SPEAKING ILL OF THE DEAD: A COMMENT ON S 25 OF THE CONSTITUTION

INTRODUCTION

In a characteristically thorough article, Professor Anne Twomey has “obituarised” s 25, taking as given that the provision will be repealed sometime in the future. Like a well-written obituary, Twomey’s piece chronicles the birth and life of its subject. Perhaps more in the vein of a eulogy than an obituary, though, Twomey’s article also has a partly redemptive aim: it seeks to rescue the reputation of s 25 from those who would, as it were, “speak ill of the dead”.

Twomey rejects the charge made by some that s 25 is a “racist” provision. In fact, argues Twomey, not only is s 25 not racist; it is actually the opposite – “an anti-racism provision and a small remaining skerrick of civil liberties inherited from the United States Constitution”.

In this comment, we seek to question the interpretation of s 25 as an anti-racism provision.

SECTION 2 OF THE 14TH AMENDMENT

One argument that s 25 is an anti-racism provision relies on the provision’s relationship to §2 of the US Constitution’s 14th Amendment. The 14th Amendment emerged after the American Civil War and it affects the apportionment of seats in the House of Representatives. According to Twomey, “[t]he intention [of §2’s drafters] was to encourage the southern States to secure the voting rights of former slaves by penalising their federal representation if they did not”. Because §2 was intended as an anti-racism provision, and because s 25 was modelled on it (so the argument would proceed), s 25 too can be considered an anti-racism provision.

There are three problems with this argument. First, the debt that s 25 owes to the 14th Amendment may not be as substantial as is sometimes assumed. We discuss this in the next section. Secondly, the intentions behind §2 of the 14th Amendment cannot be so confidently and unequivocally characterised as anti-racist. While addressing the disenfranchisement of African American men was one concern of §2’s drafters, their overriding aim was to disempower the southern States in Congress. By virtue of a US constitutional curiosity, the South – despite losing the Civil War – stood to gain additional congressional representation following the abolition of slavery. It was this mischief, rather than southern disenfranchisement of African Americans, that the North-dominated Congress of the time was primarily concerned to address in adopting §2. This raises doubts about the anti-racism credentials of §2 of the 14th Amendment and, by extension, s 25 of the Australian Constitution. If anti-racist motives cannot be so easily ascribed to §2’s American drafters, then nor can they be assuredly credited to s 25’s Australian drafters.

The third problem is with the argument’s logic. Even though one (secondary) intention of §2’s framers was to encourage more racially inclusive voting laws, it does not follow that the same intention must have been behind s 25 of the Australian Constitution. The Australians may have adopted s 25 for reasons different to those of the Americans who drafted the 14th Amendment. Accordingly, we need to inquire into the intentions of Australia’s constitutional drafters.

2 Twomey, n 1 at 125.
3 Twomey, n 1 at 141.
4 Twomey, n 1 at 126.
SECTION 25 AND THE AUSTRALIAN DRAFTERS

The drafting of s 25

To what extent does s 25 have its origins in §2 of the 14th Amendment? That the two provisions are related in some ways is plain. Their similarities were observed by Sir Samuel Griffith in 1891.6 Moreover, s 25 was incorporated, in something approximating its final form, into an early draft of the Constitution at the same time as another provision modelled on the 14th Amendment: Andrew Inglis Clark’s ill-fated “equal protection of the laws” clause.7 It is a fair assumption that this version of s 25 was inserted at Clark’s behest.

However, earlier precursors to s 25 were framed in terms quite different to the 14th Amendment. Here Griffith, rather than Clark, was the key figure. In Griffith’s 1890 “ghost draft” of a federal Constitution for Queensland, parliamentary representation of the proposed Queensland “Provinces” was to be determined “in proportion to the European population” of each Province.8 It is worth noting here that some five years earlier the Queensland Parliament, with Griffith as Premier, had expressly denied the vote to “aboriginal native[s] of Australia, India, China, [and] the South Sea Islands”.9 In the early work of the 1891 Constitutional Committee, of which Griffith was Chair, apportionment was to be determined on the basis of “[o]ne Member to every 30,000 of free population exclusive of aliens, Asiatics, or Polynesians”.10 Neither of these clauses would have pressured the States to repeal racially discriminatory voting laws, for they would have excluded non-Europeans from apportionment calculations regardless of whether they had been given voting rights. The reason for these early provisions would appear then to be largely administrative: to exclude from apportionment calculations non-European people who were not entitled to vote (at least in some colonies).

One explanation for the change in language and operation of s 25 is that the drafters saw the anti-racist merits in Clark’s provision and wanted to discourage racially discriminatory State franchises. This was in spite of Griffith, the Committee’s Chair, having as Premier shepherded through the Queensland Parliament a racially restricted franchise just five years earlier.

A different explanation – a federal one – is that the framers realised that only some colonies placed racial exclusions on their franchises. In Griffith’s 1890 draft federal constitution for Queensland, it made sense to exclude non-Europeans from apportionment counts because they were not entitled to vote in Queensland. But in a context where some States had racial restrictions on voting and others did not, it would make the most sense – and federally speaking would be the most fair – to base the apportionment calculations on each State’s actual laws. It would not be fair to exclude from a State’s apportionment population “Asiatics [and] Polynesians” where those groups had the right to vote. Equally, it would not be fair to include in a State’s apportionment population racial groups that the State excluded from the franchise.

While the anti-racist and federal explanations are not mutually exclusive, the anti-racist argument is utterly implausible as an explanation of the framers’ intentions, as we discuss below. Though there is only limited direct evidence for each explanation, the federal explanation is the more credible account of why s 25 was adopted, for it provides a better fit with the founders’ attitudes.

Discussion of s 25

Discussion of s 25 during the convention debates was very limited. There is one piece of evidence showing that the framers perceived s 25’s potential to work as a disincentive to restricted State franchises. As Twomey observes, John Cockburn, who was opposed to property qualifications on voting, queried “whether it would not be fair” for the provision to be extended beyond people

8 Williams, Australian Constitution, n 7, p 28 (for the background to Griffith’s draft, see pp 26-27).
9 Elections Act 1885 (Qld), s 6.
10 Williams, Australian Constitution, n 7, p 59.
disqualified because of their race, so that all people disqualified from voting in State elections would be excluded from federal apportionment calculations.\textsuperscript{11} Griffith responded that the effect – “a very good result” – would be to compel Western Australia to abandon its property qualification for voting, but for the fact that Western Australia was already guaranteed a certain number of representatives.\textsuperscript{12}

Nowhere in the debates over s 25 do the drafters talk about the need to penalise States for passing racially discriminatory voting laws. Edmund Barton referred to the section as “minor”, a “machinery clause”.\textsuperscript{13} Barton also spoke sanguinely about the provision’s target: “A race not entitled to vote is such an alien race as may exist in the community to whom the state in which they live has not conceded the privilege of voting.”\textsuperscript{14} There is no hint of condemnation towards such a state of affairs.

In fact, some delegates saw s 25 as a potential and important means of preserving the States’ power to enact a racially discriminatory franchise. In 1891, discussing what was to become s 25, Andrew Thynne saw the section as one under which “the states have reserved to them the power of excluding from the franchise any particular race or class of people whom they think it is undesirable should be intrusted with the franchise”.\textsuperscript{15} He worried that the Commonwealth might override a racially restricted State franchise using the race power, though Griffith assured Thynne that this would not happen.\textsuperscript{16} A similar worry was raised by Isaac Isaacs in 1898. If State laws enacting a racially discriminatory franchise came up against inconsistent federal laws, Isaacs queried whether s 25 would be “sufficient”, presumably to preserve the States’ power to establish racially discriminatory voting laws. Richard O’Connor believed the section would be sufficient.\textsuperscript{17}

**Broader discussions**

Aside from the lack of direct evidence for it, the anti-racism explanation of s 25 meets with two main difficulties, both of which concern the framers’ general attitudes. First, by today’s standards, the drafters of Australia’s Constitution typically held racist attitudes and favoured numerous racially discriminatory policies.\textsuperscript{18} As Brian Costar has forcefully observed, “[i]t defies credibility to believe that the racist consensus among the federationists was suspended to insert just one anti-discriminatory clause in the Constitution”.\textsuperscript{19} Secondly, the Constitution’s drafters rather jealously guarded “States’ rights”.\textsuperscript{20} Accordingly, provisions threatening States’ rights to enact racially discriminatory laws typically provoked considerable objections.

If s 25 was intended as an anti-racism provision directed at the States, it is curious that it sparked so little debate. By comparison, debates over Clark’s other 14th Amendment provision were more extensive and heated. Ultimately, this clause was rejected in its original form largely because it compromised the States’ powers to discriminate on racial grounds.\textsuperscript{21} Similar and lengthy discussions took place regarding the race power.\textsuperscript{22} The relative lack of debate over s 25 may have been because

\begin{itemize}
\item \textsuperscript{11} Sydney Debates 1891, n 6, pp 637-638.
\item \textsuperscript{12} Sydney Debates 1891, n 6, p 638.
\item \textsuperscript{13} Official Record of the Debates of the Australasian Federal Convention (Sydney, 1897) p 453 (Sydney Debates 1897).
\item \textsuperscript{14} Sydney Debates 1897, n 13, p 453.
\item \textsuperscript{15} Sydney Debates 1891, n 6, p 702.
\item \textsuperscript{16} Sydney Debates 1891, n 6, p 702.
\item \textsuperscript{17} Official Record of the Debates of the Australasian Federal Convention (Melbourne, 1898) pp 1827-1828 (Melbourne Debates 1898).
\item \textsuperscript{19} Costar B, ““Odious and Outmoded”?: Race and Section 25 of the Constitution” in Chesterman J and Philips D (eds), Selective Democracy: Race, Gender and the Australian Vote (Circa Books, 2003) p 90.
\item \textsuperscript{21} Williams, n 18 at 18.
\item \textsuperscript{22} See, eg Melbourne Debates 1898, n 17, pp 227-256.
\end{itemize}
the presumed effect of the section – even if it entailed weakening State power to discriminate on racial grounds – was minor. But given the depth of attachment to discriminatory policies and States’ rights amongst so many of the delegates, it is hard to imagine even minor threats to these values going wholly unchallenged. Queensland, Western Australia and the Northern Territory (administered by South Australia) all had racially restricted franchises at the time, and so were potentially affected by s 25, yet no delegates from any of these colonies spoke out against s 25.23

On the anti-racism interpretation of s 25, the framers must have been willing to countenance interference with the States’ powers to determine their own franchise. Yet it is clear that the framers fiercely defended the States’ powers over voting rights and disavowed tampering with those powers. As Barton observed in Adelaide in 1897, “[i]f anybody were to attempt to dictate to the people of New South Wales, Victoria, or any other colony the mode in which they should frame their suffrage … that person would be laughed to scorn”.24 A South Australian proposal for suffrage guaranteed to men and women over 21 was decisively rejected. As Twomey has observed elsewhere, this was primarily because the delegates believed “South Australia should not force the universal franchise on the other colonies”.25 The constitutional “right” to vote that was eventually adopted – s 41 – sought to ensure that voters in States with more liberal franchises would not be denied the vote federally.26 Again, the overriding concern here was not equality but deference to each State’s power to determine its franchise. Further evidence of the framers’ protective stance towards State franchises can be seen in the worries, noted above, over the extent to which the race power might be able to override racially discriminatory State voting laws. The framers’ extreme reluctance to interfere with State franchises goes against the interpretation of s 25 as an anti-racism provision.

The anti-racism reading of s 25 also suggests that the framers themselves favoured a franchise that did not discriminate on racial grounds. As Twomey claims, “racial discrimination in the application of voting rights was regarded [in the 1890s] as something to be discouraged and penalised”.27 However, the delegates generally expressed no objections towards racially discriminatory voting laws or spoke in favour of them.28 Charles Kingston offers an interesting example. Opposing laws discriminating against non-white people in 1898, he said, “treat them fairly and let them have all the rights and privileges of Australian citizenship”. But when asked whether such people should be enfranchised, Kingston replied in the negative, proclaiming “I should be undoubtedly found supporting a proposal which, as regards future arrivals at the least, would prevent them being admitted to the exercise of the franchise”.29 Griffith, as we observed earlier, had been Premier during the enactment of Queensland’s racially restricted franchise in 1885.

In considering the framers’ attitudes to racially discriminatory voting laws, it is also worth looking at the Commonwealth franchise enacted by the first Federal Parliament in 1902 – a significant number of the contemporary parliamentarians had also been delegates to the Constitutional Conventions. Under this legislation, voting rights were denied to “aboriginal native[s] of Australia Asia Africa [sic] [and] the Islands of the Pacific”.30 The question should be asked: why would the drafters of the Constitution want to punish the States for passing laws that many of the drafters themselves actually favoured? The most plausible answer is that they did not.

26 Twomey, n 25 at 128-130.
27 Twomey, n 1 at 129.
28 For a rare counterexample, see Adelaide Debates 1897, n 24, p 1020 (John Cockburn).
29 Melbourne Debates 1898, n 17, p 247.
30 Commonwealth Franchise Act 1902 (Cth), s 4.
While the anti-racism explanation for s 25 does not fit with the framers’ general attitudes, the federal explanation does. On this view, rather than being seen as a threat to States’ rights to discriminate on the basis of race, s 25 was understood as a way of ensuring fairer apportionment of House of Representatives seats among the States. The federal explanation is something that Twomey implicitly acknowledges when she states that, under s 25, “a State could not exclude people of a particular race from voting in State (and consequently federal) elections, while simultaneously relying on them to boost the population of the State to increase its representation in the Commonwealth Parliament” 31.

**CONCLUSION**

How, then, should we understand the origins of s 25? The claim that s 25 was intended as an anti-racism provision does not hold up to scrutiny. While it is true that the US constitutional provision to which s 25 is similar – §2 of the 14th Amendment – has some anti-racist credentials, that provision was in the first instance motivated by political considerations and conditions quite unique to the postbellum US. Moreover, the intentions of the US framers concerning §2 cannot simply be ascribed to the Australian drafters, for they may have had their own distinct reasons to adopt s 25. Looking to evidence of the Australians’ intentions, we argued that the anti-racist reading of s 25 has little support and is indeed contradicted by a great deal of historical evidence about the framers’ attitudes to non-European racial groups, States’ rights and the franchise. We suggested an alternative reading of s 25: it was intended as an administrative provision to ensure federal fairness in the distribution of House of Representatives seats between States that had a racially discriminatory franchise and States that did not.

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31 Twomey, n 1 at 127.