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The American Model

It is of some significance to be considering the question of a bill of rights for Australia in 1989 since this is the bicentenary of the adoption of the American Bill of Rights or at least of its basic core as the first ten amendments to the Constitution by the first American Congress in September 1789. Moreover, for those interested in anniversaries, this is also the tercentenary of the English Bill of Rights. This famous document, which gave statutory form to the Declaration of Rights that, earlier in 1689, proclaimed the triumph of parliamentary government and a constitutional monarchy in the settlement that brought William and Mary to the throne of England, forms a more integral part of our own constitutional tradition than does the American Bill of Rights. Nevertheless, in modern times the American instrument is commonly considered the prototype of a bill of rights, and it is with this sort of bill of rights that I am concerned in this paper.

Before moving to a discussion of Australian attempts to bring in such a bill, I want to examine briefly two points regarding the American Bill of Rights: the first is the *necessity* of a bill of rights to the American constitutional design; and the second concerns its *effectiveness*. It is perhaps hard today to imagine the American Bill of Rights not being a key part of the United States Constitution and not being one of that country's most powerful means of social reform. But, from the point of view of institutional design, that is not necessarily the case; nor has the Bill of Rights been a very effective, and certainly not a socially progressive, part of the American system of government for most of its political history.

As is well known, the United States Constitution was drafted without its famous Bill of Rights, the core of which is the first block of ten amendments that were added in 1791 to appease critics who, during the ratification debates, were apprehensive about the potential tyranny of the national government. The Federalist view, as strongly put forward by Hamilton, was that a bill of rights was unnecessary because 'the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS'.¹ In making this case and answering the objection that the plan of the Philadelphia convention contained no bill of rights, the Federalist used a variety of arguments, the most important of which was drawn from the nature of popular government in which sovereignty remains with the people rather than with the ruler or the state. Since the historic purpose of a bill of rights was to assert the subject's fundamental rights that had not been surrendered to kings, it had no application to a democratic constitution: 'Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations'. Hence, the concern of the *Federalist* writers was with the design of institutional remedies, based on the division of powers and an ingenious system of checks and balances, for correcting the pathological tendencies of unrestrained democracy, majority faction and instability.²

The Anti-Federalists who attacked the constitution for having no bill of rights were concerned at the extent of powers given to the national government. Some preferred a weaker confederal form of government, while other more radical democrats who thought that democracy was possible only in small republics were uneasy with any central power at all. The Federalists' main defence for grafting a reasonably strong national government on to the old confederal form of strong member states was based squarely on the division of powers of which federalism was a key part. The potential tyranny of the centre would be checked by the division of powers among the branches of central government as in a unitary republican state, but as well by the institutional vigilance of state governments. 'The executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration.'³ Federalism gave republican government the 'double security' of a 'compound republic', as Madison explained in *Federalist* No.51:

1. Alexander Hamilton, James Madison and John Jay, *Federalist Papers* (New York: Mentor, 1961), No.84, p.515.

2. But see Vincent Ostrom, *The Political Theory of the Compound Republic*, 2nd ed., Lincoln: University of Nebraska Press, 1987, first published 1971. Ostrom has a highly individualist interpretation of the *Federalist*.

3. *Federalist Papers*, No.84, p.516.

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurptions are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.⁴

In short, a bill of rights was not an integral part of the original American constitutional design but was added to appease critics of strong central government and facilitate ratification. It was the division of powers among multiple governments and branches of government and the expectation that these would compete with and check one another that was the basis for controlling tyrannical government and thereby protecting individual rights of citizens.

Regarding effectiveness, the American Bill of Rights was not of major significance for most of America's more than two hundred years of political history. And certainly for most of that time it was not the progressive reformist instrument of national government that it became in the 1950s and 1960s. That was partly because the states had their own bills of rights and systems of common law, and the national Bill of Rights applied only to national government until its application was progressively extended to the states by the Supreme Court in the twentieth century. It was also because for long periods of time the American Supreme Court was dominated by political and social conservatives. The point can be illustrated graphically with two examples: first, the existence of slavery in the Southern states until the Civil War; and second, the persistence of extensive public discrimination against blacks until the anti-discrimination cases of the 1950s. Thus, only for a relatively short period of modern history has the American Bill of Rights been a progressive instrument of national reform.

The Australian Situation Introduced

Whether Australia should have a bill of rights has been the subject of periodic public investigation, party discussion and partisan debate during the last thirty years.⁵ There

4. Ibid., No.51, p.323.

5. For an excellent survey of the literature discussing rights in Australia, see Alice Erh-Soon Tay, *Human Rights for Australia*, Human Rights Commission Monograph Series No.1, Australian Government Publishing Service, Canberra, 1986.

have been three major constitutional reviews between 1959 and 1988 in which the question has been addressed. During that period, there has been a realignment of partisan support with the Labor Party becoming an advocate of a bill of rights and the Liberal and Country-cum-National Parties remaining staunchly opposed. The 1959 Joint Committee on Constitutional Review was the last formal instance of bipartisan endorsement for the traditional Australian system of parliamentary responsible government and rejection of an entrenched bill of rights. In 1988 the Constitutional Commission appointed by the Hawke Labor Government to undertake a thorough-going review of the Constitution for the bicentenary year strongly endorsed an entrenched bill of rights. The intervening Constitutional Convention that met six times in plenary session between 1973 and 1985 and was composed of politicians from both sides of politics was split over the issue.

Party and partisanship provide the keys for understanding the shape and intensity of public debate over a bill of rights for Australia. During the 1960s the Labor Party changed its official policy in favour of a bill of rights, and on three successive occasions in the 1970s and 1980s the Whitlam and Hawke Labor Governments made abortive attempts at passing Commonwealth statutory bills. In 1988 the Hawke Government proposed the modest extension of several rights already in the Constitution as a possible first step towards implementing the Constitutional Commission's more ambitious recommendations that included an extensive constitutional bill of rights. This so-called 'people's' charter suffered the worst defeat of any referendum proposal ever put to the Australian people, receiving only 31 per cent approval. After the failure of all three statutory bills of rights and of the 1988 referendum proposal, it is unlikely that Australia will have a bill of rights for the foreseeable future.

In rejecting a bill of rights, Australia has become something of an exception among the older democracies of the British Commonwealth and is going against an international trend that is having a powerful impact on comparable countries. In 1960 Canada adopted a statutory bill of rights that proved rather ineffectual, but subsequently an elaborate Charter of Rights and Freedoms was entrenched in its Constitution by means of the *Canada Act 1982*.⁶ New Zealand intends to follow the Canadian example: a Bill of Rights is on the Lange Government's agenda but has been delayed because of the continuing pressures of economic restructuring and financial crisis.⁷ Nor has the United

6. The considerable compact of the Canadian Charter on Public Law and Policy is discussed in a special number of *Public Law*, Autumn 1988, on 'The Canadian Charter of Rights and Freedoms'.

7. New Zealand White Paper, *A Bill of Rights for New Zealand*, Government Printer, Wellington, 1985.

Kingdom itself been isolated from the reach of the European Convention of Human Rights: it has been subject to periodic scrutiny of its laws by the European Commission and some notable adverse decisions by the European Court of Human Rights. This has led to a lively ongoing debate about incorporation of the Convention of Human Rights into the internal law of the United Kingdom.⁸

Besides comparative interest, the debate over rights in Australia raises a puzzle with the positions taken by the major political parties: they seem to have been on the wrong sides. As a social democratic party, Labor traditionally favoured constitutional reform in order to centralise political power for purposes of 'state socialism', economic management and collective social policy. The Curtin and Chifley Governments of the 1940s epitomise Labor's practical commitment to such purposes. Moreover, for most of its federal history, the Labor Party was formally committed to the abolition of federalism on the grounds that such a structure of government fragmented political power and restricted reformist and socialist state action. In opposing this, the Liberals have been the self-professed guardians of the individual and the defenders of the established federal system. This paper explains how Labor became committed to a bill of rights, and documents the extent of the Liberal's⁹ countervailing opposition which, in conjunction with pressures from other influential groups and a lack of grass-roots support, has stymied all Labor's initiatives for an Australian bill of rights.

Labor and the Constitution

In one sense the Hawke Government's bicentenary initiative for constitutional reform should have come as no surprise since sweeping constitutional reform has been a venerable tradition of the federal Labor Party since its formation shortly after the Constitution was adopted in 1901. There were obvious reasons for Labor's earlier opposition to the Constitution.¹⁰ It was a populist and reformist party favouring majoritarian democracy and the supremacy of a national parliament. The Constitution,

8. For example, recent articles by Joseph Jaconelli, 'Incorporation of the European Human Rights Convention: Arguments and Misconceptions', *Political Quarterly*, 590, 3, 1988, pp.343-57; and Anthony Lester, 'Fundamental Rights: the United Kingdom Isolated?', *Public Law*, 1984, pp.46-72.

9. The National Party has taken essentially the same view as the Liberal Party, and will not be discussed separately. At the national level and in New South Wales, these two parties form a close coalition, and in States where they do not, they have similar positions regarding rights.

10. See Brian Galligan, 'Federalism's Ideological Dimension and the Australian Labor Party', *Australian Quarterly*, 53, 1981, pp.128-40.

which Labor had no hand in shaping, was, in important features, a conservative instrument of government that divided powers, restricted Parliament and constrained the popular will. This was a constant complaint by successive generations of Labor leaders.¹¹

For example, in 1903 Billy Hughes, rising Labor leader and subsequently Attorney-General and Prime Minister, unsuccessfully opposed Deakin's Judiciary Bill, that established the High Court, on the grounds that it was the people's prerogative to amend the Constitution and the judge's function simply to say what the law was. Deakin was proposing that the High Court's main function would be to amend the Constitution to keep pace with national development and to adjust it to release political pressures. Against such judicial activism, Hughes claimed that piecemeal fiddling by the judiciary would blunt popular pressure for more sweeping reforms and was quite illegitimate. Instead of 'going round or over or under stone walls', Hughes advocated popular plebiscites as 'that straightforward way of knocking the walls down and have done with it'.¹² Hughes blamed those who drafted the Constitution for making its amendment procedure too difficult, and thereby unduly restricting the popular will.

In its turn the Scullin Labor Government proposed to sweep away the Constitution's Section 128 amending formula in 1930 with its radical Constitution Alteration (Power of Amendment) Bill. This would have abolished both federalism and judicial review by the High Court, and given the national Parliament full power over amending the Constitution.¹³ This incident was of little practical significance because the beleaguered Scullin Government, that had the misfortune to win federal office just as the Great Depression hit Australia, did not control the Senate and had no chance of carrying a

11. The following examples and others are discussed at length in Brian Galligan, *Politics of the High Court*, St Lucia, University of Queensland Press, 1987.

12. Commonwealth Parliamentary Debates, Vol.13, 1903, p.698.

13. Federal Parliamentary Labor Party, *Caucus Minutes 1901-1949*, edited by Patrick Weller, Melbourne University Press, 1975, Vol.2, p.357; and for Scullin's exposition of the Bill, Commonwealth Parliamentary Debates, Vol.123, 1930, pp.180 ff.

referendum on the issue. But it was an important affirmation of Labor's constitutional orthodoxy at the time.

Labor's frustrations with the Constitution during its sparse periods of federal office have been well documented and constitute a major theme in Australian constitutional politics and Labor history. Until the 1970s, Labor was formally pledged to the abolition of federalism and all the constraints on centralised governments that such a structure entails. In his famous 1957 address titled 'The Constitution versus Labor', Gough Whitlam summed up Labor's frustrating experience with the Constitution during the first half-century of Australian federation. The Australian Labor Party, unlike its British and New Zealand counterparts in unitary states where parliament was sovereign, was 'unable to perform, and therefore finds it useless to promise its basic policies'. It was handicapped, Whitlam insisted, 'as they were not, by a Constitution framed in such a way as to make it difficult to carry out Labor objectives and interpreted in such a way as to make it impossible to carry them out'.¹⁴

Clearly, for such a party, constitutional reform seemed a necessary prerequisite for implementing radical policy. This became less so in recent decades due to the cumulative impact of a series of changes both in the High Court's interpretation of the Constitution and in the Labor Party's outlook, its policies and its constitutional strategy. Whitlam himself was a major figure in the transformation of the modern Labor Party. The process of accommodation had gone so far by 1978 that Whitlam could claim, despite his own government's poor record, that there was now nothing that a Labor government would want to do that could not be done under the existing Constitution. The major obstacles against a program of reform were no longer constitutional but political, he claimed: 'Even the Federal system itself, for all its restrictions, limitations, and frustrations, need not prevent reform'.¹⁵

More recent developments in constitutional interpretation and in Labor politics confirm Whitlam's 1978 view. The expansive interpretation given to the external affairs power by the High Court in the Tasmanian Dam case (1983) has greatly expanded the potential for federal encroachment in areas of State jurisdiction.¹⁶ At the same time,

14. E.G. Whitlam, 'The Constitution versus Labor', in E.G. Whitlam, *On Australia's Constitution*, Vic., Widescope, 1977, p.16.

15. E.G. Whitlam, *Reform During Recession*, Toowong, Qld, University of Queensland ALP Club, 1978, p.6. See also Whitlam's article, 'The Labor Government and the Constitution', in G. Evans (ed.), *Labor and the Constitution 1972-1975*, Melbourne, Heinemann, 1977, pp.305-30. Whitlam has recently published an extensive account of his government's achievements: *The Whitlam Government 1972-1975*, Ringwood, Vic., Penguin Books, 1985.

16. *Commonwealth v. Tasmania* (1983), 57 ALJR 450. For commentaries and analysis, see the

the Hawke Government has demonstrated that a modern federal Labor government need not be either reformist in its policies or adventurous in its use of available federal powers.

This brief sketch of Labor's political history and constitutional views suggests why the federal party was an inveterate advocate of constitutional change in previous decades and has become increasingly less so in recent times. However, it does not explain why Labor has gone to the other extreme of advocating a bill of rights that would restrict the power of the legislative and executive branches of government in favour of the judiciary, and turn over to the courts key areas of social policy-making that the judicial enforcement of a bill of rights entails. For that, we must go to the reforming Labor Conventions of the 1960s and early 1970s when the Party's basic outlook and policy directions were transformed. But first it is worth paying brief attention to two earlier events that evidence Labor's somewhat ambivalent attitude to the constitutional entrenchment of rights in the 1940s and 1950s. These are Evatt's inclusions of a few constitutional guarantees in his 1944 bid for expansion of Commonwealth powers for post-war reconstruction, and the 1959 Joint Committee on Constitutional Review that reflected Labor's more traditional views.

Evatt's Proposals for Entrenching Rights

Since Evatt was a man of liberal convictions and deeply involved in the international movements of his day, it is not surprising that he also included certain basic guarantees of individual rights in the 1944 'Powers' referendum proposals. The main thrust of these proposals was to seek increased Commonwealth powers for national reconstruction that would enable a Labor government to carry out ambitious economic and welfare policies after the defence power was curtailed with the return to peace. During the final stages of parliamentary debate on the 1944 Constitution Alteration (Post-war Reconstruction) Bill, Evatt added certain guarantees of rights, partly, as Sawyer points out, 'to reassure those who feared the socialist implications of the wider powers'.¹⁷ But perhaps more importantly, Evatt's purpose was to enshrine in the Australian Constitution the objectives of the Atlantic Charter to which the Allies were pledged.

special number of *Federal Law Review*, Vol.17, No.2 (1983-84); Australian Constitutional Convention, Standing Committee 'D' Volume II, Appendices, (1984); and M. Sornorajah, ed., *The South West Dam Dispute: The Legal and Political Issues*, Hobart, University of Tasmania, 1983.

17. Geoffrey Sawyer, *Australian Federal Politics and Law 1929-1949*, Melbourne, Melbourne University Press, 1963, p.172.

This was most obvious in Evatt's earlier 1942 Constitution Alteration (War Aims and Reconstruction) Bill, the forerunner of the 1944 legislation, that opened the Labor government's campaign for increased Commonwealth powers. As expressed in that Bill, the purpose of reconstruction was to 'carry into effect the war aims and objects of Australia as one of the United Nations, including the attainment of economic security and social justice in the post-war world'.¹⁸ Increased Commonwealth power was required for material reconstruction, expanded production, national development, full employment and immigration. But the grander purpose was to put into effect President Roosevelt's four basic freedoms that were embodied in the Atlantic Charter. According to this view, the whole purpose of fighting the war and reconstructing the nation for peacetime was to protect and enhance individual freedom and security. This grand moral synthesis of national and international goals for war and peacetime had a powerful appeal to Evatt, the international humanist, and was summed up by him in these stirring words:

This country, like all the other United Nations, has pledged itself to the task of achieving the broad objectives embodied in the Atlantic Charter and in the historic declaration of the four essential human freedoms — freedom of speech and expression, freedom of worship, freedom from want, freedom from fear anywhere and everywhere in the world. These declarations are not legal instruments technically binding on Australia; they are far more. They are solemn pledges of our dedication as a nation to the great ends of economic security, social justice and individual freedom.¹⁹

Evatt's 1942 Bill was breathtaking in its sweep, and specifically included power for guaranteeing Roosevelt's four essential human freedoms. The Commonwealth Parliament was to be given 'full power to make laws' for that purpose, and the Bill listed fourteen more specific but non-inclusive areas. These covered matters such as employment, prices, housing and 'the improvement of living standards', but also included in the list carrying into effect the guarantee of the four freedoms, that is to say

- (i) freedom of speech and expression;
- (ii) religious freedom;
- (iii) freedom from want; and

18. Commonwealth Parliamentary Debates, House of Representatives, 1 October 1942, p.1338 ff.

19. *Ibid.*, p.1339.

(iv) freedom from fear.²⁰

The Curtin Government decided not to proceed with the 1942 Bill until it had been referred to a bipartisan committee which also included State Premiers and Opposition leaders. This committee agreed that instead of holding a referendum during wartime, which would likely be divisive, the states should 'refer' fourteen specified powers to the Commonwealth for a period of five years under Section 51(xxxvii). The consensus foundered in the State Parliaments, however, with only Queensland and New South Wales passing enabling legislation in the agreed form. Hence Evatt brought back to the Commonwealth Parliament in February 1944 the Constitution Alteration (Post-war Reconstruction) Bill which proposed a referendum to secure for the Commonwealth the same fourteen powers that had been agreed to by the State Premiers for a period of five years from the end of the war.

The four basic freedoms were not included in this list. It was only towards the end of the parliamentary debate on the 1944 Bill that Evatt resurrected the first two freedoms, of speech and religion, as amendments. The proposed section for guaranteeing freedom of speech was a variation on the famous First Amendment of the American Constitution and read as follows: 'Neither the Commonwealth nor a State may make any law for abridging the freedom of speech or of expression'. In justifying this amendment Evatt argued that the Courts would make the appropriate trade off between individual liberty and social order as they had done in the United States. The second guarantee, freedom of religion, was to be effected by extending the application of the existing Section 116 to the States.

There was a curious third amendment that had to do not so much with rights as with enhancing parliamentary scrutiny of delegated legislation made under the proposed new powers. This proposal picked up one of Menzies' long list of spoiling amendments that had been moved earlier on in the debate. Evatt's purpose for including it was to head off charges that the Labor government was seeking to continue an excessively regulatory regime during peacetime.²¹

The rights amendments were carried on party lines but without much obvious enthusiasm on the Labor side, except from Evatt who also used the opportunity to display his constitutional erudition in explaining how the United States Supreme Court

20. Section 2, 60A (2) (h), Constitution Alteration (War Aims and Reconstruction) Bill 1942.

21. Commonwealth Parliamentary Debates, House of Representatives, 15 & 16 March 1944, pp.1393 ff.

had interpreted similar guarantees of rights. The Opposition criticised the proposals for a mixed bag of reasons. Some were opposed because the guarantees of freedoms had not been part of the package agreed to by the State Premiers; others, who favoured such guarantees, were opposed to their being restricted for only five years along with the other powers. One member who belonged to a group dedicated to preserving civil liberties argued that such proposals were better left out of the Constitution because the High Court was unlikely to interpret them liberally.²²

As it turned out, Evatt's belated inclusion of a few guarantees of rights in the 1944 proposals for amending the Constitution did little to blunt the substance of the Opposition's attack which focused on increased central power and a regulated state. Moreover, since these had not been part of the agreement with State Premiers, their inclusion added further ammunition for those opposed to any change. Evatt's 1942 proposals, which would have included all four basic freedoms from the Allies' war banner in the Australian Constitution, were bolder but even less plausible. There was no obvious specificity for 'freedom from want', for example, so that its inclusion in the Constitution was hardly sensible. Needless to say, with strong opposition and little enthusiasm from the government side except from Evatt who wore himself out in a vigorous campaign,²³ the 'powers' referendum along with the limited rights guarantees failed.

The 1959 Joint Committee on Constitutional Review

The 1959 Joint Committee on Constitutional Review was set up because of concern among federal politicians with issues of Parliament's functioning and powers. Because of the introduction of proportional representation for Senate elections in 1949, a Labor initiative that was not well thought out, there was the likelihood of disputes and possible deadlocks between the two Houses of Parliament. Furthermore, the Dixon High Court's *laissez faire* interpretation of Section 92, which stipulated that interstate trade be 'absolutely free', had put aspects of key policy areas such as road transport and agricultural marketing schemes beyond the control of both Commonwealth and State governments. Prime Minister Menzies was never enthusiastic about the review which he sanctioned on the grounds that he thought it would do no harm.

At the time, Labor was in opposition, and also in decline compared with the 'golden

22. Brennan, *ibid.*, p.1400. Brennan, however, voted for the amendments.

23. See Kylie Tennant, *Evatt: Politics and Law*, Sydney, Angus and Robertson, 1970, pp.151, 161-2.

years' of the 1940s when the Curtin and Chifley Labor Governments had ruled for eight consecutive years during war and postwar reconstruction. For this exercise, recalls Jack Richardson, who was Legal Secretary to the Joint Committee, Labor 'fielded its strongest team consisting of Senators Kennelly and McKenna and Messrs Calwell, Pollard, Ward and Whitlam a formidable debating force'.²⁴ Most of the Committee's time was taken up with Section 57 machinery issues concerning deadlocks between the Houses of Parliament and with the Commonwealth's legislative powers. Curiously, in view of Labor's about-face in the following decade, the Labor members, led by Calwell and Ward, insisted on spelling out Labor's traditional position in the Committee's 1958 interim report. This was the doctrinaire Labor policy of vesting full legislative powers in the Commonwealth Parliament and restricting the States to the possession of delegated powers.²⁵

The Committee met at a time when the international movement for civil rights was gathering momentum. It was strongly urged by some groups, such as the New South Wales Institute of Public Affairs, to endorse an entrenched bill of rights for Australia. The Committee noted the compensating trends of increased threats to individual rights by governments and increased use of entrenched charters of rights to protect the individual. But it rejected the need for entrenching a bill of rights in the Australian Constitution. The Committee concluded that the absence of constitutional guarantees 'had not prevented the rule of law from characterising the Australian way of life'. It reaffirmed the traditional faith in parliamentary government, inherited from Westminster, 'that as long as governments are democratically elected and there is full parliamentary responsibility to the electors, the protection of personal rights will, in practice, be secure in Australia'.²⁶

Instead of a charter of rights, the Committee recommended 'a constitutional amendment to protect the position of the elector and the democratic process essential to the proper functioning of the Federal Parliament'. The Constitution has a formula for determining the number of Representatives per State and, through the 'nexus' clause, requires the total number of members of the House of Representatives to be as nearly as practicable twice the number of Senators. But it leaves the apportionment of electorates within

24. J.E. Richardson, 'The Parliamentary Joint Committee on Constitutional Review', *Canberra Bulletin of Public Administration*, Vol.XIII, No.2 (Winter 1986), p.154. Richardson was Legal Secretary to the Joint Committee.

25. *Ibid.*, p.155.

26. *Report from the Joint Committee on Constitutional Review*, 1959, pp. 46-7, for this and the following quotations.

States to Parliament. The Committee recommended that the requirements of the Electoral Act be tightened up so that 'the votes of the electors should, as far as possible, be accorded equal value'. That meant reducing the margin on either side of the quota for a State from one-fifth, which was allowed by the Electoral Act at the time, to one-tenth. The Committee also wanted entrenched the requirement that redistributions actually be made after electoral divisions were reviewed at least once in ten years. It recommended that such requirements should also apply to the States.

The 1959 Joint Committee's rejection of an entrenched bill of rights in favour of entrenching democratic processes was something of a compromise between two constitutional traditions. Parliamentary responsible government, which was the dominant one, is premised on the belief that the individual's interests and rights are best furthered and protected through democratic processes. Curiously, however, the Committee was not prepared to trust Parliament with the key matter of electoral apportionment either at the national or State level. Hence the proposed reliance on constitutional entrenchment of the 'one vote, one value' principle.

The proposal was never taken up because Prime Minister Menzies, who had set up the Committee in response to parliamentary pressures, was not committed to constitutional change. In fact he saw little need for the review and was surprised that it had done such a thorough job. An ensuing election and ministerial reshuffle ensured that its work was terminated.²⁷ The Joint Committee's recommendations regarding the electoral system were subsequently implemented, at least at the Commonwealth level, in an enhanced form by means of Commonwealth legislation, following adverse judicial review of earlier legislation.²⁸ And the 'one vote, one value' requirement to apply to both the Commonwealth and the States was one of the referendum proposals finally put to the people in the September 1988 referendums.

Labor's Commitment to a Bill of Rights

27. Richardson, 'The Parliamentary Joint Committee on Constitutional Review', pp.155-6.

28. In *Attorney-General (Commonwealth) ex rel. McKinlay v. Commonwealth* (1975), 135 CLR 1, the High Court, with Murphy J. dissenting, rejecting the claim that the Constitution's S.24 phrase, 'directly chosen by the people', entailed the one vote - one value principle. However the Court did require strict adherence to the constitutional requirement that numbers of seats be allocated to States on the basis of their proportionate populations. The Act was deficient in not requiring regular calculations and, if necessary, redistribution. The Electoral Act was brought into line, and in 1984 the Commonwealth electoral procedures were further enhanced with the establishment of the new Electoral Commission.

A commitment to individual rights sits awkwardly with the Labor Party's earlier class origins, its power base in the trade unions, its populist approach to constitutionalism, its commitment to majoritarian democracy, its traditional strategy of using State power for economic and social purposes, and even its current 'corporatist' approach to economic management. In a nation of pragmatic utilitarians who relied on the State as 'a vast public utility', as Hancock and others have characterised Australians,²⁹ Labor represented the reformist or more radical wing. Labor's constitutionalism approximated Benthamite utilitarianism: unrestricted political power at the service of a popular majoritarian will for the improvement and benefit of all.³⁰ The party's conversion to individual rights which underpin the alien constitutional theory of classical liberalism needs explaining.

The federal party's commitment to pass legislation for the protection of civil liberties dates from the 1960s when a new generation of Labor leaders rewrote the Party's platform. Through the 1950s and early 1960s Labor's outlook and its policies were those of a backward-looking, machine-dominated and trade-union-based party whose electoral image was epitomised by such old-style parliamentary and party leaders as Arthur Calwell and F.E. Chamberlain. This began to change in the 1960s when Cyril Wyndham replaced Chamberlain as Party Secretary in 1963, becoming the first full-time Federal Secretary and head of the new Canberra-based permanent secretariat. At the same time Gough Whitlam, Lionel Murphy and Don Dunstan began to emerge as future Federal and State leaders. Labor policy was progressively overhauled to reflect reformist causes, quality-of-life issues and the concerns of Labor's increasingly 'white-collar' and middle class constituency. Civil liberties was one area that received increasing attention.

The Labor Party's stirring interest in civil liberties was signalled at the 1963 Perth Conference that adopted a new section entitled 'Civil Liberties' in the Party's platform, and added a 'Civil Liberties Committee' to the permanent standing committees that had been instituted by the 1961 Conference. The main plank of this new section called for 'The Federal and State Parliaments to pass Acts providing for Civil Liberties'.³¹ By

29. W.K. Hancock, *Australia*, Brisbane, Jacaranda, 1961, p.55 (first published 1930); and Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society', *Daedalus*, Winter 1985, pp. 147-69.

30. For an account of the Benthamite characteristics of this strain of Australian constitutionalism, see Michael James, 'The Constitution in Australian Political Thought', in M. James (ed.), *The Constitutional Challenge*, Centre for Independent Studies, 1982, pp.9-36. The Utilitarian and natural right theories are contrasted in H.L.A. Hart, 'Utilitarianism and National Rights', in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press, 1983, pp.181-97.

31. Australian Labor Party, *Federal Platform, Constitution and Rules* (as amended by the 25th

1965 there is evidence, in the more systematic Conference records that were kept after Wyndham became general secretary, of a ferment developing within the Labor Party over civil liberties. A report from the Legal Advisory Committee, comprised of Whitlam, Murphy, Wyndham and Senators S.H. Cohen and N.E. McKenna, was considered by Conference at Sydney in August 1965 and all its recommendations adopted.³² These recommendations concerned the disposition of five State resolutions, two from Western Australia, two from Queensland and one from New South Wales. A Queensland resolution to expand the civil liberties plank that had been adopted in 1963 was passed, so that the new section read:

The Commonwealth and State Parliament to pass Acts providing for civil liberties and to take all possible legislative, administrative and legal action

to prevent and combat racial, religious and political discrimination and intolerance.³³

Three other resolutions affecting civil liberties were referred back to the committee for detailed consideration or investigation. These included the establishment of a legal aid service, appointment of a Commonwealth ombudsman and a commitment, when in office, to seek a referendum to entrench the Universal Declaration of Human Rights into the Constitution.³⁴

The motion to have the ALP 'incorporate in its Platform the insertion of a Bill of Rights in the constitution of the Commonwealth' was again put forward for the next Conference held in Adelaide in July 1967.³⁵ It had been endorsed by the Civil

Commonwealth Conference, 1963), Section XX, 1,p.12. The new platform deleted from the Methods Section an earlier call for an amendment of the Constitution to include a charter of civil and human rights. This deletion was made, according to reports, because constitutional entrenchment of such a charter 'presented difficulties', *The Sydney Morning Herald* and *The West Australian*, 7 August 1963. Unfortunately, such newspaper reports are second-hand because the press were not admitted into Federal Conference until 1965, and there are no transcripts of the 1963 Conference.

32. Legal Advisory Committee Report, Document 15, 'State Resolutions: VIII Legal and Constitution'. For Minutes of the Conference's decision, Australian Labor Party, *Official Report of the Proceedings of the 26th Commonwealth Conference*, Sydney, 2 August 1965, pp.95-6.

33. Australian Labor Party, *Federal Platform Constitution and Rules* (as approved by the 26th Commonwealth Conference 1965), Section XXII, 1. p.28.

34. *Official Report of the Proceedings of the 26th Commonwealth Conference*, pp.95-6.

35. Australian Labor Party, Agenda, 27th Commonwealth Conference, 'XIII: Civil Liberties', Item 135, p.49.

Liberties Committee that was chaired by Don Dunstan and included the same five members listed earlier as comprising the 1965 Legal Advisory Committee, Whitlam, Murphy, Wyndham, Cohen and McKenna.³⁶ By now the reformist tide that had been turning in 1965 was in full flow with the new reformist leaders riding high: Dunstan had become Premier of South Australia in June 1967, Whitlam had succeeded Calwell as leader of the federal Labor Party in February of the same year, and Murphy had also become the innovative Labor leader in the Senate. Murphy's address to Conference explained the Party's new thinking on civil liberties that buttressed the proposed plank of a constitutional amendment 'to provide for the protection of fundamental Civil Rights and Liberties'. This was endorsed unanimously by Conference.³⁷

Murphy emphasised that the utmost fulfilment of every person, rather than changes to the economic structure, was the goal of democratic socialism. The concentration of economic and political power, whether in private corporations or through great public corporations and departments of State, was a menace to personal freedom unless subjected to public check. While not denying the need for changing the economic structure, Murphy sought to identify democratic socialism with the protection of rights and appealed to the great liberal milestones of the past:

Our goal is to rearrange our society in such a way that every person will have the opportunity to attain the utmost fulfilment of his own personality that is the goal of democratic socialism. It was the aim of those who wrote the Declaration of the Rights of Man and of the Citizen in 1789; it was the aim of those who wrote the American Bill of Rights; it was the aim of those who wrote the Universal Declaration of Human Rights and it is our aim.³⁸

After reviewing an assortment of recent Australian instances of infringements of rights by both Commonwealth and State governments and emphasising the dangerous growth of government powers, Murphy charged that:

Every generation has to fight over and over again the battle for our fundamental

36. Australian Labor Party, *Official Reports of the 27th Commonwealth Conference and Special Conference*, (Adelaide, 31 July 1967), p.96: Appendix T, Document 16, Civil Liberties Committee, Agenda Items, Item 135.

37. *Official Reports of the 27th Commonwealth Conference and Special Conference, 1967, p.28 for Minute; and Platform, Constitutions and Rules* (as approved by the 27th Commonwealth Conference, Adelaide, 1967), 'XXIV: Civil Liberties', 1, p.30. Murphy's speech is printed in Appendix K to the *Official Reports*, pp.64-6.

38. *Official Reports*, p.64, for this and the following quotation.

rights and liberties and this generation has to do that also. We Australians tend to think that our civil rights are beyond question. In recent times, almost every one of our fundamental rights and liberties has been either trampled on, whittled away, challenged or ignored in Australia.

Ironically, in view of his own subsequent experience of being hounded from the High Court because of allegations that came to light from illegal wiretaps, Murphy harped on attempts by the police in various States to win approval 'to invade privacy by tapping telephones to combat organised crime', something which he declared 'would never be tolerated in this community'. Murphy concluded with a flourishing call for the constitutional entrenchment of fundamental civil rights and liberties so that 'no government will be able to trample on these rights'.³⁹

At its next conference at Melbourne in July 1969, and in preparation for the 1969 general election, the Labor Party followed through on its earlier initiatives by rewriting the whole platform section on civil liberties. This was done at the instigation of Murphy who piloted the new platform through Conference.⁴⁰ It represented the mature thinking of the rejuvenated Labor Party as it had been condensed by the Party's specialised Civil Liberties and Legal Advisory Committees. The new 1969 platform had separate sections on 'Civil Liberties' and 'Law Reform'. The Civil Liberties section set out more systematically the Party's approach to protecting rights and added an important new section committing Australia to implement international covenants on human rights. The first three planks of the new Civil Liberties platform reflected both continuity and development in thinking, and read as follows:

1. The Constitution to be amended to provide for the protection of fundamental Civil Rights and Liberties.
2. The Commonwealth and State Parliaments to pass Acts providing for human rights and civil liberties, and to take all possible legislative and administrative action and judicial proceedings to prevent infringement of such rights and liberties and in particular to prevent discrimination on the grounds of colour, race, sex, creed or politics.

39. Ibid., p.66. See also *The Age*, 3 August 1967; and for a subsequent speech on a similar theme, *The Australian*, 11 September 1967.

40. Australian Labor Party, *Official Report*, 28th Commonwealth Conference, Melbourne, 28 July 1969, pp.131-5.

3. Australia to pass laws and to press for world-wide and regional implementation of international covenants on human rights. The States also to pass any laws necessary for such implementation.⁴¹

The other nine sections covered diverse matters ranging from an administrative court of appeal for reviewing administrative decisions to relaxation of censorship laws and ministerial control over the Australian Security Intelligence Organisation. At its 1969 Conference, the Labor Party also directed its attention to the area of greatest need for improving human rights in Australia, and adopted 'a new charter of political and civil rights' for Aborigines.⁴²

The Labor Party's new emphasis and thinking on civil liberties was having an impact on its traditional commitment to centralisation of political power and nationalisation of private industry. That is hardly surprising since the basic rationale for protecting personal rights is to check and limit organisational power, particularly the power of governments. As Murphy had pointed out to the previous 1967 Conference, the modern concentration of political and economic power in big government constituted a major threat to personal liberties. At the 1969 Conference, Murphy brought forward recommendations from the Legal and Constitutional Committee calling for the deletion of the Party's policy to abolish the Senate and downgrade the States. The Conference was reported to be 'almost evenly divided' on these issues, so they were referred back to Committee for further investigation. In moving that referral, the Victorian leader, Clyde Holding, pointed out that the old orthodoxies of the 1930s might not be appropriate for the 1970s: 'There may well be a case for a serious review of the centralist traditions of the Labor Party', he said.⁴³

At the subsequent 1971 Conference held in Launceston, Labor's outright centralist stance was formally modified. The Party's time-honoured pledge of amending the Constitution 'to clothe the Commonwealth Parliament with unlimited powers and with the duty and authority to create States possessing delegated Constitutional powers' was changed to giving the Parliament of Australia 'such plenary powers' as were necessary and desirable to achieve Labor's purposes. The States were not to be reduced to bodies possessing only delegated powers, but instead there was to be a better balance of

41. Australian Labor Party, *Platform, Constitution and Rules* (as approved by the 28th Commonwealth Conference, Melbourne, 1969), 'XXV: Civil Liberties', p.31.

42. *The Australian*, 30 July 1969.

43. *The Age*, 31 July 1969.

functions and finance between the three levels of government, Commonwealth, State and local, as well as extensive use of specialised commissions for inter-state policy areas and representation of local government bodies on the Loan Council.⁴⁴ This final reconciliation with federalism, which the Labor Party had formally opposed since federation, was a milestone in Labor history. It reflected the Party's support for Whitlam's 'new federalism' strategy of upgrading the quality of public services in deprived regions,⁴⁵ but as well it complemented the Party's commitment to civil liberties. Giving one government unlimited powers was no longer acceptable in principle because of the threat to personal liberty that would be entailed.

We can see from this account of the Party's Conferences that Labor's new commitment to individual liberties sat awkwardly with its traditional collective concerns and statist strategy. But, in any case, these were being abandoned or modified in favour of more orthodox economic strategies and in keeping with Labor's changed orientation towards quality-of-life issues and a more up-market, suburban constituency. Civil liberties had become a leading progressive cause internationally, and Labor's new generation of leaders were both well informed and, as progressive lawyers, attuned to such developments. At the intellectual level, new philosophical theories of rights were undermining the old utilitarian orthodoxies that had dominated British and Australian jurisprudence for more than a century, while in the United States civil libertarian activists and the American Supreme Court were overturning racial segregation and discrimination. As civil liberties became a leading progressive cause internationally during the 1970s, it was hardly surprising that Labor's leaders, most of whom were middle-class or upwardly mobile lawyers, would commit the Party to a bill of rights.

Labor's commitment to civil liberties might have been incompatible with its traditional commitment to State action and central direction of economic and social policy areas. But the Party has never been noted for theoretical rigour and has lived with major inconsistencies in the past. Indeed, the Party's traditions are diverse and spring from a number of distinct sources. As a progressive reformist party, Labor has also had a

44. For the text and Whitlam's account of the significance of the change, see Whitlam, 'The Future of Australian Federalism', extracts from an address given on 8 November 1971, in his *On Australia's Constitution*, p.149.

45. See E.G. Whitlam, 'A New Federalism', *Australian Quarterly*, 43, No.3 (September 1971), pp.6-17; and for extensive discussion the special number of *Politics*, ed. Dean Jaensch as *The Politics of 'New Federalism'*, Australasian Political Studies Association, Adelaide, 1977. The platform on Civil Liberties was not changed at the 29th Commonwealth Conference held at Launceston in 1971. However, the Law Reform agenda grew substantially to 31 items. Australian Labor Party, *Federal Platform & Policy* (as approved by the 29th Commonwealth Conference, Launceston, 1971), NSW edition, pp.16-7.

tradition of concern for small 'l' liberal values inherited from colonial radical liberalism.⁴⁶ Committing the Party to entrenching a bill of rights in the Constitution despite the insuperable obstacles to constitutional change was also a typical Labor ploy. The Party has been accustomed to signalling its preferred goal in this way and then doing what it could in practice. Hence, the attempts of the Whitlam and Hawke Governments to pass modest statutory bills of rights in 1974 and 1984-86 were in keeping with Labor's pragmatic and gradualist approach to implementing major reforms.

The Defeat of Labor's Statutory Bills of Rights

Since the Labor Party was in opposition federally throughout the 1960s, it was not until the 1970s and 1980s with the Whitlam (1972-1975) and Hawke Governments (1983 continuing) that Labor has been in a position to implement its rights platform. All its initiatives, however, have foundered because of strong partisan opposition coupled with the fact that Labor has also failed to win control of the Senate.

The Labor Party's commitment to a bill of rights and its championing by such controversial Labor Attorneys-General as Lionel Murphy and Gareth Evans was enough to arouse suspicion and opposition from both the Liberal Coalition Parties and various interest groups. The nearest thing to a reasoned debate on the issue occurred at the first session of the Constitutional Convention held in Sydney in September 1973.⁴⁷ But sharp differences of opinion emerged even at this early stage, with federal and State Labor Party leaders supporting a constitutional bill of rights and their political opponents, with only a few exceptions, being strongly opposed. The matter was referred to a Standing Committee but that too was divided on party lines and was unable to reach agreement.

46. H.V. Evatt, *Liberalism in Australia: An Historical Sketch of Australian Politics Down to the Year 1915*, Sydney, Law Book Co., 1918.

47. The Constitutional Convention sprang from dissatisfaction among the States, particularly Victoria, with severe vertical fiscal imbalance in Australian federalism and evidenced a widespread feeling that constitutional reform was both desirable and achievable. The Convention's work was carried on over a decade and a half in six plenary sessions and by continuing advisory committees. Although paralysed by partisan and Commonwealth-State rivalries during the Whitlam period and in the later years, the Convention proved a valuable forum for constitutional discussion, particularly for the States. The Convention was credited with preparing the ground for the highly successful 1977 referendums when three out of four proposals, those concerning casual Senate vacancies, territorial votes in referendums and retirement age for federal judges, were carried with exceptionally high support. The Constitutional Commission that superseded the Convention benefited from its extensive work and treated its recommendations as submissions to the Commission.

Reasoned discussion was not helped by Attorney-General Murphy giving notice that he was having prepared, and would soon introduce into Parliament, a statutory bill of rights embodying the main provisions of the United Nations Covenant on Civil and Political Rights.⁴⁸ Murphy's bill of rights was intended to bind the States by means of the external affairs power and would, he said, be an important step towards a constitutionally entrenched bill. Lionel Murphy was on the left of the Labor Party and one of the Whitlam Government's most controversial Ministers. The fact that he was promoting a bill of rights made many conservative and religious groups deeply suspicious. Moreover, State political leaders were antagonised by the prospect of Commonwealth legislation that might set national standards in traditional areas of State jurisdiction. In the atmosphere of the time, it is hard to imagine a more provocative scenario for launching an Australian bill of rights.

Labor's political opponents were quick to accept the challenge. The tough-minded Western Australian Premier, Sir Charles Court, insisted there was a link between 'starry-eyed idealism' and 'political opportunism': one ought to be suspicious of anything supported by one's political opponents, he warned.⁴⁹ Other Liberal spokesmen sketched out the case against a bill of rights, be it statutory or constitutional. These indictments would be blown into fearful proportions in subsequent public and parliamentary debates and used to defeat the various statutory bills of rights put forward or circulated by federal Labor Attorneys-General, Murphy, Evans and Bowen.

One important charge against the Murphy proposal for a statutory bill of rights was that 'its true and sole objective' was 'to assert a Commonwealth domination over the States'.⁵⁰ More generally, Liberal spokesmen were against an entrenched bill of rights because they claimed it entailed radical changes to traditional parliamentary government and the role of the courts. With exaggeration that was becoming typical even at this early stage, they warned that the imprecise language of a bill of rights 'must provoke unimaginable complexity and uncertainty, with a resultant flood of litigation

48. Australian Constitutional Convention, *Official Record of the Debates*, Sydney, Government Printer, 1973, pp.330-1.

49. *Ibid.*, pp.341-2.

50. Opinion of E.A. Willis, M.L.A. (NSW) in Regard to the Issue of a 'Constitutional Bill of Rights', in Appendix A of Standing Committee D, Report to Executive Council, 1 August 1974, p.49. Dr Forbes of the Federal Parliament concurred with this opinion, and its main points have been repeated by numerous Liberals since then.

such as this country has never known, and lead to administrative chaos'. The major reason for opposing an entrenched bill of rights was more principled, being based on the preference for government by elected representatives rather than unelected judges. According to this view, the 'fine sounding words' of an entrenched bill of rights would bind the people with 'whatever meaning may be given to them by the small handful of judges who, in the ultimate, will interpret them according to their own social and political attitudes'.⁵¹

The partisanship over a bill of rights that had emerged at the first session of the Constitutional Convention was intensified a few months later when Murphy's bill of rights was introduced into Parliament in November 1973⁵². Following the storm of criticism from groups outside Parliament as well as from the Opposition Parties, the bill was first amended by Murphy and then quietly abandoned by the Whitlam Government in the lead up to the 1974 election. There was little chance of its being revived after the 1974 election because Labor again failed to win control of the Senate and was involved increasingly in crisis management. Murphy himself was appointed to the High Court in 1975, and the Whitlam Government became immersed in economic, financial and, finally, a constitutional crisis that ended with its unprecedented dismissal from office by Governor-General Kerr.

The Whitlam Government was more successful in passing specific anti-discrimination legislation that bound the States. A Racial Discrimination Bill that relied on the International Convention on the Elimination of All Forms of Racial Discrimination was introduced at the same time as the unsuccessful Human Rights Bill, and was passed in 1975 after lengthy debate and some amendment. That Act set up the office of Commissioner for Community Relations to promote its purpose of eliminating racial discrimination in such areas as employment, housing, and access to services and facilities.

The appointment of Mr Al Grassby, a colourful ex-Labor minister from Italian background, as Commissioner ensured that the office had a high public profile. A particular target of the Whitlam Government's Racial Discrimination Act was Queensland's discriminatory laws concerning Aborigines and Torres Strait Islanders, so not surprisingly the eventual constitutional challenge to the legislation came from Queensland. In the *Koowarta* case, the High Court upheld the Commonwealth's

51. Ibid., pp.49-50.

52. Commonwealth Parliamentary Debates, Senate, Vol.58, 21 November 1973, pp.1971 ff.

legislation as a valid exercise of its Section 51(xxix) 'external affairs' power on the grounds that the Act closely followed the international convention that Australia had ratified.⁵³

Instead of a bill of rights, the Fraser Liberal Coalition Government (1975-1983), after extensive critical debate and a number of false starts, set up the Human Rights Commission in 1981. This was a rather weak body with limited powers to investigate complaints against the Commonwealth. Because of the Fraser Government's commitment to 'New Federalism', the Commission was given no mandate over the States even though many considered that the main violations of human rights occurred within their jurisdictions. In addition, the new Commission was given responsibility for the Racial Discrimination Act and absorbed the office of the independent Commissioner for Community Relations, which was downgraded.

Labor spokesmen were highly critical of the Human Rights Commission as a poor substitute for a bill of rights, and were determined to try again. When Labor returned to federal office in 1983, Gareth Evans, an articulate exponent of an entrenched bill of rights⁵⁴ and a Murphy protege who had helped draft the 1973 bill of rights became Attorney-General. Evans was immediately involved in the Commonwealth's initiatives to stop the Gordon-below-Franklin dam in an environmentally sensitive area of Tasmania. Hawke had firmly pledged that his government would stop the controversial dam, branding it 'an economic absurdity and an environmental obscenity' at his last major public rally held in Hobart before the election. In preparing the Commonwealth's case for the inevitable High Court challenge by Tasmania, Evans earned the popular title of 'Biggles' for arranging to have Royal Australian Air Force planes fly 'spy flights' over the dam site to collect court evidence. Evans greeted with enthusiasm the Court's favourable decision in the Tasmanian *Dam* case that consolidated, and to some extent expanded, its earlier broad interpretation of the Commonwealth's external affairs power. He claimed that the Government could now proceed with a statutory bill of rights that would bind the States, relying upon the external affairs power.⁵⁵

53. *Koowarta v. Bjelke-Petersen* (1982) 39 ALR 417. The judges were deeply divided, however, and the four-to-three majority included Justice Stephen who held that some inherent attribute of 'international concern' was required for Commonwealth legislation to satisfy Section 51(xxix) and that an international treaty was not sufficient.

54. Gareth Evans, "An Australian Bill of Rights?", *Australian Quarterly*, Vol.45, No.1, March 1973, pp.4-34.

55. *Commonwealth v. Tasmania* (1983) ALR 625. By a new four-to-three majority (there had been two changes to the Court since the *Koowarta* case), the High Court consolidated, and to an extent expanded, its earlier broad interpretation of the Commonwealth's external affairs power. The dam site had been listed on the World Heritage List, at the Commonwealth Government's request, and it was held

Evans subsequently had a bill of rights drafted and circulated in confidence to select individuals for comment. He announced publicly that this bill of rights was to be the 'centre-piece' of a human rights legislative package that included strengthening and expanding the Human Rights Commission and substantial tightening of the Racial Discrimination Act.⁵⁶ This package was approved in principle by Cabinet in October 1983. The Bill of Rights was to be introduced in Parliament's Autumn session of 1984, and 'be on the table to enable public reaction and consultation with the States, with a view to passage in the Budget Session'. Evans explained that the bill would be based on the International Covenant on Civil and Political Rights 'and enacted in constitutional reliance on the external affairs power'.⁵⁷ Its force, however, was to be largely declaratory and educative with 'provisions for administrative and limited judicial enforcement'. The strengthened Human Rights Commission would have the function of investigating complaints of breaches. In short, Evans' bill was to be 'a shield rather than a sword', and was branded as 'toothless' by some critics.⁵⁸ Nevertheless, the Evans bill of rights purported to bind the States; it was to apply for the benefit of natural persons against Commonwealth, State and Territory laws and to actions carried out under such laws.⁵⁹

'Having been involved very closely in 1973 with the previous abortive attempt to introduce a Human Rights Bill', Evans admitted that he had 'long cherished the desire to try again' and was determined to 'get it right this time'.⁶⁰ But nothing went right for the ambitious Attorney-General. He was described by one commentator as 'the political accident which is just waiting to happen' because of his handling of the Bill of Rights during 1984.⁶¹ Evans announced in March 1984 that tabling of the bill would be delayed until after an expected election in late 1984:

that the Commonwealth had power to prevent State development because of its responsibilities under the international Convention for the Protection of the World Cultural and National Heritage.

56. Gareth Evans, 'Commission, Contempts and Civil Liberties', Address to Conference organised by Centre for Continuing Education, The Australian National University, Canberra, 25 February 1984.

57. Ibid., p.18.

58. Justice Staples, *The Canberra Times*, 27 February 1984.

59. Australian Bill of Rights 1984, 'Draft-in-Confidence', SS.9, 15. The text was publicly released by Mr Bowen when he became Attorney-General.

60. 'Commissions, Contempts and Civil Liberties', p.17.

61. Greg Sheridan, *The Australian*, 1-2 December 1984.

In that anticipated hothouse atmosphere, it was thought unlikely that here in the Parliament, let alone the community at large, it would be possible

to have the calm and rational debate on this measure that its significance and importance justifies.⁶²

Cabinet's Administrative and Legal Sub-committee had decided to defer the introduction of the bill, although it gave approval in principle to Evans' proposals. Evans announced that 'Cabinet thought it should not proceed until after a fair amount of discussion with the States'.

Evans' political blunder was in circulating his draft Bill of Rights in confidence to certain individuals while keeping it a public secret until after the election. He and the Government were put in the indefensible position of seeking electoral endorsement for a major piece of novel legislation that they dared not show to the people. Labor's opponents, and particularly Queensland's veteran Premier who had obtained a copy of the draft bill, exploited the issue. Sir Joh Bjelke-Petersen told the Queensland Parliament that the bill eliminated all the usual limits on rights justified by public safety, public order, and the protection of public health and morals. It replaced these with 'a simple clause authorising the courts to uphold legal limitations which they, the Federal Courts, not the State Courts, consider are reasonably justified in a free and democratic society'. As a result, he concluded, 'This places the citizens of Queensland, the Government of Queensland and the Parliament of Queensland in the hands of Commonwealth-appointed courts and judges'. The proposed investigatory mandate of the Human Rights Commission that was to supplement the bill of rights was similarly rejected as a threat to the State's sovereignty. Sir Joh branded this proposal as an 'attempt to subject State ministers to wide and unprecedented investigatory and supervisory powers exercised by a non-elected and Commonwealth-appointed Human Rights Commission'. In typical fashion he concluded:

It is an audacious attempt to restructure Australian political and social life to meet the demands of a power-hungry Commonwealth Government bent on the destruction of the States and the establishment of a socialist republic.⁶³

As a result of his mishandling of the bill of rights and other issues, Evans was moved to the portfolio of Minerals and Energy after the 1984 election. He has since consolidated

62. *The Canberra Times*, 28 March 1984, for this and the following quotation.

63. *The Canberra Times*, 24 October 1984.

and improved his standing in the senior ranks of the Hawke Government by winning the deputy leadership of the Senate in February 1987, and becoming Minister for Foreign Affairs and Trade in 1988. Needless to say, Evans' Bill of Rights was abandoned.

The bill-of-rights cause was taken up without much initial enthusiasm by the new Attorney-General, Lionel Bowen. In fact, Bowen had at first opposed a bill of rights but complied with the Labor Party's formal commitment after pressure from the Caucus Legal and Administrative Committee.⁶⁴ Bowen's draft bill of rights was approved by Federal Cabinet at the end of September 1985, along with his proposal for a commission on constitutional reform.⁶⁵ Bowen's bill was to be considerably weaker than the earlier Evans draft: it was not to apply to the States and would make existing Commonwealth law inoperative only after five years. The rights guaranteed by the new bill would not be unlimited but, following the Canadian qualification, 'subject only to such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society'. A person could not initiate legal proceedings under the proposed bill of rights but might invoke it in defence before a court. The most contentious aspect of the Bowen package on human rights was the proposal to have a revamped Human Rights Commission, the Human Rights and Equal Opportunities Commission, investigate and conciliate on complaints against State laws. This was probably enough to ensure its defeat, particularly in view of the earlier bitter controversy.

When Bowen's bill of rights was introduced into Parliament, it drew fierce attacks from the Opposition and vocal interest groups.⁶⁶ The exaggerated and emotive language used to condemn this rather mild piece of legislation was quite extraordinary. The Liberal and National Parties launched a tirade of abuse against the bill, while the Democrats who controlled the balance of power in the Senate said they would reject it because it was too ineffectual.

The Shadow Attorney-General, John Spender, led the assault, branding the proposed bill of rights as 'misnamed' and 'a harmful, dangerous and divisive proposal'. The

64. L. Dobson, 'Caucus forces Bowen to reverse rights bill stand', *The Financial Review*, 18 April 1985.

65. *The Age*, 1 October 1985.

66. For Bowen's second reading speech, Commonwealth Parliamentary Debates, House of Representatives, 9 October 1985, pp.1706 ff, and a sampling of the Senate's debate, Commonwealth Parliamentary Debates, Senate, 2 December 1985, pp.2662 ff.

Opposition would try to improve it through amendments, he said, but in any case would 'move swiftly to repeal' it when in government. Spender catalogued the faults and likely consequences of the bill in similar colourful language: it was not needed; it would lead to 'legal confusion and ambiguity on a grand scale; it conferred on the Human Rights Commission powers of "inquisition contrary to basic notions of justice"; it omitted many basic rights such as the right to private property and not to join a union, and in any case did not apply to violations by powerful non-government organisations like trade unions; it did not provide any legal enforcement of rights; and it created a basis for deliberate, massive and unprecedented federal intrusion into the affairs of State governments, instrumentalities and local government bodies'.⁶⁷

Spender claimed that the bill was 'a sham. To call it a Bill of Rights is to pervert the English language'.⁶⁸

Others repeated and embellished such charges. Under the caption of a 'Bill of Wrongs', Senator Walters, a Tasmanian Liberal, sketched the following scenario: Anne Citizen could be compelled to appear before the Commission without legal representation to face accusations made by a secret informer and be required to disclose private documents without the possibility of legal appeal.⁶⁹ Opponents of the bill claimed that the Commission could exercise, for the purpose of protecting rights, powers that violated the very rights it was supposed to protect. Senator Durack, previously Attorney-General and at the time deputy leader of the Opposition in the Senate, emphasised the 'very dangerous way' in which the bill could be enforced by 'a souped-up version of the existing Human Rights Commission':

this new inquisition may decide to sit in private and prevent the publication of its proceedings. Here we have all the makings of a new institution of thought control.⁷⁰

Other leading figures like Geoffrey Blainey, Australian historian and publicist, joined in the campaign with similar exaggerated rhetoric. Blainey warned: 'The Bill of Rights has the potential to overturn many of the principles of Australian life and many of its

67. J.M. Spender, Media Release, 13 November 1985.

68. *The Canberra Times*, 15 November 1985.

69. *The Bulletin*, 25 March 1969.

70. *The Australian*, 2 January 1986.

institutions and practices'.⁷¹

When the bill came to the Senate, the opposition parties mounted a concerted filibuster until the Government abandoned the legislation. How could these statutory bills of rights, particularly the Bowen one that was a relatively mild shield against Commonwealth encroachments on personal rights, become so contentious and maligned? Probably because of its symbolic value and because it was an easy political target. Except for a few individuals like Evans and, for a time, Bowen, the Hawke Labor Government has never shown much enthusiasm for the bill of rights. For its part, the Opposition mounted a concerted and highly partisan campaign against the bill, apparently seeing its defeat as a way of denting the Government's strong image.⁷² Meanwhile, Bowen had opened up a second, and potentially more significant, front with the establishment of the Constitutional Commission that was charged with investigating the adequacy of protection for democratic rights under the Constitution. The Commission, however would be swamped by the bitter partisanship generated by the Murphy, Evans and Bowen abortive attempts at introducing statutory bills of rights.

The Constitutional Commission and 1988 Referendums

Bowen had announced the establishment of a Constitutional Commission in December 1985 for the purpose of carrying out 'a fundamental review' of the Australian Constitution with a view to its 'revision' during the bicentenary year of 1988. The Commission's terms of reference were spelt out in four propositions, one of which was to 'ensure that democratic rights are guaranteed'.⁷³ The Commission was assisted by five advisory committees, one of them examining 'individual and democratic rights under the Constitution'. The advisory committees carried out their investigations, including extensive public hearings, during 1986 and submitted public reports on their findings and recommendations to the Constitutional Commission by mid 1987.⁷⁴ At

71. Report of speech in Perth, *Australian*, 7-8 June 1986.

72. Contrast this with the sensible bipartisan approach of the Senate Standing Committee on Constitutional and Legal Affairs that published an 'Exposure Report' in November 1985, 'A Bill of Rights for Australia?' Canberra, Australian Government Publishing Service, 1985. The Committee did not proceed with a final report because the partisanship over the Bowen Bill had become too intense.

73. From the terms of reference, reprinted by the Constitutional Commission, *Final Report*, Vol.II, Appendix B, Canberra, Australian Government Publishing Service (AGPS), 1988, p.897.

74. For the report on rights, Constitutional Commission, *Report of the Advisory Committee on Individual and Democratic Rights Under the Constitution*, Canberra, Commonwealth of Australia, 1987.

the request of the Attorney-General, the Commission then prepared an interim report in early 1988 that summarised its recommendations for the revision of the Constitution together with detailed discussion of matters that Bowen was considering putting to referendum.⁷⁵ These included the requirement of 'one vote, one value', and the extension to the States of the constitutional guarantees of the right to trial by jury, freedom of religion and just compensation for acquisition of property that already apply to the Commonwealth. Versions of these recommendations were adopted by the Government and put to referendum in September 1988. Meanwhile, the Commission produced its final report that included its arguments for adding a new chapter to entrench an extensive bill of rights in the Constitution.

The Constitutional Commission is significant for having carried out a major review of the Constitution and canvassed current issues in an impressive two-volume report of nearly twelve hundred pages with thirty or so pages of recommendations.⁷⁶ As a practical political exercise, however, the Commission was an expensive failure that has killed any prospects for constitutional change in Australia for the foreseeable future. That is particularly the case as far as rights are concerned because the Commission came out strongly in favour of an entrenched bill of rights and the Government put to the people modest proposals for extending existing guarantees of rights in the Constitution. The 1988 slate of referendum proposals suffered the worst defeat of any since federation, with the so-called 'people's charter' of extending existing rights being the most unpopular of all and winning only 31 per cent approval.

The reasons for such an extraordinary defeat are to be found in the continuation and heightening of partisanship that scotched Labor's earlier attempts at implementing a statutory bill of rights, combined with the accustomed reluctance of Australians to sanction constitutional innovations that appear to favour central institutions at the expense of the States. Since these factors have been analysed in some detail elsewhere,⁷⁷ I shall summarise them here in order to round out the account of Australia's firm rejection of a bill of rights.

75. Constitutional Commission, *First Report*, Canberra, AGPS, April 1988. The Commission's terms of reference required it to make 'interim reports on matters under study at intervals to be determined in consultation with the Attorney-General'.

76. Brian Galligan and J.R. Nethercote, *The Constitutional Commission and the 1988 Referendums*, Centre for Research on Federal Financial Relations, Canberra, The Australian National University, 1989.

77. Brian Galligan and J.R. Nethercote, *The Constitutional Commission and the 1988 Referendums*, Centre for Research on Federal Financial Relations, Canberra, The Australian National University, 1989.

Ironically, Attorney-General Bowen conceived the Constitutional Commission as a non-political attempt at constitutional revision. It was intended to break the log jams of Commonwealth-State rivalries that had marred the Constitutional Convention over broader issues of constitutional reform and partisanship that was threatening to sink Labor's statutory bill of rights in the Federal Parliament. After the last plenary meeting of the Constitutional Convention in Brisbane in July 1985 at which the Federal Labor Government was neither in control of the agenda or the numbers, Bowen blasted this forum as a waste of time, and floated instead the idea of an alternative 'people's convention'. This was modified to a more routine body of 'eminent persons' who turned out to be mainly constitutional lawyers, but with notable public figures such as Sir Zelman Cowen, Gough Whitlam and Sir Rupert Hamer, former Governor-General, Labor Prime Minister and Victorian Liberal Premier respectively, along with the odd pop star and novelist such as Peter Garret from 'Midnight Oil' and Thomas Keneally. Bowen's strategy was to keep practicing politicians out of the process of constitutional review and referendum as much as possible.

Unfortunately for the success of his cause, however, the Opposition did not acknowledge that the Commission was non-partisan and that constitutional review ought to be left to a body of appointed persons. In the lead up to the 1987 elections, the opposition Coalition Parties threatened to wind up the Commission if elected to office, and when that failed to eventuate they waged an effective campaign of denigration. As a result, the Commission never achieved legitimacy with the non-Labor side of politics. Nor were many on the Labor side very enthusiastic. State Labor Premiers like John Cain from Victoria favoured the previous Constitutional Convention in which State political leaders had a direct voice.⁷⁸ In any case, the States' reform agenda centred on

redressing the extreme fiscal imbalance in Australian federalism whereby the Commonwealth collects some eighty per cent of revenues and the States are dependent on extensive grants.⁷⁹

Moreover, the Federal Government had not demonstrated any pressing need for a new round of constitutional review and revision, except that it was the occasion of the bicentenary when national euphoria might spill over into constitutional politics and facilitate constitutional revision. This did not materialise; nor was there much public

78. See John Cain, 'Towards a federal reformation: the renaissance of the Australian States', in M. Birrell (ed.), *The Australian States*, Longman Cheshire, 1987.

79. For critical discussion of this, see Chapters by Bhajan Grewal and Cliff Walsh in Brian Galligan (ed.), *Australian Federalism*, Melbourne, Longman Cheshire, 1989.

interest in the work of the Commission.

In seeking to salvage some credibility from the exercise, Bowen had the Commission make an interim report covering items that the Government might put to referendum during the bicentenary year. In so doing, he compromised further the independent standing of the Commission which was seen as furthering the Government's constitutional strategy. This was exacerbated during the referendum campaign when the Chairman of the Commission and other Commissioners endorsed the Government's proposals, even though the one seeking a four-year term for Parliament substantially altered the Commission's recommendation.

The four proposals put to referendum in September 1988 were as follows:

1. a proposed law to alter the Constitution to provide for four-year maximum terms for members of both Houses of Parliament;
2. a proposed law to alter the Constitution to provide for fair and democratic parliamentary elections throughout Australia;
3. a proposed law to alter the Constitution to recognise local government; and
4. a proposed law to alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government.⁸⁰

The first two proposals concerning four-year parliamentary terms and 'fair and democratic' elections were the more substantial ones. On the first matter, the Commission had recommended a four-year maximum term for the House of Representatives with a bar on elections before three years, and an eight year term for the Senate that would have retained the ratio of the existing three and six year cycles. The Government's proposal that dropped the three year minimum term and made the Senate's term coterminous with that of the House would have enhanced significantly the Prime Minister's discretion to call elections for both Houses whenever it suited him. While some argued that the Senate's authority would be enhanced by a shorter term that would make it more representative, the Opposition branded it as 'effective castration of the Senate behind the camouflage of the four-year term for the House of Representatives'.⁸¹ The second proposal, although beguilingly attractive, referred to a

80. Sample ballot paper, *The Cases For and Against*, Canberra, AGPS, 1988.

81. John Howard, Leader of the Federal Opposition, 'Constitutional Ambush', *The Weekend*

complicated bill that sought to impose 'one vote, one value' on the States as well as the Commonwealth. The third and fourth proposals, for recognising local government and extending three existing constitutional rights to cover the States as well as the Commonwealth, were considered by many as palliatives to attract support for the overall package.

If that were so, the strategy backfired. Opponents who had been stirred up by the previous Labor attempts to bring in a statutory bill of rights saw the fourth proposal as the thin edge of the wedge. The Constitutional Commission had given notice in its interim report that it would be recommending a whole new chapter incorporating a substantial bill of rights. The text for this was appended to the interim report as Bill No. 13, entitled 'A Bill to alter the Constitution so as to guarantee certain rights and freedoms'; but the justification for such a fundamental change to the Constitution had to wait for the final report that was not issued until after the referendum. Strategically this was a mistake, and for the opponents of a bill of rights it was further evidence that the Commission had essentially a Labor view of constitutional revision.

All four referendum proposals were overwhelmingly rejected, with the 'No' vote running two-to-one against the 'Yes' on virtually all questions in all States. The fair elections proposal did somewhat better with 38 per cent overall and a high of 45 per cent in Queensland where a National Party Government retains office through a notorious zoning system that favours rural voters. The rights proposal fared worst of all with only 31 per cent approval, making it the least popular of all forty-two proposals ever put to referendum in Australia. Needless to say, after such a defeat there was little interest in the Constitutional Commission's final report that included elaborate argument in favour of a whole new chapter guaranteeing rights and freedoms in the Constitution.⁸²

No Bill of Rights

The defeat of the 1988 referendum proposal for extending the modest guarantees of rights already in the Constitution and of all three Commonwealth statutory bills of rights, each one milder than its predecessor and the third one not intending to bind the States, has ensured categorically that there will be no Australian bill of rights. Unfortunately, such an important national decision was not taken after measured assessment of the adequacy of the existing regime for protecting rights nor reasoned

Australian, 11-12 June 1988, p.19.

82. Constitutional Commission, *Final Report*, Chapter 9.

public debate. To an extent, this did occur in the work of the Senate Standing Committee on Constitutional and Legal Affairs⁸³ and the Constitutional Commission, both of which endorsed an entrenched bill of rights. However, the reports of both bodies were swamped by partisan polemics in the ongoing battle between federal Labor Governments and their political opponents.

Nor were Labor's successive initiatives well executed politically, or for that matter even strongly supported by Labor leaders other than the Attorney-General at the time. Supporters of a bill of rights have good reason to feel cheated by the inept manner in which all the attempts have been handled. Nevertheless, both the strident opposition of the non-Labor parties and the half-hearted commitment of Labor Governments seem to be rooted in an antagonism or indifference to a bill of rights among the general public. While there is no systematic survey evidence of what Australians think about rights, it does seem that there is little grass roots support for a bill of rights. In this respect, the Australian situation is quite different from the Canadian where Prime Minister Trudeau was able to tap strong popular support for the Charter of Rights and Freedoms in his tussle with opposing provincial premiers. Although the Australian Labor Party changed its official platform to endorse an entrenched bill of rights during the 1960s under the leadership of a new breed of Labor lawyers, that did not reflect, nor has it produced, a groundswell of support from the broader Labor movement let alone the community at large. Australia does not have a rights culture, so it is hardly surprising that the various ill-contrived initiatives for a bill of rights have been defeated in its boisterous system of federal parliamentary democracy where political partisanship and Commonwealth-State rivalries are such potent forces.

Do We Need a Bill of Rights for Australia?

Given this record of abortive attempts to pass a statutory bill of rights or to entrench rights further in the Constitution, it is unlikely that Australia will have a bill of rights for the foreseeable future. But even if that is the case, it is still important to investigate whether we really need one, and what impact it might have.⁸⁴ I should like to address myself to this question of whether Australia should have a bill of rights in this last section, and suggest some criteria that might help in answering it. I think it is necessary to consider the question seriously and, whether we are for or against a bill of rights, to have a reasoned case that supports our view.

83. A Bill of Rights for Australia? An Exposure Report, Canberra, AGPS, 1985.

84. See Rainer Knopff, 'Parliament vs The Courts: Making Sense of the Bill of Rights Debate', *Legislative Studies*, Vol.3, No.2 Spring 1988: pp.3-16.

First, I think it is necessary to draw attention to a different sort of response that might be best characterised as 'value assertive' since it relies on personal values or bias, or just plain gut feeling. One is either for or against a bill of rights as a matter of fundamental preference, and everything else that is to be said follows from that original belief.⁸⁵

My contrary view is that we do need, and can make, a reasoned case, and that this is facilitated by setting down criteria that need to be addressed. There are no doubt different ways of formulating such criteria, and perhaps even a larger number that are material, but I would suggest the following three:

- i) the *compatibility* of a bill of rights with the established political and constitutional culture; or 'Does it fit?';
- ii) the *superiority* of a bill of rights for protecting rights; or 'Does it make things better?'; and
- iii) the institutional *suitability* of Courts for such a function; or 'Are Courts appropriate for such a role?'

This is not the place for a detailed examination of these three matters which are being addressed in a larger project.⁸⁶ Here I shall simply indicate a few relevant considerations.

First, a national bill of rights, that is either entrenched in the Constitution or made binding on the States by means of the external affairs power, would be a significant innovation. In a number of important respects, such an instrument is incompatible with the key components of Australia's established hybrid constitutional system of federalism and responsible Government. This paper has documented how the federal institutions of the Australian Constitution, the Senate and the States, have played a major part in defeating various Labor attempts at bringing in a national bill of rights. The theoretical dimensions of the antithesis between federalism and national standards for rights that has been evident in Australian practice are developed elsewhere.⁸⁷

85. Peter Bailey, 'The Bill of Rights Debate: A Comment', *Legislative Studies*, Vol.3, No.2, Spring 1988, p.17.

86. This is a book length examination of these and other issues concerning whether Australia should have a bill of rights that I am currently engaged in with John Uhr and Rainer Knopff.

87. Brian Galligan, Rainer Knopff and John Uhr, 'Federalism and the Protection of Rights', *Publius*:

Obviously, national institutions and their underlying constitutional culture can be modified. Canada provides a fascinating comparative case of a comparable country with a system of federalism and parliamentary responsible government that has recently adopted an elaborate Charter of Rights and Freedoms. Counter pressures in Australia have so far proved stronger, so it is important that the question of compatibility be more thoroughly investigated in the Australian situation.

The second question of the superiority of a bill of rights is more difficult to deal with. That is because it is hard to know precisely how well rights are protected in Australia today and whether a bill of rights would improve things. It is not sufficient to compare the records of countries with and without bills of rights, even if that were possible, because we cannot be sure that the differences are due to the bill of rights and not to other factors.

So far at least, Australia's distinctive approach has been for gradualist experimentation and piecemeal innovation with a patchwork of institutions. Since the 1970s there has developed a number of Commonwealth and State commissions, administrative review tribunals, offices of ombudsman, and specific legislation against racial and sexual discrimination. The revamped Human Rights and Equal Opportunity Commission was established at the end of 1986 for the purposes of education, conciliation on complaints, and conducting research and inquiries on matters concerning human rights. It has functions under its own Act, as well as under the Racial Discrimination Act of 1975 and the Sex Discrimination Act of 1984. This Commonwealth Commission has regional offices in Queensland, Tasmania and the Northern Territory, but in the other four States complaints under the Commonwealth laws are handled by various State Anti-Discrimination Boards and Equal Opportunity Commissions. As well, the Senate has been active through special committees in reviewing legislation for its impact on human rights and in investigating difficult issues.⁸⁸ Whether all of this, together with the complex body of common law, is a sufficient substitute for a bill of rights is a rather speculative question. Certainly, what has developed does seem more compatible with Australia's strong political traditions of parliamentary responsible government and a federal system.

The final question concerning the institutional suitability of courts for determining substantial social and public policy issues is a contentious one. The United States

the Journal of Federalism, Vol.20, No.2, 1990.

88. See G.S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988: Ten Perspectives*, Melbourne, Melbourne University Press, 1989, especially Ch.8.

Supreme Court has been the outstanding example of a freewheeling court that has indulged in overt policy making in the most controversial areas, such as abortion which is again topical. Not surprisingly, the key issue for American constitutional jurisprudence has become the legitimacy of judicial review in such matters. Australian judges have been much less adventurous in their work, but as well have persisted with a public rhetoric of literalism and legalism that barely recognises the real policy dimension of the role that they currently play.⁸⁹ Australian judges could no doubt adapt to, and might even relish, the enhanced policy making role of applying a bill of rights just as the Canadian judges have recently done. But, in my view, the case for giving such a role to the courts is not a compelling one.

* I have revised and added to this paper to take account of valuable suggestions from Harry Evans, John Uhr and others at the seminar presentation on 8 May, 1989. I should like to thank the organisers for providing such a useful forum.

89. See my *Politics of the High Court*, St. Lucia, University of Queensland Press, 1987.

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