Tom Campbell's Proposal for a Democratic Bill of Rights

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Introduction

In this essay, I examine Tom Campbell's contribution to a public and scholarly debate about Australian bills of rights. His engagement in this debate itself shows something of his intellectual commitments. Although deeply engaged with fundamental questions of political and legal philosophy, he brings his philosophical insights to bear on contemporary legal and political questions.[1]

Tom Campbell is a well-known opponent of the enactment of a constitutional bill of rights and a critic of statutory forms as well. In this essay, I will briefly review the arguments he makes against constitutional rights and his criticism of the statutory forms before moving to consider a more recent aspect of his work, a proposal for a 'democratic' bill of rights.

1. Against Bills of Rights

Campbell's objection to constitutional rights flows from his prescriptive legal positivism, the central claim of which is that societies are best governed by 'a system of readily identifiable mandatory rules of such clarity, precision and scope that they can be routinely understood and applied without recourse to contentious moral and political judgments'.[2] Adjudication under a bill of rights clearly falls short of this ideal: Constitutional rights require a great deal of 'contentious moral and political judgment' at the point of application by judges in the course of adjudication.

Campbell's preference for rule-based governance is partly driven by certain rule of law values. He values, in particular, the predictability afforded to citizens (and the consequent freedom to plan and co-ordinate their actions)

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1 For an explicit statement of this view see, Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (2004) 7.

2 Ibid 24.

governed by publicly known rules.[3] But his positivism is also democratic: that is it is driven by a preference that rule-making take place in legislatures not courts.[4] For the 'democratic legal positivist' constitutional rights are doubly problematic. Their interpretation requires judges to engage in a great deal of relatively unconstrained contentious moral and political judgment, a problem compounded by the preclusion of legislative revision of judicial decision.

Given these commitments, Campbell's opposition to bills of rights in statutory form is accordingly more moderate.[5] These bills of rights are typically unentrenched and employ only 'weak' remedies like declarations of inconsistency and interpretation requirements.[6] Nonetheless, Campbell remains sceptical of claims that bills of rights in this form reconcile rights review with parliamentary sovereignty. Focussing on the 'interpretive requirement' seen in the *Human Rights Act 1998* (UK),[7] Campbell argues that this provision, though seemingly innocuous, actually confers a strong power on judges to 're-write' legislation to comply with human rights standards. The provision, section 3 (1) of the *Human Rights Act*, requires that:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

In the United Kingdom it is presumed, quite apart from this provision, that Parliament intended to comply with the *European Convention on Human Rights*. Because, Campbell argues, that presumption operates in addition to the section 3(1) requirement, there is in effect a double reading in of rights standards, providing two points at which legislation is subject to interpretation by the incorporated rights.[8]

These arguments represent an important intellectual contribution. Campbell's brand of legal positivism[9] has reshaped a rather tired debate about

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3 Ibid 36-37.

4 Ibid 40, 172.

5 Tom Campbell, 'Incorporation through Interpretation', in Tom Campbell, K.D. Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (2001) 79.

6 Stephen A. Gardbaum, 'The New Commonwealth Model of Constitutionalism', (2001) 49 *American Journal of Comparative Law* 707.

7 Similar requirements are found also in the *New Zealand Bill of Rights Act 1990* (NZ) s 6, *Human Rights Act 2004* (ACT) s 30, and *Charter of Human Rights and Responsibilities 2006* (Vic) s 32(1).

8 Campbell, above n 5.

9 For similarly motivated arguments against constitutional rights, see James A. Allan, 'A Defence of the Status Quo' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights:*

constitutional rights, breaking what had previously been seen as the inevitable link between enthusiasm for human rights and advocacy of a constitutional bill of rights. Thus Campbell has avoided complacency about Australia's human rights record while focussing attention more clearly on the institutional question: 'Which institution is best suited to the task of rights protection?'

Despite the importance of this aspect of his work, in this essay, I will focus on another, less examined, part of his work on bills of rights.

2. An Alternative: A Democratic Bill of Rights

In an essay entitled 'Human Rights Strategies: An Australian Alternative'[10] Campbell makes the case for a 'democratic bill of rights'. At the heart of this proposal is the adoption of a bill of rights that is entrenched through constitutional amendment[11] but that is unenforceable in the sense that no legislation or other enactment could be rendered invalid for inconsistency with the bill of rights.[12] The proposal also denies the judiciary the weaker powers commonly found in statutory bills of rights.[13] Thus Campbell's 'democratic bill of rights is not indirectly enforceable through an interpretive

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Instruments and Institutions (2004) 175; Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Greg Craven (ed) *Australian Federation: Towards the Second Century* (1992) 151; Jeremy Waldron, 'A Rights-based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18.

10 Tom Campbell, 'Human Rights Strategies: An Australian Alternative' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 319.

11 Ideally, though Campbell also canvasses the possibility of enactment by Parliament after endorsement in a nationwide referendum. Ibid 333.

12 The proposal would therefore probably include a provision along the lines of s 4 of the *New Zealand Bill of Rights Act 1990*:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
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> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

13 Campbell, above n 10, 336.

clause like s 3(1) of the *Human Rights Act* nor does it allow for judicial declarations of inconsistency.

In addition, Campbell proposes the establishment of a Joint Standing Committee on Human Rights, which would have constitutionally protected and enforceable powers to delay legislation, to require that legislation be brought forth to address human rights problems and to hold public inquiries.[14] Thus the Committee's powers would be much stronger that existing committees of this type whose role is typically limited to review and reporting.[15] The overall goal of the Committee would be to achieve a comprehensive set of laws protecting the constitutionally enumerated rights.[16]

To put forward an argument for institutional redesign at this level of detail is – even for a scholar with so strong a commitment to applied political philosophy – a bold and unusually detailed contribution to the debate.

Naturally, the proposal is informed by Campbell's philosophical commitments. Rights remain essentially the domain of the majoritarian arms of government, contested in parliament not the courts. Moreover, by conferring on the Committee the brief of developing comprehensive human rights legislation, the proposal is faithful to Campbell's particular brand of positivism with its particular emphasis on governance through specific legislation.

But, though it is resolutely democratic and positivist, the proposal also seeks to harness the symbolic, and to some extent, the actual power of constitutions. Thus the bill of rights is entrenched (though unenforceable) and the proposed Human Rights Committee has some powers that are both entrenched and enforceable (though these stop short of substantive limitations on the legislative process). Campbell's proposal thus implicitly responds to the argument that one important function of constitutional bills of rights is that they demonstrate the centrality of rights to a nation's political and legal culture and improve sensitivity to rights within the political culture.[17]

It is this element of entrenchment to which I will direct my remarks today. In particular I want to question whether entrenchment of a bill of rights,

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14 Ibid 334.

15 Bryan Horrigan, 'Improving Legislative Scrutiny of Proposed Law to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making' in Campbell, Goldsworthy and Stone (eds), above n 10, 61.

16 Campbell, above n 10.

17 For one version of this argument, see Ronald Dworkin, *Freedom's Law* (1996) 345.

even with the proviso that the bill of rights be unenforceable, can be reconciled with Campbell's underlying philosophical commitments.

3. The Incompatibility of Entrenchment and a Democratic Bill of Rights

A. Entrenching an Unenforceable Bill of Rights

In a legal culture such as ours – where constitutional interpretation is understood as the province of the judiciary[18] – there are some dangers for the democratic legal positivist in this attempt to give rights constitutional weight. There is a risk that even though the bill of rights is explicitly unenforceable, judges will nonetheless enforce it indirectly.

To make my point, there is no need to posit maverick judges adopting highly unorthodox methods of constitutional interpretation. Rather, my argument is that even accepted methods of interpretation might allow for forms of constitutional interpretation that should make a legal positivist with Campbell's democratic commitments quite uncomfortable.

The problem arises because in our constitutional culture one part of the constitutional text cannot be easily isolated from another. Courts tend to read the document 'as a whole' extracting from particular provisions an overall picture of the system that the Constitution implements. In its most robust form, interpretation along these lines can create doctrines that are the functional equivalent of constitutional rights. Prominent in Australian constitutional law for instance is the freedom of political communication – a limited kind of free speech right – inferred from specific provisions establishing a representative and responsible form of government.[19] Through interpretive methods like these, even non-enforceable rights might have a considerable effect on constitutional interpretation and therefore indirectly involve courts in interpretation of contested moral concepts.

By way of illustration consider the question whether the Commonwealth Constitution requires that electorates for the Parliament contain equal numbers of voters (or as near to equal as is practicable) ensuring equality of voting power as between electors.

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18 See, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262.

19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 relying (inter alia) on ss 7, 24, 64, 128 as the textual foundation for the freedom of political communication.

Two cases have brought this question before the High Court. In the first, *McKinlay v Commonwealth*, a clear majority rejected the proposition.[20] The Court considered the question again in *McGinty v Western Australia*, a case of the High Court's recognition of an unwritten constitutional principle requiring 'representative and responsible government' (which in turn required freedom of political communication).[21] In *McGinty*, the question was whether this unwritten principle also required equality of voting power.

The case concerned electoral divisions for a *state* legislature, rather than the Federal Parliament, and complications arising from this feature of the case meant that no clear majority emerged.[22] However, two judges explicitly rejected the proposition that the Commonwealth Constitution contained a requirement of 'equality of voting power' in elections for the federal Parliament.[23]

The answer to these questions may well have been different if the Constitution included a guarantee of equality of some kind. Of course, such an argument would be easiest to make in circumstances in which an equality guarantee was directly enforceable in the manner of the 14th Amendment to the United States Constitution (which was important in the development of the American constitutional requirement of equality of voting power).[24] My claim, however, is that even an unenforceable guarantee of equality could have the same kind of effect.

To return for a moment to the reasoning employed in rejecting the claim. In essence, the 'equality of voting power principle' was rejected in part because of the 'thinness' of the constitutional provisions governing federal elections. For instance, sections 7 and 24 which govern elections to the Parliament require only that members of the House of Representative and

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20 *Attorney-General (Cth) Ex Rel. McKinlay v Commonwealth* (1975) 135 CLR 1.

21 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

22 A majority of four judges found that there was no constitutional requirement that invalidated malaportionment in electoral districts in electorates for a *state* parliament *McGinty v Western Australia* (1996) 186 CLR 140, 170 (Brennan J), 189 (Dawson J), 250-51 (McHugh J), 287-88 (Gummow J). Justice Brennan did not decide the question, holding only that any such principle had no application to state electoral boundaries. See *McGinty v Western Australia* (1996) 186 CLR 140, 170 (Brennan J).

23 Ibid, 186-189 (Dawson J), 236-37 (McHugh J). The third majority judge, Justice Gummow recognised a requirement of 'relative equality' in electorates voting for the federal Parliament but found the principle had no application to state electoral divisions.

24 *Reynolds v. Simms*, 377 US 533 (1964).

Senate be 'directly chosen by the people' and themselves contain no requirement of equality[25]

But in addition, extensive reference was made to other provisions of the Constitution which indicate a wide parliamentary power to determine electoral boundaries[26] as well as provisions – such as those which allow for inequality of representation in the Senate, inequality of voting power in referenda and those governing the representation of the territories and any new states admitted after federation - that seem explicitly to contemplate inequality in various ways.[27] The following passage from the judgment of Chief Justice Barwick in *McKinlay* is representative:

> [T]he expression "directly chosen by the people" is merely emphatic of two factors: first that the election of members should be direct and not indirect as for example, through an electoral college and, second, that it shall be a popular election. It is not an indirect reference to any particular theory of government.[28]

One can imagine that a constitutional guarantee of equality would change this reasoning. A guarantee of equality could be relied upon as a basis for the argument that political equality *is* a value central to the Constitution and that the provisions governing the election of Parliament should now be read in this light. In other words, a constitutional right of equality (even if not directly enforceable) might affect the interpretation of other provisions. The Australian courts would thus be faced with a complex question of the kind that typically arises under a bill of rights: 'Is equality of voting power an essential element of the 'equality' guaranteed by the Constitution?' To put the question more generally, courts would be faced with the question 'what precisely does a constitutional guarantee of equality require?'

Of course, an argument along these lines might not succeed and even if it did, it would not be equivalent of direct enforcement of a bill of rights.[29] Nonetheless, the prospect of interpretation of this kind ought to give Tom Campbell pause, for there is a real possibility that an unenforceable, and thus

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25 *McGinty v Western Australia* (1996) 186 CLR 140, 185 (Dawson J); 239 (McHugh J).

26 Ibid, 182-183 (Dawson J); 239-40 (McHugh J).

27 Ibid, 185 (Dawson J); 237-239.

28 *Attorney-General (Cth) Ex Rel. McKinlay v Commonwealth* (1975) 135 CLR 1, 21.

29 For the difference between the direct enforcement of rights and the enforcement of rights recognized through this process of inference, see Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29.

apparently 'democratic', bill of rights allows judges to assume exactly the role which he would like to deny.

B. Entrenchment of the Committees Power

The problem that I have just outlined would be compounded by the establishment of the Joint Standing Committee on Human Rights along the lines Campbell proposes. The proposal envisages that the provisions establishing that Committee and those outlining its powers should also be entrenched in the Constitution. Once again the purpose is to utilise the power of the Constitution to protect rights without undermining the democratic legal positivist's preference to leave rights issues in the political sphere. Indeed, in this case, Campbell appears to make an exception to the general rule about enforcement by allowing the provisions governing the Committee to be directly enforceable.

I suspect Campbell's rationale for this aspect of the proposal is that provisions establishing the Committee and governing its powers will be expressed in relatively specific language that confers little judicial discretion. Moreover, it is probably envisaged that provisions of this kind will deal with prosaic procedural matters rather than the overtly moral and inevitably contentious concepts invoked by constitutional rights.[30] The prospect of judicial review of these provisions seems therefore less troubling to a democratic legal positivist.

It should not be thought, however, that the proposal contains no such dangers. For when it comes to constitutional interpretation, even quite specific and prosaic provisions can be taken as evidence of a broader more contentious proposition.[31] The provisions which give rise to the constitutional principle of 'representative and responsible government' (and in turn the freedom of political communication and, perhaps, the additional freedoms of movement and association) are themselves specific and prosaic.[32]

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30 For a more detailed exposition of this kind of argument, see Adrienne Stone 'Judicial Review without Rights' (2008) 28 *Oxford Journal of Legal Studies* 1.

31 In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the Court denies that the process of implication gives rise to 'underlying' or 'overarching' principles. The inadequacy of this characterisation of constitutional implication is discussed in Adrienne Stone, 'The Limits of Constitutional Text and Structure' (1999) 23 *Melbourne University Law Review* 668.

32 Sections 7 and 24 detail the methods of election for the House of Representatives and the Senate and the key phrase giving rise to the implied

Thus the provisions establishing the Joint Standing Committee on Human Rights might provide a fertile source for implication based arguments. For the first time the Constitution would contain provisions explicitly directed to rights protection. Those provisions could ground an argument that the system of representative and responsible government established by the Constitution is a 'rights respecting' form of government, a characterisation which could then strengthen and extend argument for rights-based limitations on power.

4. Reponses

My argument, then, is that someone with Tom Campbell's democratic and positivist commitments cannot harness the symbolic power of a constitution without the risk of undermining the values on which that democratic positivism depends. Judges employing quite orthodox methods of interpretation might utilise unenforceable rights (or associated provisions) as evidence of broader underlying principles that in turn require judges to exercise moral judgment of a kind that a democratic legal positivist would like to avoid.

Two objections to this argument suggest themselves. First, it might be said that the methods of interpretation I have described are themselves illegitimate, at least when used to give effect to a bill of rights deliberately rendered unenforceable. For instance, Jeffrey Goldsworthy has argued that unwritten principles derived by 'implication' must be consistent with the original meaning of the Constitution.[33]

But, whatever the force of this argument, it does not appear to be accepted by the High Court. After all, the High Court recognised the principle of representative and responsible government, and in turn the freedom of political communication, despite rather clear evidence that the framers' thought constitutional rights unnecessary.[34] Thus, bearing in mind the way constitutional interpretation is actually practiced,[35] it seems unlikely as a practical matter that implication could be excluded without an explicit prohibition.

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freedom is the seemingly innocuous requirement that these house of Parliament be 'directly chosen by the people'.

33 Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1. See also, Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *University of Queensland Law Journal* 249.

34 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 136.

35 As surely is appropriate when considering a proposal for constitutional reform.

This point brings me to the next possible response to my criticism: surely the problems I envisage could be overcome with an express provision that the inclusion of a bill of rights in the Constitution is not to affect the meaning of any other provision.[36] This strategy may well prevent the High Court using methods of implication that undermine, however, it risks undermining Campbell's attempt to harness the symbolic power of the Constitution. Under such a provision, the bill of rights would be marked out as an exceptionally weak part of the Constitution. The denial of direct enforcement and even of indirect influence may suggest that our commitment to the values it enshrines is not wholehearted. Protecting the democratic element of this proposal would thus endanger its symbolic strength.

Perhaps the point can be answered: there is no necessary or conceptual link between constitutionalisation (and it attendant symbolism) and judicial enforcement.[37] To give a simple example, despite the strong assertion of the power of judicial review by the Australian High Court[38] aspects of the Constitution are unenforceable by reason of the doctrine of non-justiciability yet there is no suggestion that these aspects of the Constitution are some how devoid of significance.[39] So, it might be possible to persuade Australians – perhaps most critically legislators and the executive – that constitutional rights are fundamental constitutional values despite their unenforceability. But the case is a relatively difficult one to make. Non-enforcement remains the exception in our system and in those to whom we are most closely related.

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36 Consider the following provision of the *Constitutional Alteration (Preamble) 1999* (unsuccessfully) proposing the insertion a new preamble in the Australian Constitution:

> Section 125A Effect of preamble
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> The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.

37 See generally, Mark Tushnet *Taking the Constitution Away from the Court* (1999) for an argument for a system 'wherein constitutional interpretation has no special normative weight deriving from the fact that it is done from the court' leaving other interpreters of the Constitution free to disagree with judicial interpretations and creating a 'populist' constitutional law.

38 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

39 According to the High Court the Commonwealth's power of appropriation under s. 81 of the *Constitution* falls in this category (*Victoria v Commonwealth* (*AAP Case*) (1975) 134 CLR 338, 367-9 (McTiernan J), 392-6 (Mason J), 419 (Murphy JJ). For further instances see the discussion by Geoffrey Lindell in 'The Meaning of Justiciability" in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* 180, 187-88.

Our constitutional tradition thus strongly links constitutionalisation and judicial enforcement. Denying rights enforceability thus risks negating the symbolic significance of their constitutionalisation.

Conclusion

Tom Campbell's proposal for a bill of rights is a refreshingly constructive proposal in a debate more often dominated by dogged defence of entrenched positions. Its originality lies in its acknowledgment of the symbolic weight of constitutions (and their attendant power to protect rights) without abandoning a vision of democracy that emphasizes the moral authority of the Parliament over the judiciary.

Its originality, however, creates some tension. Campbell is determined to prevent judges assuming the role of arbiters of moral and political values. My argument has been that it will be difficult to do so without isolating constitutional rights from the rest of the Constitution in a way that risks negating the significance of entrenchment.

The argument points to a deeper challenge to the democratic legal positivism at the heart of Campbell's theory. As I have argued elsewhere,[40] constitutional review – even of seemingly prosaic structural elements of a constitution – poses a challenge for democratic legal positivism. It may be that to remain true to his basic commitments, Campbell cannot accept judicially enforced constitutionalism at least in its traditional 'strong' form where judges have the power to invalidate laws, without any legislative override. Thus the essential elements of Campbell's positivism may preclude entrenched judicially enforced constitutions rather than just entrenched judicially enforced rights. If that is so, then it seems his proposal to insert a democratic bill of rights into a constitutional system that defies those principles, was doomed to fail.

40 Above n 30.