ON THE MONARCHIST'S MAXIM: "IF IT AIN'T BROKE, DON'T FIX IT"

*Leighton McDonald**

> [T]he plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.[1]

INTRODUCTION

It is often said that the great innovation of America's eighteenth century constitution-makers was not their acceptance of the ideal of constitutionalism but their insistence that legal constraints on government be subject to alteration, breaking free from the hold of divine law and natural right theories. To be sure, the notion of constitutionalism necessarily entails that there be some distinction between how ordinary legal change is effected and how a constitution is changed. A constitution binds and guides ordinary law-making by virtue of itself not being subject to those processes. But there is no conceptual inconsistency between constitutionalism and allowing for constitutional amendment. Of course, a particular constitution may maintain its own partial or total unamendability, providing no internal mechanism for amendment.[2] And, even where amendment is provided for, there may be questions about exactly what possible changes are mandated[3] or what procedures must be

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* Lecturer, Faculty of Law, University of Adelaide. I have benefited from the criticisms and suggestions of Danielle Banks, Michael Detmold, John Keeler, Stewart Motha, and David Wiseman.

1 George Mason's opening comments on the question of constitutional amendment at the 1787 Philadelphia Convention: see M Farrand, *The Records of the Federal Convention of 1787* (1937) vol 1 at 202-203, quoted in S Levinson, "Introduction: Imperfection and Amendability" in S Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995) at 3.

2 For example, some provisions in the Indian Constitution are, by judicial interpretation, *absolutely* entrenched, in the sense of not being subject to amendment; unamendable provisions of the German Basic Law are expressly provided for in the constitutional text. See E Katz, "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment" (1996) 29 *Colum J L & Soc Probs* 251 at 265-273. Only under the Austinian version of legal positivism, where the existence of an unlimited sovereign is a necessary condition for the existence of law, does the notion of immutable constitutional limits court logical absurdity.

3 For example, J Rawls, *Political Liberalism* (1993) at 238-239 argues that Art V, the amendment provision of the United States Constitution, sanctions only those amendments

followed.[4] These, however, are questions of how a particular constitution is to be interpreted, and they do not challenge the coherence of internally allowing for constitutional amendment, revision or, indeed, replacement.

There are three basic categories of questions raised by the possibility and prospect of constitutional amendment in Australia, questions which cut to the core of contemporary constitutional law, theory and politics. Although these different categories of questions are deeply interconnected, it is sometimes useful to separate them out. First, there are the interpretive questions of the constitutionality of particular (or possible) amendments. Perhaps in Australia the declaration in s 128 that the Constitution "shall not be altered except in the following manner" removes some of these difficulties,[5] but important questions of interpretation remain.[6] Further, there are related questions about the role which the existence and terms of s 128 should play in the interpretation of other features and provisions of the Constitution. Next, are the host of theoretical questions, normative and conceptual, prompted by the possibility of constitutional amendment. What, if any, tensions exist between limits on democratically accountable officials and rule by collective self-will? What is the appropriate balance between constitutional stability and adaptability in a liberal democracy (or, perhaps, in a civic republic)? How can we distinguish interpretation from amendment? Indeed, it is a short step from inquiring into the constitutional validity of an amendment to the question of how the Constitution itself is grounded—and from there to ask why the entire system of legal norms in Australia is valid, taking us deep into one of the persistent questions of jurisprudence. The last group of questions are the more substantive political ones of whether the Constitution should be amended and, if so, how. These were the sorts of questions which the recent constitutional convention grappled with. Should Australia become a republic? How should the president be chosen? And so on.

This article seeks to make a small contribution to thinking through some of the implications of amendability, by examining one argument which is frequently invoked in relation to the question (which initially falls into the last category of issues) of whether the Constitution should be amended through the mechanism provided by s 128. It is an argument which is often raised regardless of the particular amendment proposal under consideration, but which has been given considerable prominence by constitutional monarchists in the current republic debate. In the current context, the argument runs as follows: we should not become a republic or make other more substantive changes to the Constitution because the Constitution is not broken (after all

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which are historically in line with the "original promise" of the Constitution, excluding those which fundamentally contradict the constitutional tradition.

4 For example, Bruce Ackerman's constitutional theory holds, contrary to orthodoxy, that Art V is not the *exclusive* route by which the United States Constitution may be amended. See B Ackerman, "Constitutional Politics/Constitutional Law" (1989) 99 *Yale LJ* 453 and B Ackerman, *We the People: Foundations* (1991).

5 The current debate in the United States over the exclusivity of Art V is one of the defining debates for contemporary American constitutional law and theory.

6 G Winterton, "The States and the Republic: A Constitutional Accord?" (1995) 6 *PLR* 107 at 118-123 discusses how some such issues arise in the context of establishing a republic.

these years!) and there is thus no need for constitutional repair ("If it ain't broke, don't fix it)".[7]

The primary purpose of this article, then, is to mount a case against this argument, which (despite its recurrent popularity with defenders of the constitutional status quo in general) I shall refer to as "the monarchist's argument". It is argued that none of the various ways in which the monarchist's argument can be interpreted adds anything useful to our debates over constitutional amendment. Rather, the argument serves to obscure the real and important issues in dispute. Indeed, the monarchist's argument misconceives the nature of the social and political conditions which are conducive to achieving better constitutional outcomes through the process of constitutional amendment. Moreover, the argument is underpinned by a number of erroneous assumptions and has implications which, once identified, can be seen as not merely unhelpful, but as positively undesirable.

THE NOTION OF A BROKEN CONSTITUTION

The obvious line of response to the monarchist's argument is to take up the challenge directly and argue that the Constitution is, in fact, broken. This is not the strategy I will employ here. While it is important and helpful to identify deficiencies and imperfections in the Constitution, an attempt to do this *in response* to the monarchist's argument is to concede too much. The reason is that the sense in which the Constitution can be said to be broken or not broken is left obscure on both sides of the argument. At base, the problem is that an attempt to clarify the issue of whether or not the Constitution is broken is to accept what is, in the context of a debate over specific constitutional amendments, an unhelpful question. In essence, it amounts to asking, "How well has the Constitution worked and is it still working?" But this question can only be answered with reference to the *same* criteria for judgment which the disputants use to debate the substantive merits of the proposed amendment in the first place. Let me explain.

It is true that we can make judgments about how well or badly political institutions serve us and what it would mean for them to succeed or fail. The difficulty arises when it is recognised that in assessing the harm or good political institutions do, it is almost impossible to identify standards of criticism which enjoy wide agreement. Stated simply, we may agree that if the Constitution is harmful it should be condemned but disagree over what constitutes harm.[8] Stephen Griffin accepts this point but seeks to overcome the problem with the assertion that "[a]t a minimum, it can be agreed that the Constitution should fulfill its purposes as stated in the Preamble, should ensure a stable and well-ordered polity, and should not lead to political outcomes that are in no one's interest (such as frequent coups d'état or other breakdowns in public order)."[9] "From this perspective" he continues, "amendments, radical shifts in interpretation, and

7 H Zwar, "Let's stay the way we are" *Australian* 28 January 1998 at 13 claims that this "encapsulates nearly the strongest argument for retaining the present system".

8 There is also scope for disagreement as to whether a particular harm or benefit is caused by or occurs in spite of the Constitution. For example, whether the level of individualism, egoism and social conflict in the United States is the result of constitutional "rights-talk" or is the product of other cultural factors may be a matter of debate.

9 S M Griffin, "Constitutionalism in the United States: From Theory to Politics" in S Levinson, above n 1 at 44.

constitutional crises are prima facie evidence that the Constitution is not working well."[10] Yet even on this thin set of evaluative criteria for determining whether a constitution is "working", significant disagreement is possible. On some political theories radical and frequent change is, far from being dysfunctional, a healthy sign.[11] Less radically, it is not difficult to see that constitutional stability can quite easily come at the price of justice. The general point to make against Griffin is thus that his "agreed" criterion for constitutional success (that is, lack of amendment and change) only makes sense if we attempt to judge the Constitution assuming the justice or wisdom of its own terms. Yet, when amendments to the Constitution are proposed, it is precisely those terms which are in issue.[12] In claiming the Constitution is not broken, monarchists purport to be making an argument against change, but, in truth, fail to give any substantial or specific reasons to support the rejection of the proposed reform.

Thus, asking whether the Constitution is broken, in the sense described above, does not progress matters very far: we will inevitably be forced back to the substantive issue of whether or not there are sufficient arguments for adopting particular amendments (put forward, of course, as improvements). Asking and answering the question underlying the monarchist's argument adds nothing to the analysis. Perhaps, however, I have misinterpreted the nature of the question monarchists seek to foist upon constitutional reformers. It may be that the monarchist's argument does not lead to asking whether the Constitution is, generally speaking, working, but demands that we inquire whether or not it is "broke" in a more literal sense of that word. It might be claimed that what is meant is not mere imperfection or ill-working but complete constitutional rupture, breakdown, or acute crisis. The first comment to make in response to this permutation of the monarchist's argument is to accept the descriptive claim that the Constitution is not broken in this extreme sense. But it is surely false to assume that republicans and constitutional reformers need or want to claim that the Constitution is broken in this literal sense of the word to make out their case: all they need to argue is that the Constitution is imperfect and can, for whatever reasons, be improved. Once the argument for change is put in these terms, it is no response at all to claim that the Constitution is working well enough to avoid dramatic constitutional crises such as a coup d'état.

QUESTIONS OF TIMING: THE APPROPRIATE CONDITIONS FOR, AND RATE OF, CONSTITUTIONAL AMENDMENT

Still another possible version of the monarchist's argument, based on the idea that the Constitution is not *literally* broken, requires consideration. Here the argument is not that we should refrain from fiddling with the Constitution absent a constitutional crisis, but holds that attempts to do so are doomed to fail in practice. Historically, the process of constitution-making has normally followed some sort of social and political strife.

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10 Ibid.

11 L Lessig, "What Drives Derivability: Responses to Responding to Imperfection" (1996) 74 *Texas L R* 839 at 847 refers to Roberto Unger's political theory to make this point.

12 In Australia all would agree that the Constitution is working to the extent that there is an absence of frequent or dramatic constitutional crises (Griffin's other indicia of constitutional success). I examine below the possibility that this extreme sense of constitutional breakdown underpins the monarchist's notion of brokenness.

Peter Russell, writing in the context of Canada's indefatigable efforts at constitutional reform over the past quarter of a century, states:

> No liberal democratic state has accomplished comprehensive constitutional change outside the context of some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup.[13]

Thus, if one believed that proposed amendments to the Australian Constitution were, contrary to minimalist rhetoric, comprehensive and sought to change fundamentally its institutions and forms, it might then be claimed that the *necessary* social conditions for such change are absent and that change should not, therefore, be pursued. There is, however, a *non sequitur* hard at work here. Although many important constitution-making exercises have been undertaken in the wake of "cataclysmic" events, whatever constitutional outcomes were reached may well have been reached in spite of, not because of, social and political upheaval. Indeed, pushed too far there is a danger that this line of argument becomes self-fulfilling.[14] Moreover, there are strong reasons, based on the general conditions which can be expected to lead to successful and just constitution-making, for resisting the logic of this position.

In this regard, Jon Elster has identified an important paradox of constitution-making which "arises from the fact that the task of constitution-making generally emerges in conditions that are likely to work against good constitution-making". His discussion of the implications of this paradox are worth quoting at length:

> Being written for the indefinite future, constitutions ought to be adopted in maximally calm and undisturbed conditions. Also, the intrinsic importance of constitution-making requires that procedures be based on rational, impartial argument. In ordinary legislatures, logrolling and horse-trading may ensure that all groups realize some of their most strongly held goals. Constitution-makers, however, legislate mainly for future generations, which have no representatives in the constituent assembly. It is part of their task to look beyond their own horizons and their own interests. At the same time, the call for a new constitution usually arises in turbulent circumstances, which tend to foster passion rather than reason. Also, the external circumstances of constitution-making invite procedures based on threat-based bargaining. Marx said that "mankind always sets itself only such tasks as it can solve." In constitution-making, by contrast, it seems that the task is set only under conditions that work against a good solution.[15]

The normative lesson of this analysis is simple. Precisely the worst time to undertake constitution-making or (less dramatically) constitutional amendment is when the existent constitution is in a state of crisis. Here the appropriate response to the monarchist's argument is that, if we want good results from our exercises in

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13 P H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (2nd ed 1993) at 106.

14 In moral theory it is generally accepted that "ought" implies "can". That is to say, the imposition of moral duties must pass the requirement of practicability—it cannot be that one must do what one is in fact unable to do. But whether or not a polity can undertake deliberate constitutional change depends on the strength of its own political will and commitments, factors which can in theory be influenced and changed by the actions of individuals and groups who are part of the polity. To that extent, whether or not a political community can effect constitutional amendment is, at least in part, within its own control. (How much control will depend, of course, on how well democracy is working.)

15 J Elster, "Forces and Mechanisms in the Constitution-Making Process" (1995) 45 *Duke LJ* 364 at 394 (footnotes omitted).

constitutional politics, the idea that we must wait until a "country [has its] back ... to the wall for its leaders and its people to have the will to accommodate their differences"[16] should be resisted. Surely part of a healthy, well-functioning democracy is an ability for constitutional change to occur in times of peace and political stability, times when good constitution-making becomes more likely.[17] Indeed, it is precisely this prospect that the promise of amendment mechanisms such as s 128 hold out; amendments are, in George Mason's already quoted words, best provided for "in an easy, regular and Constitutional way than to trust to chance and violence".

Thus far I have argued that very little meaning can be given to the notion that the Constitution either is or is not broken, in the various senses in which the monarchist's argument may be taken.[18] To attempt to make *any* sense of the monarchist's argument or, at least, to understand its popular appeal, it becomes necessary to probe what I believe is an important, though unarticulated, assumption of constitutional perfection on which the argument can be seen to rest.

Before doing so, however, we need to consider one possibility which has, to this point, been neglected. Recall one of the examples I gave of a normative question raised by the possibility of amendment for constitutional theory, namely, determining the appropriate "balance of rigidity and flexibility, of permanence and adaptability" — an issue which, as Stephen Holmes and Cass Sustein say, "lies at the heart of constitutional government".[19] Perhaps the "If it ain't broke, don't fix it" line is simply a worry about upsetting a delicate balance between rigidity and flexibility struck in Australia. However, on one level, so long as s 128 is not itself changed, there is — for better or worse — simply no change whatsoever to the balance of permanence and flexibility achieved by barriers to constitutional change entrenched by the Constitution's amendment provisions. On another level, the extent to which particular constitutional provisions (including amendment provisions) are themselves characterised by rigidity or flexibility, will depend on the terms in which they are drafted; in general, the broader the terms the less brittle the Constitution is likely to be. Again, however, the monarchist's argument is an uninteresting one, adding nothing to first order arguments against proposals for change. Monarchists adopting this strategy also need to articulate the costs, risks and so on of proposed amendments, explaining why these are reasons for rejecting constitutional change, by demonstrating why the Constitution as it stands

16 P H Russell, above n 12 at 106.

17 In the context of the republic debate, we might say that an attempt to codify constitutional conventions would proceed in more conducive circumstances now than in those existing immediately after November 1975. Of course, absence of crisis in no way guarantees constitutional good sense — but it does better the odds.

18 Michael Detmold has suggested to me that it is a "carry-all" argument which must be met. That is to say that the monarchist's argument is one in which people are asked to use their own criteria for constitutional success (whatever they may be) and then to apply the "if it ain't broke, don't fix it" maxim. However, if this is the nub of the monarchist's argument, it simply does not even call for a response from reformers, for on the republican's criteria the Constitution is patently not succeeding in some significant respect and that is precisely what they assert when calling for change. The monarchist's argument does not, therefore, constitute a response to the reasons republicans put forward as to why the Constitution should be altered.

19 S Holmes and C R Sunstein, "The Politics of Constitutional Revision in Eastern Europe" in S Levinson, above n 1 at 275.

achieves the appropriate levels of constitutional permanence and adaptability and why proposed amendments risk upsetting that balance. Claims that the Constitution is not broken cannot substitute for the more sophisticated argumentation required.

Such possible worries about the rate of constitutional change indicate an obvious sense in which conservatism underscores the monarchist's argument. Thus, it is, perhaps, worth noting that even if the monarchist's argument is merely a gesture towards the broader philosophical doctrines of conservatism, these doctrines will not in themselves support the weight of this particular anti-change posture. Classical conservatism is pre-disposed to seek out wisdom latent within our institutions and traditions. But even for the Burkean, who prefers the general stock of nations and ages to their own rational faculties,[20] the reasons for rejecting constitutional change must be related to the specific proposals of reformers — even if this is to be done in terms of articulating the benefits which flow from the wisdom of our traditions and institutions as they stand and explaining how proposed changes may destroy those benefits. While conservatism counsels caution in relation to significant changes to not-in-crisis institutions, thoughtful exponents of the view have never held that all change, no matter the details, is dangerous, so as to be against reform *per se*.[21] If it is thought that proposed changes to a not-in-crisis constitution may themselves precipitate a crisis, it must also be argued why this is so.[22] Here as elsewhere, the monarchist's argument has no independent work to do, and simply serves to obscure the real issues in contention.

IMAGES OF A PERFECT CONSTITUTION

Given that the monarchist's argument is not helpful as a distinct objection to constitutional change, what might possibly count for its almost ritualistic incantation? The popularity of the argument can, in my view, be (at least) partially explained by a confusion between the claim that the Constitution is not broken and an unarticulated assumption on which the claim is sometimes based, namely, the notion that the Constitution is perfect. If made explicit, the idea of a perfect constitution would inevitably sound the bell of its own implausibility. It rests on a number of highly dubious assumptions: among other things, that it is possible for human institutions to be fault free and, also, that social conditions do not change in ways which alter the conceptual coherence, relevance, or justice of political institutions. Moreover, in the Australian context the image of a perfect Constitution is wholly unpersuasive. On almost everyone's reckoning, the Constitution is patently not free of imperfections, and

20 See E Burke, *Reflections on the Revolution in France* (J Pocock ed 1987).

21 Here is not the place to consider the plausibility of philosophical conservatism. However, to argue that all innovation equates to bad change would be to accept what Bentham called the "Hobgoblin argument". Bentham's "exposure" of this "political fallacy" still hits the mark: "To say that all new things are bad is as much as to say that all things are bad, or in any event that all were bad at their commencement. For of all the old things ever seen or heard of, there is not a single one that was not once new. Whatever is now *establishment* was once *innovation*." H A Larrabee, *Bentham's Handbook of Political Fallacies* (1952) at 94.

22 Maybe the fear is that one change will have a domino affect. Here Monarchists would also need to mount first order reasons against the predicted further changes. It is worth noting, however, that rapid constitutional change via amendment is not a spectre which haunts us in Australia.

this, no doubt, is the reason why the notion of a perfect Constitution is rarely made explicit.

Although the claim that we have a perfect Constitution is rarely acknowledged, there are two possible reasons for its persistence at a more submerged level. First, one can sense that the monarchist's argument is often premised on the transference of reverence from the Monarchy itself to the constitutional status quo. Who are we, as the current generation of Australians, to challenge the institutions which have served us faithfully?[23] This attitude is apparently more widespread in the United States, where constitutional reverence and veneration is a firmly entrenched part of that culture's civil religion.[24] Indeed, the American Constitution is often seen as a symbol for the nation and its successes as a whole.[25] For present purposes, it is enough to say that an attitude of reverence is wholly out of step with contemporary constitutional and democratic theory in Australia.[26] There is an important difference between reverence and respect when we come to assess our political institutions: "[a]s revered as the Constitution may be, it is primarily a political institution and deserves to be evaluated as we evaluate other fallible human projects".[27]

The second source of the perfect Constitution image is more challenging, and can be found in the writings of a number of prominent constitutional scholars and legal theorists. Most notably, the image is reflected in the work of Ronald Dworkin.[28] In general and simplified terms, Dworkinian jurisprudence holds that law is identified by reference to the dual criteria of fit and justification: judges must construct a political theory which not only fits existing legal traditions and materials, but which is also the most morally attractive theory (passing the requirement of fit). Dworkin's mythical judge, Hercules, recognises the Constitution as "foundational" and, as such, attempts to give the document as a whole an equally foundational interpretation. Such an interpretation "must fit and justify the most basic arrangements of political power in the community, which means it must be a justification drawn from the most

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23 Lloyd Waddy's heart-felt plea in his opening address at the recent constitutional convention — "Hands off our Constitution!" — is indicative of this view. Such a position is liable to raise the familiar objection of the inter-generational legitimacy of any constitution, which can be used to question the sense of having a constitution at all. I express no views on this issue here. However, it is worth noting that the possibility and practice of constitutional amendment may absorb some of the force of the inter-generational objection (and, on some views, avoid what Bentham dubbed the "wisdom of our ancestors fallacy", that is, the view that "the opinions of men by whom the country ... was inhabited in former times" are inevitably or inherently superior to those of a reformer). Larrabee, above n 20 at 43.

24 See S Levinson, *Constitutional Faith* (1988).

25 S M Griffin, above n 9 at 37-38. S D White, "Idolatry in Constitutional Interpretation" (1993) 79 *Virginia L R* 583 at 587 has gone so far as to claim the civil religion of the United States Constitution extends beyond popular culture to the legal academy, describing the interpretive efforts of American constitutional scholars "as a species of 'idolatry'".

26 In recent constitutional theory the ability of the Australian people to have effective and meaningful recourse to the s 128 procedure has become an important consideration when assessing success or failure of our constitutional system. Also, given modern society is in a state of flux (where, as Marx said, "all that is solid melts into air"), we are at least entitled to ask whether the Constitution is in good working order if it is never, or rarely, amended.

27 S M Griffin, above n 9 at 38.

28 R Dworkin, *Law's Empire* (1986) at 380.

philosophical reaches of political theory".[29] In short, Hercules is charged with making the Constitution the best it can be, given its text, history and previous interpretations. This approach does not, of course, *equate* to saying that the Constitution should be interpreted as if it were perfect.[30] But in attempting to read the Constitution in its best possible light — in attempting to view it as a coherent whole serving morally laudable objectives — the resultant interpretation will undoubtedly seek to smooth out imperfections, emphasising the coherence and justice of our constitutional inheritance.

The tendency to *interpret* the Constitution in the best possible light is in some senses understandable as it does have an initial intuitive appeal. The Constitution, it might be argued, should be interpreted charitably, it being designed to serve us (and to serve us well). Although the merits of Dworkin's challenging legal theory cannot be debated here,[31] what can be said is that, no matter how much one is attracted to Dworkin's ideas, when it comes to the issue of how those entrusted with *interpreting* the Constitution should undertake their task, they are irrelevant when the issue is how Australians should exercise their powers of amendment.[32] Indeed, attempting to read the Constitution in its best light may, in the context of amendment, lead to democratic complacency and an immature constitutional politics, where citizens become resigned to leave their constitutional destiny to those perceived as expert in constitutional interpretation or as possessing Herculean abilities. As Jeffrey Goldsworthy has noted, the idea of a perfect Constitution, taken to its extreme, would make its amendment procedures redundant.[33] Attempts to deny that our Constitution is free from imperfections may thus operate to stifle discussion about how the Constitution can be improved or how certain interpretations it has been given might be modified. Furthermore, the assumption of constitutional perfection may also work to undermine whatever legitimating role the amendment process is thought to serve for constitutional interpretation.[34]

The thought that the assumption of constitutional perfection, even in the limited sense of viewing the Constitution in its best light, does not serve us well in the context of amendment, raises a source of potential confusion about the arguments I have been making throughout this article. It may be accepted that the Constitution is imperfect. It needs to be emphasised, however, that this does not mean that it should be changed for the sake of change, irrespective of particular proposals. The argument — that we should change the Constitution simply because we can — is clearly fallacious. A similar error is often made in rights discourse, where actions are thought to be justified so long as they are within a person's rights. But having a right is no justification for exercising it in a particular way. For example, the fact that I may, on some views, exercise my right to free speech so as to vilify a racial minority, in no way means that I

29 Ibid at 380.
30 Ibid at 400-403.
31 For compelling refutations of his theory of legal interpretation, see A Marmor, *Legal Theory and Interpretation* (1994), and W J Waluchow, *Inclusive Legal Positivism* (1994).
32 If the High Court were to adopt a Dworkinian approach to interpretation, it would clearly be prudent to take this into account when exercising powers of amendment.
33 J Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *F L Rev* 1 at 49.
34 For accounts of this legitimating role, see B Ackerman, "Constitutional Politics/ Constitutional Law", above n 4, and J Toohey, "A Government of Laws, and Not of Men" (1993) 4 *PLR* 158.

am justified in doing so.[35] Similarly, the fact that the people of Australia have the collective right to amend the Constitution provides no *justification* for doing so.

This much is straightforward, and the arguments of this article in no way suggest otherwise. (To my knowledge, prominent republicans do not make this mistake either.) Before we make decisions about whether we ought to amend the Constitution in a particular way, it is necessary to debate the substantive issues relating to whether such a move would be an improvement on the status quo and what risks are involved. The argument I have pressed — on what hopefully is the uncontroversial assumption of constitutional *im*perfection — is that the "If it ain't broke, don't fix it" argument contributes nothing of substance to the republic debate or, indeed, to debates over constitutional amendment generally. Further, the assumption of constitutional perfection, which can at times be seen to underlie the argument, detracts from the important role which the possibility and practice of constitutional amendment plays in modern constitutionalism.

THE "NECESSITY" OF CONSTITUTIONAL AMENDMENT

If it is true that we should not exercise our powers under s 128 simply because we may do so, it might also be said that we should not exercise these powers unnecessarily (that is, if the Constitution properly interpreted is already believed to achieve the desired outcome or effect). This is essentially the reasoning which underpins the other oft-heard complaint of monarchists, namely, that we are, in *substance*, already a "crowned republic" and have, in the Governor-General, an Australian head of state. No change is therefore necessary because what the republicans demand is already at hand. I do not wish to dispute directly such claims here. However, given the concerns of this article, it is worth briefly examining some of the reasons we may have for deeming amendments necessary, as this links up with the issues of the sort of criteria which are legitimately available to evaluate the Constitution's success and, also, to the role amendment provisions can play in the democratic legitimation of an imperfect Constitution.

Sanford Levinson has recently suggested that a textual addition or subtraction from the constitutional text may not in truth be an *amendment* to the Constitution, but rather might simply be a *declaration* or *recognition* of what was already there (perhaps when interpreted in its best light).[36] On this view, genuine amendment occurs only where there are changes made which are *necessary* to alter "the pre-existing legal reality". Levinson cites the Fifteenth and Nineteenth Amendments to the Constitution of the United States — amendments prohibiting laws abridging voting rights on the basis of race and sex — as examples of textual alterations which were not strictly speaking necessary by reference to the interpretation of the Fourteenth Amendment's equality guarantees then accepted by the Supreme Court. Given divergent or vague interpretations of a constitutional text, there may, of course, be disputes about what is

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35 As Jeremy Waldron has explained, we sometimes have the right to do wrong, the right to do what we *ought* not do: see "A Right to do Wrong" (1981) 92 *Ethics* 21-39. Where rights protect an area of personal or collective choice, it thus makes perfect sense to argue that a particular exercise of those rights is foolish, immoral or unjust.

36 S Levinson, "How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change" in S Levinson, above n 1 at 26.

in fact necessary.[37] But the point I wish to argue for here is that it would be unwise to take a narrow view about what is and what is not necessary when it comes to making amendments. Lawrence Lessig gives part of the explanation:

> "Necessity" is a pragmatic as well as a logical question. It might be that an amendment is necessary when something new is added, but ... there may be other reasons why it is necessary as well. A constitutional text is significant not just because of its particular substantive content; it is significant as well for its democratic pedigree. Even if the substantive content of an amendment's text is the same as the substantive content of the unamended Constitution, there may still be a need for that amendment — in particular, when there is a need to link that substantive content to a properly democratic pedigree.[38]

Consider, for instance, Michael Detmold's somewhat premature claim, based on the High Court's decision in *Leeth v Commonwealth*,[39] that "[w]e now have everything that a written Bill of Rights could give us".[40] Assuming that Detmold's interpretation of the constitutional position was correct when suggested, might not there still be good reasons to amend the Constitution to better reflect this position?[41] Surely there is a strong argument to be made that, in addition to the symbolism of constitutional statements of rights and freedoms which publicly and solemnly affirm particular values (often in response to historical injustices), there are sometimes tangible democratic benefits to be had. In the context of contemporary constitutional theory in Australia, where the High Court has accepted that all political power is derived from the Australian people, a direct acknowledgment or confirmation of a diagnosis such as Detmold's in a referendum may well be necessary to make its substance tenable or meaningful. And in the context of the judicial activism debate, it might also serve to relieve some of the institutional pressure carried by the High Court.

CONCLUSION

It seems to me that similar reasons, relating to the "necessity" of gaining formal democratic credentials, are often behind Australians' desire for a republic and an Australian head of state. Such reasons should not be lightly dismissed. As Brennan CJ has recently stated, "Constitutions are made for a people and a time".[42] In assessing whether or not the Constitution should be amended, it is not *merely* a matter of examining how well its forms and institutions create stable democratic governance as

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37 Note, however, that Dworkin has long rejected the view that hard cases do not have a "right" answer, notwithstanding the Olympian nature of Dworkinian adjudication: see "No Right Answer?" in P Hacker and J Raz, *Law, Morality and Society: Essays in Honour of HLA Hart* (1977); *Taking Rights Seriously* (1978) at 279-290 and 331-345; and R Dworkin, above n 27 at 266-275.

38 L Lessig, above n 10 at 845.

39 (1992) 174 CLR 455.

40 M J Detmold, "The New Constitutional Law" (1994) 16 *Syd LR* 228 at 248.

41 Assuming also, for current purposes, that we want the substance of a Bill of Rights. It should be noted that part of Detmold's argument is that there are considerable advantages to be had by avoiding textual constraints on our freedoms, which he sees as best protected under a common law approach to adjudication: ibid.

42 G Brennan, "The Parliament, the Executive and the Courts: Roles and Immunities" (Address delivered at School of Law, Bond University, 21 February 1998).

compared with the risks of alternative constitutional arrangements.[43] The calculus may certainly be extended to asking how well the Constitution protects the plurality of our principles and the extent to which it reflects and fosters our diverse aspirations. In making such judgments in the context of assessing the wisdom of the current push for a republic, sensible debate is considerably hampered by the monarchist's misguided maxim, "If it ain't broke, don't fix it".

The maxim's apparent simplicity belies ambiguities of meaning which monarchists seem reluctant to confront. Clearly, those wishing to invoke the underlying argument must do a much better job of explaining exactly how this argument is supposed to work; the maxim does not speak for itself. However, for reasons I have explained, the reluctance to fill in the blanks of the argument is understandable — the various notions of brokenness which it may be interpreted as adopting, along with the implausibility and unattractiveness of any underlying assumption of constitutional perfection, all point out the argument's manifest weaknesses. In the lead up to the planned referendum on the republic, it is to be hoped that we hear considerably less of an argument which has begun to play like a broken record.

43 In assessing the risks of alternatives it is important to remember that successful constitutional government presupposes certain cultural conditions. (Cf J Raz, "The Politics of the Rule of Law" (1990) 3 *Ratio Juris* 331.) As such, how well particular arrangements suit a particular polity, given its history (told from various perspectives), institutions and political culture, is always an important question.