at 1476-1477

At an evidentiary level, constitutional amendment proposals have a far greater capacity, than most other sources, to provide courts, and other decision-makers, with reliable information about both the *strength* and *breadth* of legislative (and popular) views on constitutional meaning. In many cases, courts themselves are also explicitly open to considering such information in interpreting various open-ended constitutional provisions.

The fact that, in most countries, the public as a whole tends to identify more clearly with constitutions than statutes means that, all else being equal, the act of proposing a constitutional amendment will carry higher political costs, for proponents, than equivalent proposals to create change by legislative means. For legislators, this means that, by simply invoking the rubric of constitutional amendment, they can provide a credible signal to courts – and other actors – about the *strength* of their views on constitutional meaning.<sup>28</sup>

Compared to ordinary legislation, constitutional amendment procedures also give legislators broader scope to express disagreement with courts about constitutional meaning, consistent with respecting commitments to the rule of law.<sup>29</sup> This means that, in general, both actual constitutional amendments – and most constitutional amendment proposals – will also be truer guide than ordinary legislation to the true scope of disagreement between courts and legislatures over questions of constitutional meaning, or public, values.<sup>30</sup>

At a more formal, doctrinal level, constitutional amendments can also play an important role in helping expand – or reset – the *analogical baseline* for subsequent constitutional reasoning.<sup>31</sup> Changes of this kind will be significant, in common law systems in particular, because the ultimate analogical baseline for constitutional reasoning clearly matters in many cases. The broader that baseline is, in general, the easier it will also be for subsequent decision-makers to establish an analogy between new and established constitutional arguments, or claims.

What this implies in the context of specific amendment event such as the 1967 amendments in Australia, of course, is highly speculative. It is certainly possible that Australian and U.S. constitutional law – and thus also legal identity – would look no different, had either the 1967 race amendments in Australia been framed and debated differently, or the ERA actually passed. There are also good reasons, however, why they might look at least somewhat different in the context of both ongoing disputes in Australia over the scope of the race power and debates in the U.S. over the status of classifications based on age, disability and even sexual orientation.

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<sup>28</sup> On the logic of this kind of signaling process generally, see e.g., A. Michael Spence, *Job Market Signaling*, 87 Q. J. ECON. 355 (1973)(signaling in the context of employment markets).

<sup>29</sup> On different meanings of the rule of law, see Richard H. Fallon, ‘*The Rule of Law*’ As a Concept in *Constitutional Discourse*, 97 COLUM. L. REV. 1, 5 (1997) (discussing four conceptions of the Rule of Law: historicist, formalist, Legal Process type, and substantive).

<sup>30</sup> A similar contrast applies between constitutional amendments and public opinion polls, if one assumes that even popular constitutional understandings are subject to certain minimal requirements of deliberativeness: see further Dixon, *supra* note 8.

<sup>31</sup> See further Rosalind Dixon, *Constitutional Definitions* (Working Paper 2010).

For both age and disability, in the U.S., there is strong evidence provided by the passage of a range of Congressional statutes to support the idea that a clear national majority exists in favor of treating such grounds of discrimination as at least quasi-suspect.<sup>32</sup> Both state-level legislative trends, and executive practices, also seem to suggest that, other than those relating to marriage, classifications based on sexual orientation also increasingly appear to be regarded by a national majority as illegitimate and suspect. The Supreme Court, however, has consistently rejected calls to apply (at least formally) heightened scrutiny to classifications based on any of these characteristics, in part because it has suggested there is little relevant analogy between discrimination based on these characteristics – and that based on race.<sup>33</sup>

Gender, by contrast, has several obvious parallels with age and disability in particular (both sets of characteristics may be relevant for some purposes, but are also associated with a long history of disadvantage and unfair stereotyping): distinctions based on gender, as Kathleen Sullivan notes, do not affect a group that is discrete, insular, or even a true minority in either demographic or electoral terms.<sup>34</sup> Instead, they are associated with a “long and unfortunate history of sex discrimination”, or prejudice toward women, causing significant harm to women’s agency, opportunities for economic and political participation, and also economic and social well-being.<sup>35</sup> Had gender-based discrimination provided a *distinct* analogical baseline for equal protection purposes, rather than a category that itself depends on an analogy to race,<sup>36</sup> it thus

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<sup>32</sup> See e.g., Congressional vote on the ADA (House passed in a voice vote of 403-20; Senate voting 76-8 in favor). See Bill Summary & Status, H.R. 2273 (1990), available at: <http://thomas.loc.gov/cgi-bin/bdquery/z?d101:HR02273:@@R>; Bill Summary & Status, S. 933 (1990), available at: <http://thomas.loc.gov/cgi-bin/bdquery/z?d101:SN00933:@@R>.

<sup>33</sup> See e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 444-46 (1985) (rejecting arguments for heightened scrutiny in the context of intellectual disability, in part based on the fact that there is no analogy between such a group and racial minorities, given that (i) members of the class are defined by certain real “differences” that lead to a need for care by others; (ii) by the mid-1980’s, “lawmakers ha[d] been addressing” the needs of the intellectually disabled “in a manner that belie[d] a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary”; (iii) “this legislative response... [could not] have occurred and survived without public support” fundamentally undermined the claim that the intellectually disabled were “politically powerless in the sense [of] hav[ing] no ability to attract the attention of ...lawmakers”; and (iv) the intellectually disabled are a “large and amorphous” class, which makes it difficult to distinguish them class from related groups); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-314 (1976) (holding that the elderly are not a discrete and insular minority in need of “extraordinary protection from the majoritarian political process”, and that “while the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a history of ‘purposeful unequal treatment’ or been subject to unique disabilities on the basis of stereotypes characteristics not truly indicative of their abilities” to be suspect for Equal protection purposes); *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia J. dissenting) (holding that at least one reason to reject rejecting the application of such a standard in this context was that it was highly inaccurate “to call ‘politically unpopular’ a group which enjoys enormous influence in the American media and politics, and which... though composing no more than 4% of the population had the support of the 46% of the voters [in Colorado]”).

<sup>34</sup> Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735 (2002).

<sup>35</sup> *Id.*

<sup>36</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

seems entirely plausible that the Court might have been more willing explicitly to apply a form of heightened scrutiny.<sup>37</sup>

In Australia, a different evidentiary record in 1967 might also have changed the shape of ongoing disputes over the scope of the race power. In *Kartinyeri*,<sup>38</sup> for example, the most recent case to reach the High Court of Australia involving the race power, the Court was almost evenly divided on the question of whether the race power was confined to laws designed to benefit particular racial groups, or was in fact broader in scope. Two justices held that it was not constrained in any way; and two justices that it was at least somewhat constrained; while two justices did not address the issue. All of those justices who rejected the argument about constraint also suggested that, irrespective of their view of text of s. 51 (xxvi), the evidence provided by the 1967 amendments as to popular understandings was insufficient to support such a conclusion.<sup>39</sup> No-one, moreover, could point to other sources that provided such information.<sup>40</sup>

### III. COMPARATIVE LESSONS: IDENTITY & INEVITABLE AMENDMENT GAPS?

What, if anything can we learn as comparative constitutional scholars from these two stories of amendment success, and failure? One potential answer is not very much. From a global perspective, the U.S. and Australia both have requirements for successful constitutional amendment that are unusually onerous.<sup>41</sup> In both countries, these requirements may also mean that it is particularly difficult to conduct *wholly* successful constitutional amendment campaigns.<sup>42</sup>

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<sup>37</sup> This would also have had a clear impact on the probability that legislation drawing such distinctions would be viewed as constitutional by the Court, and on the probability that federal legislation prohibiting discrimination on these grounds would be treated by the Court as overriding states' sovereign immunity. *See e.g., Heller v. Doe*, 509 U.S. 312 (Kennedy J.) (upholding the Constitutionality of a Kentucky statute establishing different procedures for involuntary commitment of the intellectually disabled, as compared to mentally ill), and esp. 329-30 (acknowledging "Kentucky could have provided relatives and guardians of the mentally retarded some participation in commitment proceedings by methods short of providing them status as parties" ... but that that this was "irrelevant in rational-basis review"); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding that Title I of Americans with Disabilities Act (ADA) was not within Congress' power under s. 5 of the Fourteenth Amendment, and therefore not enforceable against the states, the Court placed strong reliance on the fact that the disabled are not a suspect or quasi-suspect class, for equal protection purposes); *Kimel v Florida Bd. of Regents*, 528 U.S. 62 (2000). Contrast also *Nevada v. Hibbs*, 538 U.S. 721 (2003).

<sup>38</sup> *Kartinyeri v. Commonwealth*, 195 CLR 337 ("The Hindmarsh Bridge Case") (1998).

<sup>39</sup> *Id.* (Gaudron J. at [29-30]) (suggesting that the evidence was ambiguous, though if anything more favorable to the formal equality view); *Id.* Gummow and Hayne JJ. at [91] (suggesting that the only way to infer such intentions is by reference to the broader context).

<sup>40</sup> That included Justice Kirby, who was the strongest proponent of the constrained view of the power: *see Kartinyeri*, 195 CLR 337 at par 105 (beginning of Justice Kirby's opinion).

<sup>41</sup> *See e.g.,* Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237 (Sanford Levinson ed., 1995); ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009)

<sup>42</sup> Compare Dixon, *supra* note 13.

Another way of understanding the Australian and U.S. experience, however, is that they point to more general limits on the ability to use formal amendment procedures to amend constitutional identity. By itself, the 1967 Australian amendment experience, for example, could easily be read to point to the importance, from an evidentiary perspective, of proponents of constitutional change seeking to *surface* from the outset the identity stakes behind a particular proposed amendment.

The U.S. experience, however, arguably points in exactly the opposite direction when it comes to text-based constitutional change – namely against, rather than in favor, of a decision by proponents of constitutional change to surface the identity-freighted dimension to any proposed formal constitutional amendment. The ERA, as Jane Mansbridge has argued, arguably failed in large part *because* the text of amendment made it clear to gender traditionalists that it was their distinct self-identity that amendment proponents were seeking to “negate”.<sup>43</sup> Phyllis Schafly, for example, as early as 1972 warned a wide audience of homemakers that the purpose of the ERA was “to destroy morality and the family”, by attacking “men, marriage and children”.<sup>44</sup> Gender traditionalists such as Schafly also ultimately played an important role in blocking the ratification of the ERA in a number of key state by both exerting direct pressure on conservative legislators *and* persuading undecided voters that the ERA threatened to create extreme outcomes in a range of areas, especially in the context of the draft and the constitutional regulation of abortion.<sup>45</sup>

This dynamic also seems far from unique to the ERA, or even the U.S., context. Any constitutional amendment that is explicitly identity-freighted sends a clear message to a political minority that its self-identity is threatened: in Rosenfeldian terms, the explicit aim of such an amendment is to negate a plural constitutional identity in favor of one based on more unitary, majoritarian norms.<sup>46</sup> Political minorities are more far likely to mobilize against such amendments than against other amendments. Given that almost every capital “C” constitution worldwide imposes *some* form of super-majority requirement for successful constitutional amendment, mobilization of this kind will also have a direct capacity to reduce the chance of successful text-based constitutional change.<sup>47</sup>

Together, the Australian and U.S. experiences might therefore be read to point to what is in fact a quite general tension in the process of constitutional amendment, as it relates to issues of constitutional identity. On the one hand, they seem to suggest, for example, that it is only amendments that explicitly surface the desire to negate old constitutional identities that are likely to succeed at an evidentiary level, but on the other, that only amendments that do not wear their colors on their sleeve, in this way, that are likely to create text-based change. If this is true, it certainly invites us to think harder than we have done to date about which of the two functions of

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<sup>43</sup> MANSBRIDGE, *supra* note 22. Compare ROSENFELD, *supra* note 1

<sup>44</sup> MANSBRIDGE, *supra* note 22 at 112-114.

<sup>45</sup> *Id.* at 13, 176. Mansbridge argues that their emphasis on the implications of the ERA for single-sex toilets was ultimately less significant to actual ratification decisions, or public opinion more generally. *Id.* at 114.

<sup>46</sup> Compare ROSENFELD, *supra* note 1 at 44 (on the fragmented nature of constitutional identity in many instances).

<sup>47</sup> See Lutz, *supra* note 41, ELKINS ET AL, *supra* note 41.

constitutional amendment procedures – i.e. the evidentiary or the textual – is generally more powerful, in specific national contexts, in amending constitutional identity.

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