Indigenous recognition will hand power to judges. John Roskam, The Australian, 3 November 2014.

***DEMOCRACY in Decline* is an important new book by James Allan, a law professor at the University of Queensland, published by Connor Court. In 2009, in the midst of climate change as "the greatest moral challenge of our time", Connor Court brought out *Heaven and Earth: Global Warming, the Missing Science* by the resolutely sceptical professor Ian Plimer.**

It seems a long time ago now but just five years ago Labor and the Liberals supported an emissions trading scheme and the Canberra press gallery still believed anyone "opposing the science" was doomed to electoral ignominy. *Heaven and Earth* sold 140,000 copies worldwide including 40,000 copies in Australia. Not bad for a book that was all but ignored by much of the mainstream media here. These days if a book sells 10,000 copies in Australia it counts as a bestseller.

Heaven and Earth signalled the beginning of the end of the hold hysterical warmism had on Australian public policy and a few months ago Tony Abbott repealed the carbon tax. Australia's political elite is no longer preoccupied with climate change. Their new preoccupation appears to be "recognition" of Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

Democracy in Decline may do to the campaign for indigenous recognition in the Constitution what *Heaven and Earth* did to climate change policy. Allan's book is not about indigenous recognition. It is a vigorous, forensic analysis of how judges and lawyers in the US, Canada, Britain, New Zealand and Australia have taken it on themselves to overturn the decisions of democratic majorities for their own personal, invariably left-leaning version of what is good for society.

Judges and lawyers have done this by using a combination of bills of rights, international law and international institutions. As Allan makes clear, anyone who thinks that an amendment to the Constitution to recognise indigenous Australians will not ultimately be used by judges to subvert the decision of parliament has no understanding of history.

The decline of democracy is most obvious in countries with explicit bills of rights that give the judiciary the express power to pronounce on the validity of laws.

While Australia doesn't have a legislative bill of rights, Allan documents how the High Court has, through a series of decisions, basically invented a range of previously unknown constitutional rights such as the right to "freedom of political communication". In the US the democratic contest is all about elected politicians who get to choose the judges who interpret the laws. In Britain there's not much point to the democratic contest because most of the laws are made by the European Union anyway.

Majoritarian democracy remains the best guarantee of individual rights. As Allan explains, when judges intervene against a majority decision it is seldom to correct an egregious denial of human rights — most often it is to impose their own preference on policies such as abortion, marriage, the limits on free speech, and the place of religion in public life. The best way to resolve questions on which there are fundamental disagreements over values is by "counting

each of us as equal and letting the numbers prevail". A decision arrived at by the majority has democratic legitimacy — a 4-3 decision in the High Court doesn't.

Exactly how Aboriginal and Torres Strait Islanders will be recognised in the Constitution is not yet known. Nor what such recognition will achieve. Indigenous recognition is a lot like the carbon tax — whenever its advocates were asked what difference it would make to the world's temperature, they refused to answer. It's the symbolism that counts.

The trouble with symbolism that is that sometimes symbols matter. That's the case when it comes to indigenous recognition in the Constitution. The history of the High Court demonstrates repeatedly how words that are seemingly clear can be twisted to suit the political agenda of judges.

Even if a constitutional amendment on indigenous recognition expressly states judges cannot override the parliament's decision, judges will find a way around that prohibition. That's what happened to New Zealand's Bill of Rights Act of 1990.

Even though it specifically stated it was to have no effect on any other piece of legislation and gave the courts no authority to provide remedies for the breach of the law, within a few years judges were ignoring the written words of the act. The president of the country's highest court declared that the Bill of Rights Act required judges depart from the longstanding practice of applying what the words of a law actually mean because "we in New Zealand try to live up to international standards or targets and keep pace with civilisation".

There's no knowing what a future High Court will do to a constitutional amendment that recognises indigenous Australians to "keep with civilisation".

The irony of all of this is, as the great Mark Steyn says in his endorsement of *Democracy in Decline*, the core anglophone democracies have over the centuries done a pretty good job at keeping pace with civilisation. Yet at the beginning of the new millennium in the name of ersatz "human rights" and transnationalism some of the world's oldest and most successful democracies have decided that rule by judges and lawyers is preferable to rule by a democratic majority.

Democracy in Decline — Steps in the Wrong Direction by James Allan is published by Connor Court Publishing