Federal Law Review (2026), **54**, e6, 1–23
doi:10.1017/fed.2026.10020

RESEARCH ARTICLE

Uncertainty and Risk as an Argument against Constitutional Amendment

Scott Stephenson

The University of Melbourne, Melbourne Law School, Australia
Email: scott.stephenson@unimelb.edu.au

(Accepted 6 October 2025 UTC)

Abstract

In 2023, the Australian people were asked to vote on a proposal to amend the *Constitution* to establish an Aboriginal and Torres Strait Islander Voice. A major argument advanced against the proposal was the uncertainty and risk associated with it. This article evaluates the argument's role in relation to the referendum and in relation to constitutional amendment more generally. It analyses why this type of argument is deployed in public debate, the constitutional values and assumptions embedded in the argument, and what it portends for future efforts to amend the *Constitution*. The article contends that the argument and its use merit careful attention in part because it can risk constitutional stasis and engender institutional distrust among the public.

Keywords: Australian constitutional law; constitutional amendment; constitutional theory; the voice; uncertainty and risk

I. Introduction

In 2023, the Australian people were asked to vote on a proposal to amend the *Constitution* for the first time in over two decades. In the lead up to the vote, the uncertainty and risk associated with the proposed amendment — to establish a body ('the Voice') that would allow Aboriginal and Torres Strait Islander peoples to make representations to government — was a major point of contention. There was debate over, for instance, whether the new constitutional provision would be justiciable and how the Voice would interact with the complex body of administrative law found in the common law, statute, and the *Constitution*.

Remarkably, these technical legal questions were not confined to debate within the legal community. For a period in 2023, justiciability — a topic which few lawyers, let alone members of the public, care about — was headline news in

© The Author(s), 2026. Published by Cambridge University Press on behalf of Australian National University. This is an Open Access article, distributed under the terms of the Creative Commons Attribution-NonCommercial licence (http://creativecommons.org/licenses/by-nc/4.0), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original article is properly cited. The written permission of Cambridge University Press or the rights holder(s) must be obtained prior to any commercial use.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

Australia.[1] The very first reason put forward for voting 'no' to the proposal that was published in the official referendum pamphlet distributed to almost 16 million voters was 'This Voice is legally risky'.[2] The pamphlet went on to say 'Legal experts don't agree, and can't know for sure, how the High Court will interpret such a constitutional change.'[3] The Australian people rejected the proposed amendment at a referendum, with approximately 60% of electors voting no and 40% voting yes. The result now means that the *Constitution* has not been amended in almost half a century.

The purpose of this article is to examine uncertainty and risk as an argument against constitutional amendment. It seeks not only to tell the story of its role in relation to the Voice, but also to understand why this type of argument is deployed in public debate, the constitutional values and assumptions embedded in the argument, and what it portends for future efforts to amend the *Constitution*. It contends that the argument has several characteristics that help explain some of the confusion that arose during the campaign on the Voice and the difficulty of debating questions of uncertainty and risk. It also suggests that Australia is particularly vulnerable to this sort of argument due to the extent to which the *Constitution* is entrenched. While this article does not argue that uncertainty and risk are never legitimate causes for concern, this article posits that uncertainty and risk arguments carry dangers with them. In particular, the argument contributes to constitutional stasis — a result that, paradoxically, makes the concerns about uncertainty and risk even worse — and feeds off, and even exacerbates, distrust in government.

Part II of this article explains the proposal to amend the *Constitution* to establish the Voice and the ways in which it was designed to minimise uncertainty and risk. Part III sets out how uncertainty and risk were nevertheless used in argument against it. Part IV evaluates the argument's assumptions and characteristics, suggesting, among other things, that it is two arguments rather than one and that it is built upon several contestable premises. Part V then looks forward and examines the implications of the argument. Part VI concludes.

II. The Voice

The Voice was a proposal to amend the *Constitution*, put to the Australian people at a referendum in October 2023. In accordance with the *Constitution*'s amendment procedure set out in s 128, to succeed the proposal needed to be approved by a majority of voters nationwide as well as a majority of voters in a majority of states. The proposal met neither threshold. Indeed, it failed to attain a majority in any state. To understand how uncertainty and risk were used as an argument against the proposal, it is necessary to first consider the proposal in some detail.

[1]See, eg, Michael Pelly and Tom McIlroy, 'The High Court Judges Split over the Voice', *The Australian Financial Review* (online, 3 March 2023) <https://www.afr.com/politics/federal/the-high-court-judges-split-over-the-voice-20230227-p5cnzq>; Rosie Lewis, 'Voice Control: Albanese at Odds with Experts', *The Australian* (online, 29 March 2023) <https://www.theaustralian.com.au/nation/indigenous/anthony-albanese-at-odds-with-experts-over-indigenous-voice-to-parliament/news-story/25cd0059c76e4db5d1d141bedb4cd458>.

[2]Australian Government, *Your Official Yes/No Pamphlet* (Referendum Pamphlet, 2023) 7.

[3]Ibid.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

The proposed amendment would have established a body to represent Aboriginal and Torres Strait Islander peoples. It would have inserted a new provision into the *Constitution* that had three sub-sections. The first stated that 'there shall be a body … called the Aboriginal and Torres Strait Islander Voice', the second provided that the Voice 'may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples', and the third gave the Commonwealth Parliament the power 'to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures'.[4]

Both the history and text of the proposed amendment indicated that the Voice was designed to minimise the amount of uncertainty and risk it would pose to Australia's existing constitutional system of government. Beginning with the history, the idea of amending the *Constitution* to establish a body that would facilitate the participation of Aboriginal and Torres Strait Islander peoples in public decision-making processes on Indigenous affairs had been under development for more than a decade.[5] In 2012, the Expert Panel on Constitutional Recognition of Indigenous Australians considered a set of submissions from the Cape York Institute to create a mechanism 'to manage the interface between indigenous Australians and governments intending to pass laws for their benefit'.[6] The idea was discussed in greater detail in the 2015 report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.[7] Importantly, the Cape York Institute and its Chair, Noel Pearson, made a number of submissions about its design that relate to uncertainty and risk and that would remain relevant to the proposal as it was developed in subsequent years.

First, the body's role would be to *advise* government in its decision-making rather than take over decision-making from government.[8] Second, the intention was that the body would align with, rather than disrupt, the existing system of government. Noel Pearson said that '[t]his could be a procedural amendment, in keeping with the nature of the *Constitution* as a practical and pragmatic charter of government'.[9] Academic Cheryl Saunders similarly stated that '[i]t fits with the distinctive focus of the *Australian Constitution* on institutions and the organisation of power as the principal tools for ensuring compliance with principles of constitutionalism'.[10] Third, the body's advice would not be binding on the Parliament and would not interfere with its lawmaking power. Noel Person said that:

[4]Australian Government (n 2) 2.

[5]It should be noted that the broader idea of achieving greater Indigenous participation in Australia's system of government spans almost a century: Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs' (2015) 26(3) *Public Law Review* 166, 171–2.

[6]Expert Panel, Commonwealth, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (16 January 2012) 185.

[7]Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Commonwealth, *Final Report* (June 2015) 33–8 ('Joint Select Committee 2015 Report').

[8]Ibid 34.

[9]Ibid.

[10]Ibid.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

> the advice of the Indigenous body is highly persuasive and authoritative, but not binding on Parliament. It would not constitute a veto over Parliament's law making. It would therefore not derogate from parliamentary sovereignty in any way.[11]

Fourth, the proposal would be, as the Cape York Institute submitted, 'non-justiciable: it does not transfer power to the courts (but it should not contain an unattractive "non-justiciable" or "no legal effect" style clause)'.[12]

The text of proposed amendment put to the people in October 2023 would have established an institution that did not have the constitutional power to delay, veto, alter or otherwise interfere with decisions taken by the three arms of government. The proposal would not have required the executive or the Parliament to follow, consider, request or even acknowledge the Voice's representations before taking action. It would have given no new powers to the judiciary. It would not have required the executive or the Parliament to compose, structure or fund the Voice in a particular manner. It would not have ceded sovereignty to Aboriginal and Torres Strait Islander peoples or committed the executive or the Parliament to a process of treaty-making with Aboriginal and Torres Strait Islander peoples.

As a result, the proposal aligned with the existing constitutional system of government in several important respects. First, it left the Parliament responsible for legislative decision-making on Indigenous affairs. The Voice would have provided advice to the Parliament, but any influence it would have on the lawmaking process would be as a result of its moral and political standing, not any constitutional mandate. In this way, the proposal aligned with the principles of representative and responsible government in that the Parliament can and does consult widely through a variety of formal and informal mechanisms when making law, but is not bound to follow the advice of any of them if it so chooses. The Voice would have served as another consultative mechanism.

Second, the proposal left the Parliament with broad discretion to constitute the Voice as it saw fit. Most institutions established by the *Constitution* contain little detail about how they are to be structured and operated.[13] Most details are determined by the Parliament in statute, which allows them to be changed through the ordinary lawmaking process from time to time as circumstances change. The same arrangements would have applied in respect of the Voice.

Third, the proposal did not envisage any alteration to the distribution of power between the three arms of government. In particular, it did not seek to expand judicial power or to diminish executive and legislative power. The proposal stood in contrast to many alternatives that had been suggested at various points in the recognition process that would have effected such a change. A prominent example was the proposal to insert a clause into the *Constitution* that would have prohibited the Commonwealth, States and Territories from discrimination on the ground of race, colour or ethnic

[11] Ibid 35.

[12] Ibid.

[13] See, eg, the provisions relating to the High Court (*Constitution*, ss 71–6) or the Inter-State Commission (*Constitution*, s 101).

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

or national origin.[14] That proposal would have expanded judicial power by allowing courts to invalidate executive and legislative acts that were found to amount to prohibited discrimination. This concern was reflected in criticisms of this proposal being a 'one clause bill of rights'.[15]

The Attorney-General for the Commonwealth asked the Solicitor-General to provide legal advice on, among other things, whether the proposed amendment was 'compatible with Australia's system of representative and responsible government established under the Constitution?'.[16] In a detailed advice, the Solicitor-General concluded that '[t]he proposed amendment is not only compatible with the system of representative and responsible government established under the *Constitution*, but it enhances that system.'[17]

Consequently, the proposal to establish the Voice was not one that self-evidently invited criticism from the perspective of uncertainty or risk. In comparison to the proposal to adopt a non-discrimination clause, the Voice proposal was not seeking to give new powers to the judiciary, which would have raised obvious questions of uncertainty relating to how the courts might interpret it. In comparison to previous proposed amendments to the *Constitution* such as the establishment of a republic,[18] the proposal was not seeking to reconstitute one or more arms of government, which would have raised obvious questions relating to the risks associated with it.

In light of this background, two questions are raised. What arguments related to uncertainty and risk were made by opponents of the Voice? Why did these arguments play such a prominent role in the debate about the proposal? Part III considers the former while Part IV considers the latter.

III. The Arguments about Uncertainty and Risk

In addition to being the first argument for the 'no' side in the pamphlet distributed to voters, uncertainty and risk featured prominently in public statements made by the most high-profile advocates against the proposal. Leader of the Opposition Peter Dutton stated that 'this constitutional change is risky.'[19] Senator Jacinta Nampijinpa Price described the Voice as a 'risky proposal to be enshrined forever in the *Constitution*' that was 'full of unknowns'.[20] Former

[14]See, eg, Joint Select Committee 2015 Report (n 7) 43 (recommendation 5).

[15]See Shireen Morris, 'Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-Discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition' (2015) 40(2) *Monash University Law Review* 488, 495.

[16]Mark Dreyfus, Submission No 64 to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (21 April 2023) [8].

[17]Ibid [11].

[18]*Constitution Alteration (Establishment of Republic) 1999* (Cth).

[19]Peter Dutton, 'Why Australians Should Vote No in the Upcoming Voice Referendum', *The Daily Telegraph* (online, 22 September 2023) <https://www.dailytelegraph.com.au/news/national/peter-dutton-reveals-why-australians-should-vote-no-in-the-upcoming-voice-referendum/news-story/cf19a1ce0979a41e52249a02fde5e510>.

[20]Parliament of Australia, *Parliamentary Debates*, Senate, 19 June 2023, 2581–2 (Jacinta Nampijinpa Price).

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

High Court Justice Ian Callinan wrote that '[t]here is little clarity about what is proposed.'[21]

Uncertainty and risk were not, however, simply a slogan used to campaign against the Voice. A number of academics raised questions about the operation of the proposed amendment that touched on the themes of uncertainty and risk in parliamentary submissions and scholarly papers.[22] Indeed, it was not possible to contend, reasonably and in good faith, that the Voice was *completely* free from all uncertainty and risk. That was particularly the case because it was a proposal for substantive constitutional reform. It was not designed to be purely symbolic, in comparison to, for instance, a modification to the Preamble to the *Constitution*.[23]

It was, therefore, possible to point to several aspects of the proposal that generated points of uncertainty and risk, each of which is set out below. The responses to them will also be considered. In addition to the Solicitor-General's legal advice mentioned above, a number of scholars and barristers wrote publications addressing each dimension of the argument.[24] The purpose of this article is not to relitigate the debate or offer an opinion on which side had the stronger argument. Instead, the purpose is to illustrate how uncertainty and risk was deployed in debate and to provide the foundations for an analysis of the argument's characteristics and premises in Part IV.

A. Lack of detail

One source of alleged uncertainty was the lack of detail about the structure and operation of the Voice.[25] The claim was that the proposed model for the Voice — how many members there would be, the appointment process for members, the resources that

[21] Ian Callinan, 'Examining the Case for the Voice — An Argument Against', *The Australian* (online, 17 December 2022) <https://www.theaustralian.com.au/inquirer/examining-the-case-for-the-voice-an-argument-against/news-story/e30c8f2ffcbae73eaa3921e82bf174a9>.

[22] See, eg, Nicholas Aroney and Peter Gerangelos, Submission No 92 to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (2023); Nicholas Aroney and Peter Congdon, 'The Voice Referendum and the Federal Division of Powers: A New Head of Commonwealth Legislative Power to Implement the Voice's Representations?' (Paper, 31 October 2023) <https://ssrn.com/abstract=4589764>.

[23] See, eg, *Constitution Alteration (Preamble) 1999* (Cth).

[24] See, eg, Gabrielle Appleby, Sean Brennan and Megan Davis, 'Constitutional Enshrinement of a First Nations Voice: Issue Papers 1: The Constitutional Amendment' (Discussion Paper, UNSW Indigenous Law Centre, September 2022); Gabrielle Appleby, Sean Brennan and Megan Davis, 'Constitutional Enshrinement of a First Nations Voice: Issue Papers 2: The Referendum Question' (Discussion Paper, UNSW Indigenous Law Centre, September 2022); Gabrielle Appleby, Sean Brennan and Megan Davis, 'Constitutional Enshrinement of a First Nations Voice: Issue Papers 3: Finalisation of the Voice Design' (Discussion Paper, UNSW Indigenous Law Centre, September 2022); Craig Lenehan, 'The Voice: imagined legal problems distract from the substance', *AusPubLaw* (Blog Post, 10 May 2023) <https://www.auspublaw.org/blog/the-voice-imagined-legal-problems-distract-from-the-substance>; Scott Stephenson, 'Is the Voice Too Uncertain or Risky?', *AusPubLaw* (Blog Post, 17 April 2023) <https://www.auspublaw.org/blog/2023/4/is-the-voice-too-uncertain-or-risky>; Elisa Arcioni and Andrew Edgar, 'The Voice and the Executive', *AusPubLaw* (Blog Post, 31 March 2023) <https://www.auspublaw.org/blog/2023/3/the-voice-and-the-executive>.

[25] James Massola, Anthony Galloway and Lisa Visentin, '"Building Bewilderment" at Lack of Voice Detail, Dutton Says', *The Sydney Morning Herald* (online, 2 December 2022) <https://www.smh.com.au/politics/federal/building-bewilderment-at-lack-of-voice-detail-dutton-says-20221201-p5c2yp.html>.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

would be provided to it, the processes it would follow, etc — needed to be released to the public ahead of the referendum so that the people would know what they were voting on. The First Nations Referendum Working Group released a set of design principles prior to the referendum, which contained broad guidance on how the Voice would be structured, for example, stating that members would be selected by Aboriginal and Torres Strait Islander communities, not the executive, and would serve for a fixed period of time to ensure regular accountability to their communities.[26] However, this document did not reduce the calls for more detail.[27]

The counter-claim was that leaving finalisation of the details of the Voice until after the referendum was the ordinary and logical way of proceeding. The proposed constitutional amendment provided for a two-stage process. The amendment provided for the establishment of the institution. It also provided that the details of the institution would subsequently be determined by the Parliament. That meant the amendment provided for two separate votes — a vote of the people to approve the establishment of the institution and a vote of the Parliament to approve the details of the institution. It also meant the two votes had to occur in that order — the Parliament would not be granted the power to determine the institution's details until the people had voted to approve the amendment that gave the Parliament that power. This two-stage approach follows how other constitutional institutions operate. In the 1890s, the Australian people did not know the full details of the executive, the Parliament and the High Court when they were voting to approve the proposed constitution.[28] They were voting on a text that established a set of new Commonwealth institutions and gave the Parliament the power to determine most details of these institutions, which were settled in subsequent votes in the Parliament. The fact that the approach adopted in relation to the Voice resembles what had occurred elsewhere in the *Constitution* and follows a logical order undercut the suggestion it was uncertain or risky.

However, there was a sharper rejoinder to the call for more detail — that the call itself was an attempt to create uncertainty. The two-stage process exists for a reason. Separating an institution's establishment from its configuration allows the Parliament to reconfigure the institution as circumstances change. It is an important feature of Australia's constitutional system of government that the Parliament has been able to alter, for example, the details of the High Court — the number of judges, its jurisdiction, etc — as the demands placed on it have changed.[29] The same applies to the Voice. Leaving the details to the Parliament would have allowed its configuration and

[26]First Nations Referendum Working Group, 'Design Principles of the Aboriginal and Torres Strait Islander Voice', *Australian Government: the Voice* (Web Page, 2023) <https://webarchive.nla.gov.au/awa/20230929160619/https://voice.gov.au/about-voice/voice-principles>.

[27]See, eg, Stacey Eldridge, '"Australians Are Entitled to Know": John Howard Slams Lack of Voice to Parliament Detail as "Patronising and Insulting"', *Sky News* (online, 14 September 2023) <https://www.skynews.com.au/australia-news/voice-to-parliament/australians-are-entitled-to-know-john-howard-slams-lack-of-voice-to-parliament-detail-as-patronising-and-insulting/news-story/905ccf424fcab744180afab7500ce061>.

[28]There were some details of the institutions in the proposed constitutional text, but the details beyond those contained in the text were not shared with the people because they had not been finalised.

[29]See, eg, the history of changes that have been made to the *Judiciary Act 1903* (Cth) and *High Court of Australia Act 1979* (Cth).

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

functions to be altered in order to, for instance, improve its effectiveness and accountability. Calling for details of the Voice prior to the referendum helped *create* uncertainty because any details that were released would not be binding on the Parliament. If, for example, the government had said the Voice would be comprised of 15 members, there was nothing in the constitutional text stopping the Parliament from establishing the Voice with 30 members. It would have created uncertainty by inviting questions about, for example, why were the details announced prior to the referendum if they were not going to be followed by the Parliament? Discussing details prior to the referendum would have risked confusion by talking about issues to be resolved in relation to the second vote — the Parliament's vote to approve the Voice's details — during the context of the first vote — the people's vote to establish the Voice.

B. Justiciability

A second source of alleged uncertainty was the justiciability of the Voice. As mentioned above in Part I, a principle emphasised during the development and design of the proposed amendment was that the Voice be 'non-justiciable'.[30] In 2017, the Referendum Council recommended that the Voice 'would not be justiciable' in the sense that it 'would not interfere with parliamentary supremacy' and 'the details of its structure and functions would be established by Parliament through legislation that could be altered by Parliament'.[31] In 2018, the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples noted that one theme of the proposed drafts put to it was that the Voice's 'structure and functions [should be] non-justiciable'.[32] In 2021, the Indigenous Voice Co-Design Process 'affirm[ed] that non-justiciability is an essential feature of the overall design',[33] by which it meant that 'alignment with the [consultation] standards could not be challenged in court and could not legally affect the validity of legislation or policies.'[34]

The uncertainty came from the fact that, in a strict sense, the amendment would not be — and, indeed, could not be — non-justiciable.[35] Justiciability is a complex, multidimensional concept that implicates a number of constitutional relationships.[36] During the development and design phases of the Voice, justiciability was primarily used to refer to the relationship between the Parliament and the judiciary. The desire to ensure the Voice would be non-justiciable was a desire to ensure that legislation, including legislation regulating the structure and functions of the Voice, could not be invalidated by a court for failing to heed the Voice's representations. While the proposed amendment sought to ensure that was the case, it was still possible that this legislation

[30] Aspects of this section are taken from [removed for peer review].

[31] The Referendum Council, *Final Report of the Referendum Council* (June 2017) 38.

[32] Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) 95.

[33] Indigenous Voice, *Indigenous Voice Co-Design Process: Final Report to the Australian Government* (July 2021) 167

[34] Ibid 159.

[35] See, eg, Callinan (n 22).

[36] Scott Stephenson, 'Justiciability and the Voice' (2023) 34(1) *Public Law Review* 21.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

would have been justiciable in some rare cases. For example, if the Parliament enacted legislation constituting the Voice in a way that could not possibly meet the description of an 'Aboriginal and Torres Strait Islander Voice' (eg it was comprised of a single non-Indigenous person), it was possible the courts may entertain a challenge to the legislation on this basis.[37] There was, therefore, some uncertainty about this type of justiciability.

More significantly, this understanding of non-justiciability did not touch on the relationship between the executive and the judiciary. In respect of that relationship, it was possible to make a much stronger claim that the Voice would be justiciable. If the Parliament enacted legislation granting the executive the power to, for example, recognise and protect Indigenous heritage and indicated that the Voice's representations on the subject were relevant to the executive's powers on that subject, the Voice's representations would be justiciable. It would be possible to bring an administrative law challenge in court if the executive failed to take the Voice's representations into account on the basis that they had failed to take account of a relevant consideration. Some arguments went further, suggesting that, as executive decisions can be reviewed on administrative law grounds that are inferred rather than expressly set out in legislation, there would be decades of litigation to determine when and to what extent the Voice's representations needed to be considered by the executive.[38] Put alternatively, not only would the amendment be justiciable, it would create many justiciable controversies because there would be uncertainty over its administrative law implications.

Proponents of the Voice had to concede that, in relation to administrative law, the Voice would be justiciable.[39] The counter-claim thus had to focus on the degree of uncertainty created by this type of justiciability.[40] It stressed that the relationship between the Voice and executive decision-making would be determined in accordance with well-established principles of administrative law. Furthermore, the principles of administrative law state that, when determining when the executive would need to consider the Voice's representations, the statute that conferred power on the executive to make the decision assumes prime importance.[41] Therefore, when assessing the degree of uncertainty that would be created, it needed to be remembered that any justiciability would be determined in accordance with longstanding legal principles and those principles give primacy to the statute that confers power on the executive. That meant the degree of uncertainty or risk that would be constitutionally entrenched would not be as significant as some supposed — even if an aspect of the Voice's representations

[37] Aroney and Gerangelos (n 23) 6–7.

[38] See, eg, Callinan (n 22).

[39] See, eg, Kenneth Hayne, 'Fear of the Voice Lost in the Lack of Legal Argument', *The Australian* (online, 28 November 2022) <https://www.theaustralian.com.au/commentary/fear-of-the-voice-lost-in-the-lack-of-legal-argument/news-story/9696d03a566d3d946a74b7035175a9e4>.

[40] See, eg, Elisa Arcioni and Andrew Edgar, 'The Voice: A Constitutional and Administrative Law Perspective', *Law Society Journal* (Web Page, 2 June 2023) <https://lsj.com.au/articles/the-voice-a-constitutional-and-administrative-law-perspective/>.

[41] See, eg, *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 133 [24] (Kiefel CJ, Gageler and Keane JJ).

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

were held to be justiciable, it could be adjusted by the Parliament through the ordinary lawmaking process by adjusting the powers conferred on the executive.

C. The High Court

The High Court was considered by some people to be an important source of risk with the proposed amendment.[42] The argument was that the Court has been known to depart from the text of the *Constitution* in ways that expand limits on executive and legislative power. The Court's implied freedom of political communication case law and its decision in *Love; Thoms*[43] were cited as examples of this move.[44] The risk, on this argument, was that the Court might construe the proposed amendment in ways that appear to be contrary to the intent or original understanding of the provision, for example, interpreting it to require the executive or even the Parliament to consult the Voice before taking action on Indigenous issues. As a result, the proposed amendment could bring about a change to Australia's system of government that was more far reaching and more restrictive of executive and legislative power than was originally envisaged.

One counter-claim was to challenge the premise of the argument. The risk identified in the argument presumes the High Court has a history of departing from the text of the *Constitution*. In the abovementioned examples, it could be argued that the text is not definitive one way or the other. It is possible that ss 7 and 24 could be read as requiring freedom of political communication to ensure that the words 'directly chosen by the people' mean the choice is a genuine one and that certain prerequisites are required for it to be genuine. It is possible that s 51(xix) could be read as meaning that an 'alien' cannot mean someone who is indigenous to the country. As a result, the view that the High Court has a history of departing from the text relies on a particular interpretation of that text — that the text should be interpreted as not requiring a freedom of political communication or an understanding of 'alien' that excludes Indigenous persons. These interpretations are generally derived from an originalist approach to interpretation.[45] Originalism is only one possible approach — it is not accepted by all lawyers, scholars or judges.[46] As a result, the risk identified in relation to the High Court might not be

[42] See, eg, James Allan, 'Very High Risk, Very Low Reward: This Voice Referendum Deserves to Be Defeated' (2023) 97(6) *Australian Law Journal* 411, 411–3.

[43] *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152.

[44] See, eg, Allan (n 44) 413; Chris Merritt, 'Voice to Parliament Too Vague to Support', *The Australian* (online, 4 November 2022) <https://www.theaustralian.com.au/business/legal-affairs/proposed-voice-change-to-constitution-too-vague/news-story/4da8e8c9cab1bc610c4b878cfd14c84b>; Morgan Begg, 'Voice Activists Speaking Out of Both Sides of Their Mouth', *Spectator Australia* (online, 11 March 2023) <https://www.spectator.com.au/2023/03/voice-activists-speaking-out-of-both-sides-of-their-mouth/>.

[45] See Allan (n 44) 412; James Allan, 'In Honor of a Simple-Minded Originalist' (2019) 34 *Constitutional Commentary* 401.

[46] See, eg, Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455. In relation to the implied freedom of political communication specifically, see Geoffrey Nettle, 'Whither the Implied Freedom of Political Communication?' (2021) 47(1) *Monash University Law Review* 1.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

considered a risk if one does not accept that originalism is the correct approach to constitutional interpretation.

A second counter-claim was to consider the likelihood of the risk eventuating. Even if one accepts *arguendo* the premise of the argument, there is a separate question of how likely the High Court would be to depart from the text of the proposed amendment in a way that expand limits on executive and legislative power. The Court's case law provides ample evidence to mount the argument that its tendency has been *not* to expand limits on executive and legislative power.[47] Even employing the strongest evidence to the contrary (the development of the implied freedom of political communication), the Court has only struck down legislation for incompatibility with the doctrine on a handful of occasions over the three decades it has been in existence.[48] It has, on this view, not been a significant curtailment on the exercise of executive and legislative power.

D. Entrenchment

Finally, the fact that the Voice would be constitutionally entrenched was said to present a risk that, if anything went wrong with the Voice, it would be difficult to rectify. In this regard, entrenchment was an argument that built on and strengthened the preceding three arguments. If issues arose from the lack of detail, justiciability or the High Court interpreting the provision in a problematic manner, they would be more difficult to address because it might require further amendment, and amendment is no small task. This risk was commonly underscored by suggesting that a safer option existed — enacting the Voice as an ordinary statute — and that this option should be tried first before considering constitutional entrenchment.[49]

The first response to this argument was to emphasise how little of the Voice would be entrenched — only its establishment and its power to make representations to the executive and the Parliament. All other aspects of the Voice would be determined by ordinary statute. Indeed, it was not even clear if the existence of the Voice would be constitutionally entrenched. There was some precedent to suggest that the Parliament might be able to abolish the Voice at some point in the future. The Inter-State Commission was also established by the *Constitution* and later abolished by the

[47] One could point to the interpretation of the heads of legislative power (see, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1; *New South Wales v Commonwealth* (2006) 229 CLR 1), the provisions for the distribution of financial resources (see, eg, *South Australia v Commonwealth* (1942) 65 CLR 373; *Vanderstock v Victoria* [2023] HCA 30) or the curtailment of implied limitations on power (see, eg, *Austin v Commonwealth* (2003) 215 CLR 185).

[48] After the initial decisions establishing the doctrine (*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1), many challenges have been brought, but few have succeeded: see George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2013) 162–3; Kieran Pender, 'The Status of Free Speech in Australia', *The Saturday Paper* (online, 1 October 2022) <https://www.thesaturdaypaper.com.au/opinion/topic/2022/10/01/the-status-free-speech-australia>. For examples of successful challenges since *Australian Capital Television* and *Nationwide*, see *Coleman v Power* (2004) 220 CLR 1; *Unions NSW v New South Wales* (2012) 252 CLR 530; *Brown v Tasmania* (2017) 261 CLR 328.

[49] See, eg, Paul Kelly, 'Division Is No Path to Reconciliation', *The Australian* (online, 27 May 2023) <https://www.theaustralian.com.au/inquirer/division-is-no-path-to-reconciliation-via-the-indigenous-voice-to-parliament/news-story/b48c599822686f80098a83d05722b57f>.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

Parliament.[50] As no court challenge was brought following its abolition, there is no High Court decision on whether its abolition was constitutionally valid or not. At the very least it shows that it is possible to envisage a scenario whereby even the Voice's existence is not entrenched — where it is abolished by the Parliament decades into the future and, due to a lack of constituency in support of its continuation, no challenge is brought to that act of abolition. Furthermore, even if formal abolition were not constitutionally permissible, the executive and the Parliament could significantly curtail its activities through, for example, altering the amount of funding it was granted or reducing the amount of administrative support it received. In other words, entrenchment would do very little to constrain the ability of the political process to control the Voice's fate.

The second response to this argument was to emphasise that the vote of the Australian people should be respected. The Labor Party went to the 2022 federal election with a campaign pledge that, '[i]f elected, we will move quickly on a referendum to enshrine a Voice to Parliament in our Constitution.'[51] As the Labor Party was able to form government following the 2022 federal election, the pursuit of this change by means of constitutional amendment rather than statute was in line with the vote of the Australian people. Furthermore, the constitutional — as opposed to statutory — model also demonstrated respect for the Australian people by giving them the opportunity to have a direct say on their constitutional system of government.

IV. The argument's characteristics and premises

From the foregoing, it is possible to see that uncertainty and risk as an argument against constitutional amendment has a number of important characteristics and is built on a number of key premises about the *Constitution* and the system of government it establishes. These characteristics and premises go to the relevance and strength of the argument as well as its implications for the future of constitutional reform in Australia. They also help explain why uncertainty and risk played such a prominent role in the debate. This part of the article evaluates these aspects of the argument.

A. Form versus substance

Uncertainty and risk can be an argument against the substance of a proposed constitutional change as well as an argument against its form. For instance, if a system of government did not have a bill of rights, one might oppose the introduction of one on the basis of its substance, for example, that it would create greater uncertainty about the people's rights and duties because bills of rights typically have language that is ambiguous and open to disagreement about its meaning in precise circumstances. However, one could also support the introduction of a bill of rights, but oppose the particular form that it would take. For example, one could argue against the introduction of a *statutory* bill of rights, but support a *constitutional* bill of rights on the basis that there

[50]For a full history of the Commission, see Stephen Gageler, 'The Inter-State Commission and the Regulation of Trade and Commerce under the Australian Constitution' (2017) 28 *Public Law Review* 205.

[51]Australian Labor Party, *Labor's Commitment to First Nations Peoples* (Policy Report, 18 May 2022) 3.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

is greater uncertainty as to whether a statutory model would be effective because it risks running up against existing constitutional doctrines that limit the ability to bring about constitutional change by means of statute.[52]

While the distinction between substance and form will not always be clear cut, it is important to make given that they touch on different concerns. Uncertainty and risk as an argument against the substance of a particular constitutional proposal relates to the merits of that proposal, can be offset by speaking to benefits of the proposal, and might be ameliorated through alterations to specific features of the proposal. By contrast, uncertainty and risk as an argument against the form of a proposed change relates to specific features of the constitution, cannot be offset by speaking to the merits of the proposal, and is less likely to be ameliorated by altering the proposal.

This distinction was an important feature of the debate about the Voice. Many people invoked uncertainty and risk as an argument against the decision to establish the Voice *by means of constitutional amendment*. They stated their concern was not with the proposal's substance (ie a body comprised of Aboriginal and Torres Strait Islander peoples that made representations to the executive and the Parliament). Indeed, many of these people claimed to support this type of reform.[53] Instead, their concern was with the form the proposal would take (ie that it would be established through an amendment to the *Constitution* rather than an ordinary statute). As a result, their concern could not be addressed by speaking to the merits of, or proposing to modify, the substance of the proposal — indeed, they purported to agree with the substance.

The use of uncertainty and risk as an argument against the form rather than substance of a proposal has a number of implications. First, it is a portable argument that can be deployed against a wide range of possible constitutional amendments.[54] As it is not tied to the substance of the proposal, it has broad applicability. Even a proposed amendment that purports to have no substantive effect, such as a modification to the Preamble to the *Constitution*, could be challenged on this basis. The argument would be that the proposal's form is objectionable because, if the High Court used the Preamble to interpret a constitutional provision in a problematic way, it would be difficult to reverse due to it being entrenched in the *Constitution* — it would be safer to place the preambular language in an ordinary statute so that it can be changed from time to time.

Second, it can be used to avoid engagement with the substance of the proposal. For someone who is opposed to the substance of a proposal but does not want to publicly debate the substance, they can frame their opposition in terms of its form. They can say, for example, that their concern with the proposal is merely that it will be constitutionally entrenched and, therefore, difficult to remedy if anything goes wrong.

[52]This has occurred in Australia and Canada, where the effectiveness of statutory bills of rights have at times been impeded by countervailing constitutional doctrines: see Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) 137–9.

[53]Including the Leader of the Opposition, at least at one point in the campaign: Dennis Shanahan and Rosie Lewis, 'Dutton's Promise on Recognition', *The Australian* (online, 12 August 2023) <https://www.theaustralian.com.au/nation/politics/indigenous-voice-to-parliament-peter-dutton-says-his-government-would-fight-for-constitutional-recognition/news-story/c579b0043e418059ac048974277d8dd8>.

[54]It would not be applicable to those proposed constitutional amendments that must be made by means of constitutional amendment (eg it would not be possible to formally change Australia to a republic by means of statute).

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

That can obfuscate debate — is opposition to the proposal in fact grounded in the form of the proposal, its substance or a combination of the two? The low rate of constitutional amendment in Australia means it is difficult to assess this matter by comparing the stance of people across multiple amendments (ie does someone raise the form of the proposal as a point of opposition in relation to some, but not other, proposals?).

Uncertainty and risk are a particularly attractive way of making this argument given they can be difficult to evaluate and even more difficult to resolve. In terms of evaluation, uncertainty and risk are almost impossible to estimate with precision in the constitutional arena. It is simply not possible to say that a particular constitutional amendment has, say, a 10% chance of producing a particular (or any) negative outcome that will be entrenched against subsequent revision. In terms of resolution, they are almost impossible to resolve except for abandonment of the amendment — if the problem with the proposal is that it will take the form of a constitutional amendment, the only solution is not to amend the constitution. These aspects of uncertainty and risk arguably help explain why opponents of the Voice stressed them even though the substance of the proposal did not, as discussed above in Part II, self-evidently invite criticism from the perspective of uncertainty or risk.

B. Two arguments rather than one

While the terms uncertainty and risk were used interchangeably and without much precision in the wider public debate about the Voice, it is more accurate to suggest that two different arguments were being put forward.[55] In its most persuasive form, the argument about uncertainty was a concern about the *unknown*. It referred to the possibility that new circumstances and new developments would take the amendment in a direction that was not or could not have been foreseen by those who sought, drafted, and approved the amendment. As a result, one might end up with a state of affairs that, if shown to the people involved with securing the amendment, they might oppose. By contrast, in its most persuasive form, the argument about risk was a concern about the *untrustworthy*. It referred to the possibility that institutional actors would take the amendment in a direction that would be contrary to the will of those who sought, drafted, and approved the amendment. As a result, one might end up with a state of affairs that the people involved with securing the amendment would absolutely oppose.

Once understood in this way, it is possible to see that the two arguments were pointing to different points of potential concern with the constitutional system of government. Uncertainty is a concern about entrenchment. The argument is that constitutional amendment introduces a form of uncertainty that is *difficult to address*. No approach to constitutional change exists that is entirely free from uncertainty.

[55]The literature on risk distinguishes the concept from uncertainty, but in a slightly different way, by suggesting that risk is calculable in terms of probabilities while uncertainty is not: see, eg, Jenny Steele, *Risks and Legal Theory* (Hart Publishing, 2004) 6. This understanding is not adopted in this article precisely because many participants in the debate on the Voice invoked the language of risk without assigning any probability to that risk eventuating.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

Constitutional change that occurs by means of statute[56] or judicial decision can also produce uncertainty — about the change's interaction with other parts of the system of government, the consequences for different arms of government, the implications for the rights and liabilities of the people, and so on. Even a decision *not* to engage in constitutional change can produce uncertainty — about how the existing system of government will react to new developments such as an unforeseen economic or political shock or an unanswered demand for constitutional reform from the people.

In its most persuasive form, therefore, the argument against constitutional amendment is not that it produces uncertainty because every form of constitutional change produces uncertainty (including the decision to engage in no change), but instead that it produces a form of uncertainty that cannot easily be addressed. If, for example, an entrenched constitution is amended to add protection for a new right and subsequent events give rise to uncertainty about the scope of that right, the legislature's ability to address that uncertainty through subsequent action is going to be more limited than if that right had been added by means of a statute or common law judicial decision.

By contrast, risk is a concern about the *reliability of institutions*. The argument is that constitutional amendment involves a change to the constitutional text and every time that occurs there is a risk that an institution will take the altered text in a direction that is different from what the people involved in the amendment sought to achieve. For example, if a constitution is amended to establish a new body, there is a risk that the executive or legislature will not take steps to provide it with adequate funding, preventing it from operating to any meaningful extent. In this scenario, the executive or legislature has proven to be unreliable or untrustworthy — they are frustrating what the people approved at a referendum. The 'rogue' institution might also be the judiciary. For example, if a constitution is amended to include protection for a new right subject to carefully negotiated limits, there is a risk that the judiciary will interpret it in a way that ignores those limits, taking it far beyond what the drafters agreed to.

Risk is also connected to constitutional entrenchment. An institution that enjoys constitutional entrenchment will pose a greater risk to a system of government if it goes 'rogue' than an institution that can be curtailed or abolished by statute. However, uncertainty and risk speak to very different concerns. Uncertainty speaks to the dangers of a design choice — to have an entrenched constitution — while risk speaks to the dangers of human agency — that institutional actors will not act in the public interest.

With the distinction between uncertainty and risk in mind, it becomes apparent that each argument is built on a central premise that will be the subject of disagreement within a jurisdiction and across jurisdictions. The next two sections explore these premises.

C. The importance of constitutional entrenchment

Uncertainty is a contingent argument against constitutional amendment. The argument's relevance and strength will vary according to the extent to which a constitution

[56] See, eg, the extensive literature on constitutional statutes and quasi-constitutional law: see, eg, Vanessa MacDonnell, 'A Theory of Quasi-Constitutional Legislation' (2016) 53 *Osgoode Hall Law Journal* 508; Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

is entrenched. One way of conceptualising entrenchment is to map a constitution along a spectrum from highly flexible to highly rigid.[57] The former refers to a constitution where amendment is little to no more difficult than invocation of the regular law-making process. The latter refers to a constitution where amendment is or is almost impossible.

At the highly flexible end of the spectrum, uncertainty has less strength as an argument because constitutional amendment is not significantly more constraining on future generations than other forms of lawmaking. Revision of an amendment to deal with an unforeseen development is no more difficult than dealing with uncertainty arising from the common law or statute.

At the highly rigid end of the spectrum, uncertainty diminishes in relevance. If constitutional amendment is or is almost impossible, there will be little reason to consider the possible consequences of amending the constitution, both because serious proposals for amendment will rarely arise and because any serious proposal is likely to fail, rendering discussion of the consequences otiose.

Towards the middle of the spectrum is where the argument has most relevance and strength because constitutional amendment is sufficiently difficult such that the consequences are serious — it will prove challenging to revise the constitution again if significant problems arise from an amendment — yet constitutional amendment is sufficiently available such that it is a realistic possibility, even if it is far from easy to accomplish, and therefore the costs and benefits of amendment warrant careful consideration.

It is, therefore, possible to see why the argument resonated so strongly in Australia. The country is arguably located somewhere towards the middle of the spectrum.[58] No one would contend that the *Constitution* sits at the highly flexible end of the spectrum, having been amended only eight times since 1901. While some might contend that it sits at the highly rigid end of the spectrum,[59] the Voice itself brings that classification into doubt. The Voice was a serious proposal for amendment that had a realistic prospect for success. Indeed, the debate surrounding the Voice reflected the *Constitution*'s position towards the middle of the spectrum and the importance of entrenchment to arguments about uncertainty.

The 'no' side emphasised the high degree of constitutional entrenchment to make the point that any uncertainty would be unaddressable. The 'no' pamphlet, for example, said 'Putting a Voice in the Constitution means it's permanent. We will be stuck with negative consequences.'[60] By contrast, the 'yes' side emphasised the fact that most aspects of the Voice would be alterable by ordinary legislation and therefore capable of

[57] On constitutional rigidity, see, eg, Rosalind Dixon and David Landau, 'Tiered Constitutional Design' (2018) 86 *George Washington Law Review* 438; Scott Stephenson, 'The Challenge for Courts in a Moderately Rigid Constitution' (2021) 44(3) *Melbourne University Law Review* 1041; George Tsebelis, 'Constitutional Rigidity Matters: A Veto Players Approach' (2021) 52(1) *British Journal of Political Science* 280.

[58] See, eg, Stephenson (n 54).

[59] See, eg, the well-known quote of Geoffrey Sawer from 1967 that Australia was 'constitutionally speaking … the frozen continent': Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

[60] Australian Government (n 2) 7.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

adaptation to new circumstances.[61] It also sought to highlight that the *Constitution* is not as entrenched as the 'no' side suggested. As Megan Davis said, '[t]he Constitution is meant to change. It is *built to change*.'[62]

D. The importance of institutional trust

Risk is also a contingent argument against constitutional amendment, but contingent on a different aspect of the system of government. The argument's strength and relevance will vary according to the extent to which the institutions of government can be trusted to implement the constitution in a responsible manner. If one considers the three arms of government generally to be trustworthy implementers of the constitution, there is less risk that a constitutional amendment will generate problematic results. Conversely, the risk grows the more untrustworthy the arms of government are or are perceived to be.

What amounts to a breach of trust is a large question. There are some actions that most people agree would amount to a breach of trust. Few would dispute that, if the proposed amendment on the Voice had passed and the Parliament refused to enact legislation enabling the Voice to operate, the Parliament would have betrayed the trust of the Australian people who had voted in favour of the amendment.

However, as the degree of divergence between the constitutional text and the constitutional practice diminishes and the time between the enactment of the constitutional amendment and the practice in question increases, more scope for reasonable disagreement emerges. For instance, if the proposed amendment on the Voice had passed and, twenty years later, the Parliament enacted legislation significantly reducing the amount of funding made available to the Voice because the government was facing an economic crisis that required a general reduction in public spending, there would be more room for reasonable disagreement as to whether that amounted to a breach of trust.

The question of trust arises frequently in constitutional theory. It is tied to one's preferred approach to constitutional interpretation.[63] For example, an originalist will argue that a court that departs from the original meaning of the text has exceeded its constitutional role and thus breached the trust of those who conferred power on the court, even if the departure is small and even if the text was written centuries ago. By contrast, a functionalist will argue that a court that gives effect to the functions or

[61] See, eg, Gabrielle Appleby, 'An Indigenous "Voice" Must Be Enshrined in Our Constitution. Here's Why', *The Conversation* (online, 22 January 2021) <https://theconversation.com/an-indigenous-voice-must-be-enshrined-in-our-constitution-heres-why-153635>.

[62] Megan Davis, 'Enshrining a Voice to Parliament – from the Uluru Statement from the Heart' (Sambell Oration, The University of Melbourne, 5 December 2022) <https://assets.bsl.org.au/assets/Sambell-Oration-2022-Transcript.pdf> (emphasis added). See also Anne Twomey's view that 'constitutional reform [is] difficult but achievable and worthwhile': Anne Twomey, 'Changing the Australian Constitution Is Not Easy. But We Need to Stop Thinking It's Impossible', *The Conversation* (online, 27 March 2022) <https://theconversation.com/ changing-the-australian-constitution-is-not-easy-but-we-need-to-stop-thinking-its-impossible-183626>.

[63] For one comparative overview of the different approaches to constitutional interpretation, see Jeffrey Goldsworthy, 'Conclusions' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2007) 321.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

objectives of the constitution has fulfilled its constitutional role and demonstrated it is a trustworthy steward, even if that involves some departure from the original meaning of the text and even if that departure is from a recently-enacted text.

The question of institutional trust also arises in the debate that occurs in relation to constitutional rights protection. Political constitutionalists and legal constitutionalists disagree about which institution can be most trusted with the protection of rights.[64] The former trust the legislature, while the latter trust the judiciary. As this longstanding debate has shown, it is a question that is not capable of objective answer. Legal constitutionalists and political constitutionalists can look at the same history of rights protection over the same period in the same jurisdiction yet reach very different conclusions about which institution has proven to be more trustworthy in the performance of that task.[65] They can also look at the very same institution and arrive at very different conclusions about the characteristics that indicate whether it can be trusted with difficult moral and political questions.[66] For example, in relation to the judiciary, legal constitutionalists focus on the judiciary's capacity for reason and ability to add a unique perspective to complex rights questions while political constitutionalists focus on the judiciary's lack of electoral credentials and the narrow range of people it consults prior to decision.[67]

The point of connection to this article is that the arguments developed by originalists and functionalists as well as legal constitutionalists and political constitutionalists can be deployed in the realm of constitutional amendment. If one adopts the view that the judiciary demonstrates a lack of trustworthiness every time it departs from the original meaning of the constitutional text, that will form an argument against further amendment to the constitution to add more text. It only increases the degree of risk inherent in the system of government by giving the judiciary more opportunities to develop the constitution beyond the confines of the text. If one adopts the view that the judiciary cannot be trusted with rights because judges develop them in expansive and unpredictable ways that lead to 'government by judges',[68] the same concern would apply to other constitutional amendments — if they can use a rights provision to expand their power at the expense of the other arms of government, they may also be able to do it with, for example, structural provisions. The converse views lead to the converse conclusion.

[64] A canonical version of the debate is between Ronald Dworkin and Jeremy Waldron: Ronald Dworkin, *Law's Empire* (Belknap Press, 1986); Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999). For a (critical) overview of the debate, see Alexander Latham-Gambi, 'Political Constitutionalism and Legal Constitutionalism — An Imaginary Opposition?' (2020) 40(4) *Oxford Journal of Legal Studies* 737.

[65] One Australian example of this dichotomy was the National Human Rights Consultation conducted in 2009, which received submissions arguing that Australia's record of human rights protection was adequate and inadequate: see *National Human Rights Consultation Report* (September 2009) chs 12–3.

[66] See Dworkin (n 66) and Waldron (n 66).

[67] There are also newer models of rights protection that seek to harness the attributes of both institutions in a productive manner: see, eg, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) chs 2–3.

[68] Or what has been called by one scholar 'juristocracy': Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2007).

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

The connection between risk and trust was prominently on display during the debate on the Voice. Ian Callinan's view about the risk posed by the Voice was based on his view that the judiciary was not a trustworthy institution: 'In modern times, it is an open question whether the US constitutionalist Alexander Hamilton's assertion that the courts are the least dangerous branch of government holds true.'[69] He used the High Court's development of the doctrine of legitimate expectations in *Teoh*[70] as evidence of its propensity to engage in 'heresy' in the interpretation of the *Constitution*. This view was echoed by other people who thought that there was no possible way of drafting the amendment that would ameliorate this risk. Greg Sheridan wrote 'even if [the proposed amendment] contains words to the effect that it must have no influence on how the *Constitution* is interpreted, it is virtually impossible to stop activist judges reading things into any part of the *Constitution*'.[71] As mentioned earlier, the Court's decision in *Love; Thoms* was commonly invoked to show that the Court could not be trusted with the interpretation of constitutional provisions related to Indigenous affairs.[72] On the other side of the debate, former High Court Justice Kenneth Hayne emphasised the Court's trustworthiness on these matters.[73] In response to the suggestion that a litigant might try to invalidate a statute if the Parliament failed to consider the Voice's representations, he said '[t]he courts have always shown great reluctance to interfere in the internal affairs of parliament.'[74] He also emphasised the limited power of the judiciary to interfere with executive decision-making: 'the most that could happen is that the decision-maker would be told to remake the decision.'[75]

V. The argument's implications

The purpose of this article is not to claim that uncertainty and risk are unquestionably problematic arguments against constitutional amendment. But there are potentially concerning implications with them that merit acknowledgement, two of which will be highlighted here.

A. Constitutional stasis

Uncertainty as an argument against constitutional amendment has a self-reinforcing character, which means that it can engender constitutional stasis. As mentioned above, uncertainty relies on a degree of constitutional entrenchment — the more entrenched a constitution is, the more problematic any uncertainty is because it will be more difficult to address. If the argument succeeds and a proposed amendment fails, the constitution becomes slightly more entrenched, as an empirical matter, and thus uncertainty

[69] Callinan (n 22).

[70] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

[71] Quoted in Jeremy Patrick, 'A Survey of Arguments against the Constitutional Recognition of Indigenous Australian Peoples' in Jennifer Nielsen, Jeremy Patrick and Simon Young (eds), *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016) 143, 153.

[72] See n 45.

[73] Hayne (n 41).

[74] Ibid.

[75] Ibid.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

strengthens as an argument in relation to future proposed amendments. The successful invocation of concern about uncertainty begets more concern about uncertainty.

We can observe this dynamic in relation to the Voice. Uncertainty will have even greater force when the next proposed amendment comes up for debate because the Voice has pushed the *Constitution* further along the spectrum towards the highly rigid category. Put in numerical terms, the amendment success rate is now 8 out of 45 rather than 8 out of 44. Even more importantly, it means the last successful amendment was over 45 years ago — if the Voice had succeeded, that counter would have been reset to 0 and thus dramatically reduced perceptions of the *Constitution*'s level of entrenchment. This defeat means that the claim 'any change to the *Constitution* will be permanent' will have even more plausibility next time.

At a certain level of entrenchment, uncertainty will diminish in relevance, but that will only be because the *Constitution* has come to be considered so difficult to amend that amendment is no longer considered a viable means of achieving constitutional change. Importantly, however, the demand for constitutional change never disappears. A constitutional system of government always faces pressure to change from new circumstances and from new demands made by the people. An ossified constitutional text instead means those demands are channelled towards other avenues of constitutional change, such as judicial development of the constitution and the enactment of constitutional statutes, which bring their own challenges.[76]

B. Institutional distrust

Risk as an argument against constitutional amendment feeds off, and exacerbates, distrust of government. It taps into the idea that the institutions of government serve themselves rather than the people, especially in the context of the people having a direct say on what is and is not included in the constitutional text by means of a vote at a referendum. The institutions of government and the people are put in opposition to each other, with the people ratifying the constitutional text and the institutions of government acting inconsistently with that text.

We can once again observe this dynamic in relation to the Voice. Among opponents of the Voice, it was common to argue that the High Court could not be trusted with the Voice because it is populated with 'activist' judges.[77] The language of activism was

[76] As has arguably occurred in the United States: see, eg, Bruce Ackerman, *We the People, Volume 1: Foundations* (Harvard University Press, 1993).

[77] Michael Pelly, 'Submissions for No Case Reveal Obsession with "Activist Judges"', *The Australian Financial Review* (online, 27 April 2023) <https://www.afr.com/companies/professional-services/submissions-for-no-case-reveal-obsession-with-activist-judges-20230427-p5d3lb>; Elizabeth Byrne, 'Voice to Parliament Court Saga Offering Echoes of the Indigenous Rights Battles around Mabo, Wik Decisions', *ABC News* (online, 14 May 2023) <https://www.abc.net.au/news/2023-05-14/high-court-voice-to-parliament-referendum/102302322>; Michael Pelly, 'Former Chief Justice Dismisses Threat of "Judicial Activism" to Voice', *The Australian Financial Review* (online, 16 February 2023) <https://www.afr.com/politics/federal/former-chief-justice-dismisses-threat-of-judicial-activism-to-voice-20230208-p5ciuc>; John Storey, 'The Voice to Parliament – An Analysis of the New Zealand Experience and Australia's History of Judicial Activism', *Institute of Public Affairs* (Blog Post, 7 December 2022) <https://ipa.org.au/ipa-today/the-voice-to-parliament-an-analysis-of-the-new-zealand-experience-and-australias-history-of-judicial-activism>.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

carefully chosen to draw from the campaign against the Court that occurred in the mid-1990s in relation to its decisions on Indigenous land claims, but had largely fallen into abeyance since that period.[78] The debate about the Voice provided an opportunity for it to rise to prominence again. The Voice served as a platform for those who think segments of the judiciary are untrustworthy to spread that message throughout the community.

The question of how to speak about public institutions is a complex one. It is unquestionably the case that public institutions should be subject to criticism, and it is possible to argue that even unfair criticism is justifiable in some circumstances.[79] Yet it is also the case that, as the extensive literature on democratic decline indicates, some level of public trust in the institutions of government is necessary for the health of a democratic polity.[80] If the people believe institutions are not acting in the public interest, even if this belief is not well founded in fact, a number of dangers arise in the system of government, ranging from public support for anti-democratic figures through to threats of violence against officials.

It is worth noting that, in a survey taken after the referendum, the judiciary was the only institution that experienced a substantial decline in public trust over the course of the referendum campaign.[81] Although it cannot be proven that the arguments about activism from the judiciary were the cause for this decline in public trust, it does indicate that Australia is not immune from declines in public trust of institutions and, therefore, the dangers associated with it.

C. The positive dimensions of uncertainty and risk

Finally, framing uncertainty and risk as an argument against constitutional amendment diminishes if not outright denies their positive dimensions. Uncertainty and risk are what make constitutional law possible. A constitution cannot answer every question about its operation ahead of time. And every constitution requires implementation by a variety of institutional actors. That means it is not possible to have a constitution free from uncertainty and risk. Importantly, these aspects of constitutional law are a feature, not a bug. The silences and ambiguities in the text give the constitution the flexibility to respond to unforeseen circumstances and alleviate the burden of needing to resolve every issue at the point of drafting. In relation to the latter feature, Ros Dixon and Tom Ginsburg have noted that deferral is a crucial element of the constitutional lawmaking process that makes agreement possible.[82]

[78]Tanya Josev, *The Campaign against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017).

[79]Scott Stephenson, 'Are Political "Attacks" on Judges Ever Justifiable? The Relationship between Unfair Criticism and Public Accountability' (2023) 71(3) *American Journal of Comparative Law* 748.

[80]Tom Gerald Daly, 'Democratic Decay: Conceptualising an Emerging Research Field' (2019) 11(2) *Hague Journal on the Rule of Law* 9, 29, 31. See generally Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018).

[81]ANU Centre for Social Research and Methods, *Detailed Analysis of the 2023 Voice to Parliament Referendum and Related Social and Political Attitudes* (Report, 28 November 2023) 53.

[82]Rosalind Dixon and Tom Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9(3-4) *International Journal of Constitutional Law* 636.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

Furthermore, leaving the constitution in the hands of institutional actors to implement not only risks abuse of power, but also opens the possibility of improvement. Their implementation of the constitution might improve the system of government by reducing the impact of errors made by the drafters and correcting mistakes made by previous generations of institutional actors. The risk that comes with entrusting the constitution to institutional actors must, therefore, also be seen as an opportunity for adaptation, the resolution of ambiguity, the addition of detail, and the addressment of problems. There is value in the flexibility that constitutions, including entrenched ones, offer.

Again, it was possible to see this dynamic in the debate around the Voice. The uncertainty and risk associated with the proposed amendment was framed purely in negative terms. It was an argument for voting no, but not for voting yes. However, it is possible to view the points of uncertainty and risk with the Voice in positive terms. For example, the uncertainty over the relationship between administrative law and the Voice (eg could the Voice's recommendations become a mandatory consideration in government decision-making?) was a form of flexibility. It was leaving the question open to be resolved by the Parliament in the future if it formed the view that consideration of the Voice's recommendations would improve government decision-making on Indigenous issues. Similarly, the risk that the High Court might interpret the amendment in unexpected ways was also an avenue for adaptation. If a government sought to develop an innovative way of disabling the Voice from performing its functions, the flexibility offered to the Court would give it some scope to develop new doctrines to ensure the will of the people — to establish a Voice that would make recommendations — was respected.

VI. Conclusion

The referendum on the Voice revealed that uncertainty and risk can be prominent forms of argument about a proposed constitutional amendment and therefore merit careful attention. There is a separate question about the extent to which the argument influenced people's votes at the ballot box. After the referendum, the Australian National University conducted a survey of a broadly representative sample of 4,000 adult Australians.[83] One survey question asked respondents to rank the importance of five different factors affecting the reasons for their vote. One factor was risk ('The change was too risky'). The riskiness of the proposal was ranked among the least important reasons for a person's vote among all voters, and only the second most important reasons among people who voted 'no', with it being far less important than the concern that the proposed amendment would divide Australia.[84] It suggests the argument can have an impact, but it should not be considered all-powerful. However, the survey does not canvas the more subtle influences of the argument mentioned in this article, such as providing a means of opposing a proposed amendment without having to engage in debate about the substance of the proposal.

[83] ANU Centre for Social Research and Methods (n 84).

[84] Ibid 77–8.

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press

There is a further question about how to ensure the people are able to assess arguments about uncertainty and risk (as well as other aspects of a proposed amendment to the *Constitution*) before they vote at a referendum. It is tempting to conclude that the answer is more public education. While education is essential, it is important to be realistic about how much knowledge one can expect the people to have about their constitutional system of government, especially when it comes to complex topics. The debate about uncertainty and risk was highly technical in parts — it is unlikely that any civic education campaign would be sufficient to enable the public to understand whether the concerns about justiciability were well-founded or not. It might, therefore, be the case that work must also be done to develop a constitutional amendment process that is more trusted by the public so that, even if they do not understand every single detail of the proposal, they are confident it has been drafted in a way to minimise the likelihood of the most injurious possible outcomes.

Acknowledgements. Thanks to Gabrielle Appleby, Rosalind Dixon, Colin Feasby, Harry Hobbs, David Kenny, Paul Kildea, Gregoire Webber and the article's referees for their exceptionally helpful comments and questions on earlier drafts of the article.

Cite this article: Stephenson S (2026). Uncertainty and Risk as an Argument against Constitutional Amendment. *Federal Law Review* **54**, e6, 1–23. https://doi.org/10.1017/fed.2026.10020

https://doi.org/10.1017/fed.2026.10020 Published online by Cambridge University Press