

AN ENTRENCHED BILL OF RIGHTS: A PROTECTION FOR THE RIGHTS OF MINORITIES

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ABSTRACT

This paper is concerned with the question of whether Australia would be better served by the inclusion of an entrenched Bill of Rights in the Constitution of the Commonwealth of Australia. In particular, attention will focus on the abuses of minorities that are all but certain to arise in any society that is based on majoritarian rule. This paper will also examine the question of whether an entrenched Bill of Rights would serve as an effective safeguard against such abuses, especially where the rights of unpopular minorities are involved. The analysis to follow is undertaken against the backdrop of the efficacy, or the lack thereof, of the Constitution of the United States in preventing such abuses, and particularly that portion of the American Constitution that is known as the Bill of Rights.

I INTRODUCTION

In 2008 the Rudd Government established a National Human Rights Consultation for the purpose of determining how best to protect human rights and freedoms in Australia. However, this seemingly wide ambit was constrained in one fundamental way: ‘the Government has made it clear that any proposal must preserve the sovereignty of Parliament’.¹ The terms of reference made it clear that any new laws in this area ‘shall not be based on the United States Bill of Rights’ and that any options put forward by the Committee should not include a constitutionally entrenched Bill of Rights.²

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¹ ‘Rudd Government announces National Human Rights Consultation’, 10 December 128/2008 Attorney-General, Robert McClelland, Parliament House, Canberra ACT 2600.

² Australian Labor Party National Platform and Constitution, April 2007, Chapter Thirteen ‘Respecting Human Rights and a Fair Go for All’. This

In April 2010, the Attorney-General, the Hon Robert McClelland MP, launched the Government's response to the National Human Rights Consultation Committee's report: *Australia's Human Rights Framework*.³ The Framework is based on Australia's commitment to human rights obligations, human rights education, domestic and international engagement on human rights issues, improvement in human rights protections and greater respect for human rights within the community.⁴ The goal to improve human rights protection is expressed to include greater judicial scrutiny.

These are laudable goals, but the actions that are designed to address them are far from adequate.⁵ One of the key recommendations (the enactment of a national Human Rights Act) was supported by more than 87% of the 35,000 public submissions, but not adopted by the government.⁶ The Australian Human Rights Commission publicly expressed its disappointment that this recommendation was not implemented and encouraged the government to revisit this as part of its review of the Framework in 2014.⁷

This author urges the government, whether as part of its 2014 Framework review or otherwise, to call for submissions on an entrenched Bill of Rights and give the submissions its utmost attention. To ignore this issue or, as was the case with the 2008 Consultation, exclude it from the terms of reference, would be most unfortunate and represent another missed

is not to suggest that the *Constitution of the Commonwealth of Australia* is completely devoid of protection of civil liberties. See, for examples, ss 51(xxxi), 80 and 116 which guarantee the right of trial by jury for Commonwealth indictable offences, compulsory acquisition of property on just terms and the separation of church and state respectively.

³ Attorney-General Robert McClelland, *Australia's Human Rights Framework* (21 April 2010) Attorney-General's Department <<http://www.ag.gov.au/humanrightsframework>>.

⁴ Ibid.

⁵ Education initiatives; a new Parliamentary Joint Committee on Human Rights to review legislation for compliance with international human rights obligations; making a statement of compatibility with international human rights obligations for new bills; combining federal anti-discrimination laws into a single Act; and holding an annual Human Rights Forum.

⁶ ABC, 'The Drum', *Human Rights Framework: Icing Without the Cake*, 22 April 2010 (Philip Lynch) <www.abc.net.au/unleashed/33766.html>

⁷ Australian Human Rights Commission, 'Important steps to better protect human rights but substantial gaps remain' (Media Release, 21 April 2010).

opportunity. An entrenched Bill of Rights is worthy of reconsideration, especially for the adequate protection of minorities.

In addressing this long-standing issue, debated since before federation, it is appropriate to begin by ascertaining what central objective is sought to be achieved by an entrenched Bill of Rights. Attention will then focus on whether this objective is legitimate and, if so, to what extent Australia can adequately achieve it without an entrenched Bill of Rights.

II WHAT IS THE CENTRAL OBJECTIVE IN HAVING AN ENTRENCHED BILL OF RIGHTS?

In this context, 'entrenched' denotes a body of law which is supreme not only in the sense that it has an overriding effect on other law, but supreme in the sense that it cannot be altered or repealed through the ordinary legislative process.⁸ Rather, it can only be altered through an arduous process that is designed to make it resistant to the temporal whims of the electorate, as by amendment requiring ratification by public referendum and/or a super majority of states or the national legislature.⁹

⁸ Colin Munro, *Studies In Constitutional Law* (Butterworths, 2nd edn, 1999). It should be emphasised that there are numerous statutory schemes now extant in Australia which accord federal protection to human rights. Just to cite some of numerous examples, see *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth). For similar statutory protections provided by the states and territories, see *Charter on Human Rights and Responsibilities Act 2006* (Vic); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); the *Anti-Discrimination Act 1977* (NSW), the *Equal Opportunity Act 2010* (Vic), the *Anti-Discrimination Act 1991* (Qld), the *Equal Opportunity Act 1984* (SA), the *Equal Opportunity Act 1984* (WA), the *Anti-Discrimination Act 1998* (Tas), the *Discrimination Act 1991* (ACT) and the *Anti-Discrimination Act 1992* (NT) (none are entrenched).

⁹ For example, *United States Constitution* art V; *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany], art 144; *La constitution du 4 octobre 1958* [French Constitution of 4 October 1958] art 89; The Constitution of the Republic of Italy, art 138.

In many modern democracies, entrenched rights are part and parcel of written constitutions which are themselves entrenched in the manner described. An entrenched Bill of Rights in the Australian context, therefore, is one that would be adopted by amendment to the *Constitution of the Commonwealth of Australia*. Chapter VIII of the *Australian Constitution* outlines the requirements for its amendment. Any amendment (such as the introduction of a constitutional Bill of Rights) would require an absolute majority in both houses of the Federal Parliament and, by referendum, the agreement of a majority of electors (nationally) and a majority of electors in a majority of states.¹⁰ An entrenched Bill of Rights in Australia would be a constitutional rather than a statutory one.¹¹

To define the term ‘entrenched’ is also to illuminate the basic objective in having an entrenched Bill of Rights; namely, to express society’s judgment that certain rights are too important to make their continued existence dependent upon the will of a simple majority of the electorate.¹² It has been said, with justification, that Australians are wary of constitutionally entrenched rights.¹³ This observation is exemplified in the fact that two attempts to amend the Australian Constitution so as to include rights protection have failed.¹⁴ Further, in Australia the rights of the majority have generally been well protected without an entrenched Bill of Rights.¹⁵ Nevertheless, it is contended that an entrenched Bill of Rights is necessary for the protection of minorities. Under certain circumstances, the rights of minorities must take precedence over the right of the electorate to impose its will in the form of ordinary legislation,¹⁶ and this requires an entrenched rather than a statutory Bill of Rights.

¹⁰ *The Constitution of the Commonwealth of Australia* (‘*Australian Constitution*’), s 128.

¹¹ The latter has been recommended by the National Human Rights Committee, Recommendation 18.

¹² Munro, above n 9.

¹³ Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without A Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 3 (‘Protecting Rights’)

¹⁴ 1944 Referendum and 1988 Referendum to the *Australian Constitution*

¹⁵ *Protecting Rights*, above n 14.

¹⁶ Jonathan D Varat, William Cohen and Vikram David Amar, *Constitutional Law, Cases and Materials* (Foundation Press, 10th ed, 2009), 18

Constitutions typically entrust the responsibility of constitutional interpretation to an independent judiciary that is free from electoral accountability.¹⁷ The end result is that any action which conflicts with the constitution, be it executive, legislative, or otherwise, is null and void unless and until the constitution is amended in the aforementioned manner.¹⁸ In common parlance, and for purposes of the discussion to follow, the power of the judiciary to invalidate such acts will be referred to as the power of judicial review.

The perceived advantages of judicial review (carried out by an independent judiciary that is free from electoral accountability) are oftentimes seen as disadvantages; that is, it is said that judicial review of legislation is inherently undemocratic because it not only permits the nullification of legislation, but reflects the will of unelected judges.¹⁹ However, in the case of judicial review of legislation (or another Act) that conflicts with the constitution, the nullification is in fact the will of the people as expressed in the supreme law of the land. From this perspective an entrenched Bill of Rights and judicial review comport well with the tenets of democracy; ‘the judges do not check the people, the Constitution does, which means the people are ultimately checking themselves’.²⁰

III IS THE PROTECTION OF MINORITIES A LEGITIMATE OBJECTIVE?

If the central objective of an entrenched Bill of Rights is to protect minorities, a preliminary question arises: is the protection of minorities a legitimate objective? For those who would answer in the negative, the argument is as follows: no form of government is legitimate unless it is democratic and, further, democracy denotes government by the people or majoritarian rule. It follows, therefore, that to the extent that protection of minority interests is anti-majoritarian, it is undemocratic and illegitimate.

¹⁷ Michael Louis Corrado, *Comparative Constitutional Law: Cases and Materials* (Carolina Academic Press, 2005).

¹⁸ Roger Douglas, *Douglas and Jones's Administrative Law* (Federation Press, 5th edn, 2006).

¹⁹ Brian Boynton ‘Democracy and Distrust after Twenty Years: Ely’s Process Theory and Constitutional law from 1990 to 2000’ (2000) 53(2) *Stanford Law Review* 397

²⁰ John Hart Ely, *Democracy and Distrust* (Harvard University Press, 1980), p 8.

It should be noted that most dictionaries define ‘democracy’ in spacious terms that do not lend themselves to precision. While ‘democracy’ is usually defined as ‘government by the people’,²¹ the divergent forms of government in France, Italy, Germany, Canada and the United States, all generally recognised as democratic, illustrate the fact that there is no universally accepted concept of democracy.²² Moreover, the term ‘majoritarian’ has varying connotations of its own. In its purist sense, the term can be taken to mean that the will of the majority governs. Yet in practical terms, how could such a system ever be implemented? To ensure that all governmental actions conform to the will of a majority of the electorate, it would be necessary to submit all issues to the electorate in the form of a public referendum or some analogous technique. Such a practice would not only be onerous and impractical, but would strip elected representatives of conscience and independence in making decisions. In any event, suffice it to say that majoritarian government in its purist form is non-existent in the modern world. What is extant is a pragmatic form of majoritarian government whereby laws are enacted and enforced by elected officials who are accountable to their respective constituencies.²³ Electoral accountability, however, by no means ensures that elected officials will carry out the wishes of a majority of their constituents. Rather, it ensures that if they fail to do so, a day will eventually come when they may be voted out of office and replaced by others who may or may not prove to be equally disappointing. Moreover, the very fact that elected officials are often voted out of office demonstrates that pragmatic majoritarian government is far removed from majoritarianism in its purist form.

In a similar vein, it is highly impractical to expect an elected official to act in accordance with a majority of his or her constituents on every occasion. It is common knowledge, that the re-election of incumbents is more often the rule than the exception. This is an indication that elected representatives are judged on their entire records and not on the notion

²¹ David B Magleby, Paul C Light, J W Peltason, Clay Robison and Thomas E Cronin, *Government by the People* (Prentice Hall, 2007); United States Constitution, art VI, s 2.

²² Laza Kekic ‘The Economist Intelligence Unit’s Index of Democracy’ (2007) *The World in 2007, The Economist*.

²³ David S Lee, Enrico Moretti and Matthew J Butler ‘Are Politicians Accountable to Voters? Evidence from U.S. House Roll Call Voting Records’ (Working Paper No 50, Center for Labor Economics University of California Berkeley, March 2002).

that they are always expected to follow the wishes of their constituents. It is therefore apparent that whatever the professed commitment of most modern societies to the notion of majoritarian rule, it is less than a total commitment. This point is buttressed by the fact that all of the aforementioned nations have adopted the concept of an entrenched Bill of Rights as an integral component of their systems of democracy. Therefore, unless one is prepared to argue that true democracy does not exist in the modern world, the fact that the protection of minorities may be anti-majoritarian does not lead inexorably to the conclusion that it is undemocratic and, therefore, illegitimate. Reaching this conclusion, however, is not the sole factor which affords legitimacy to the objective of protecting minorities from the abuses that can be associated with majoritarian rule.

In further exploring this issue, it is helpful to examine the legitimacy, or lack thereof, of the notion of majoritarian rule. In truth, there is nothing sacrosanct in the concept of 'government by the people'. Rather, it is simply a pragmatic means of ensuring, at least theoretically, that those who are disaffected with society's rules will be in the minority. Since a minority can and often does constitute nearly half of the population, it is fair to say that majoritarian rule is an ineffective means of achieving total peace and harmony among the electorate.

Second, just as the notion of majoritarian rule was spawned from considerations of pragmatism, so too was the notion that certain principles are too important to make their continued existence dependent upon the will of a majority of the electorate. In particular, this notion emanates from a recognition that majoritarian rule poses a risk that the rights of minorities will be abused. It requires little imagination to appreciate that what is popular is not necessarily just. In any representative system of government, therefore, there lies the risk that minorities who are weak, unpopular, or effectively disenfranchised may lose fundamental protections that are not vouchsafed by some form of law which is resistant to the temporal whims of the electorate. Thus, the necessity for an anti-majoritarian body of law to protect the rights of minorities becomes apparent. Since the notions of majoritarian rule and the need for a supreme law to protect minority interests both derive from considerations of pragmatism, there is no apparent reason why the former should be viewed as any more legitimate than the latter. This, coupled with the fact that most modern societies deem both to be essential components of democracy, affords legitimacy to the objective of protecting the rights of minorities.

IV CAN AUSTRALIA ADEQUATELY PROTECT THE RIGHTS OF MINORITIES WITHOUT AN ENTRENCHED BILL OF RIGHTS?

Australia's system of government reflects both British and North American influences. One such influence is the doctrine of parliamentary sovereignty: the Parliament can pass, amend, or repeal any law it wishes and no person or body is recognised as having the authority to amend, repeal or override an act of Parliament.²⁴ By definition, therefore, the doctrine of parliamentary sovereignty precludes the existence of an entrenched Bill of Rights and the power of judicial review.²⁵ On the other hand, Australia has a written constitution (in part based on the United States Constitution). The Australian Constitution is the supreme law in Australia and ultimate sovereignty resides in the Australian people.²⁶

Some would argue that judicial review in the Australian system affords a certain measure of protection to minorities. The argument follows that as a body of non-elected members who are essentially appointed for life,²⁷ the judiciary can operate with the requisite degree of independence from political pressures. This, it may be argued, serves as an important check on the potential abuses of majoritarian rule. Although this argument is not entirely bereft of merit, the judiciary can only provide assistance by overturning actions it interprets to be inconsistent with existing laws. In such situations the legislature can amend the legislation if desired. The exception to this is where the legislation is deemed unconstitutional; however, the Australian Constitution does not include a Bill of Rights. It follows, therefore, that the judiciary is not a particularly effective

²⁴ *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723 (Lord Reid); *R (Jackson and Others) v Attorney General* [2006] 1 AC 262, (Lord Carswell).

²⁵ The position has been somewhat modified in the United Kingdom. See *Church of Scotland Act 1921* (UK); *European Communities Act 1972* (UK); *Human Rights Act 1998* (UK).

²⁶ Geoffrey Lindell 'Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29, 37; *Australian Capital Television Pty Ltd v Commonwealth of Australia* (1992) 177 CLR 106, 138; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171; *Wong v Commonwealth of Australia* (2009) 236 CLR 573, 596.

²⁷ *Federal Court of Australia Act* (Cth) 1976, s 6; *Australian Constitution* s 72.

form of protection for the rights of minorities from majoritarian rule without an entrenched Bill of Rights in Australia.

Another common argument is that Australia's status as a signatory to international human rights instruments is sufficient to protect the rights of minorities. Australia has committed to give effect to the human rights obligations in a number of international human rights instruments, including the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) and the *Universal Declaration of Human Rights* (UDHR).

Analysis reveals, however, that there are both technical and practical reasons why it is not sufficient to adequately protect the rights of minorities. First, even if Australia is a signatory to an international instrument, the requirements in the instrument will only be effective in Australia when and to the extent that they are incorporated into national legislation. The mere fact that Australia has agreed internationally to certain obligations is no guarantee that our legislation already meets those standards or that it definitely will. Unlike the ICCPR, for example, the ICESCR has not been scheduled to or declared under the Australian *Human Rights Commission Act*. International instruments rarely have any real enforcement mechanism. Second, the international instruments themselves usually include an escape clause. For example, Article 4 of the ICCPR allows its obligations to be derogated 'in times of public emergency which threatens the life of the nation' provided that such measures do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.²⁸

Finally, the efficacy of these international human rights instruments in safeguarding human rights in Australia is simply this: there is nothing to prevent Parliament from invoking its sovereignty to withdraw from these instruments altogether, although it is important to note that such a statement fails to take into account both customary international law as well as the fact that the ICCPR is devoid of any mechanism for denouncing the Convention. Therefore, it is apparent that Australia's status as a signatory to the international human rights instruments,

²⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 4. There are, however, certain obligations that are non-derogable under Article 4 of the ICCPR.

while commendable and appropriate, is not an adequate substitute for incorporating an entrenched Bill of Rights into its domestic law.

The argument that minorities in Australia are adequately protected under present law might also be predicated on the view (formulated by Dicey) that adherence to the rule of law is, by itself, sufficient to safeguard individuals from arbitrary governmental action.²⁹ By rule of law, Dicey was referring to more than merely the common law and acts of Parliament; rather, the rule of law consists of three separate components. Although Dicey's theories were formulated in the British context, they are relevant in Australia. First, Dicey's rule of law denotes the absolute supremacy or predominance of ordinary law as distinguished from the influence of arbitrary power; it therefore excludes the existence of wide discretionary powers, prerogatives and arbitrariness on the part of government.³⁰ Second, the rule of law envisages equality before the law of all classes as administered by the ordinary courts of law. This excludes the notion of exemptions for public officials and others from obedience to the laws that govern ordinary citizens or from the jurisdiction of the courts of ordinary jurisdiction.³¹ Lastly, the rule of law denotes a formula for expressing the fact that in Britain, a constitution is not the source of individual rights, but the consequence of the same as defined and enforced by the courts. In Australia, therefore, according to Dicey's argument, individual rights are secured by judicial decisions developing the common law and construing acts of Parliament in cases before them.³²

Though adherence to Dicey's formulation of the rule of law would afford a substantial measure of protection for the rights of minorities, it should be pointed out that Dicey did not take issue with the fact that acts of Parliament displace common law rules where such is the intent of Parliament. To be sure, Dicey was one of the leading proponents of the view that parliamentary sovereignty, by definition, places no restrictions on the power of Parliament to pass whatever legislation it deems proper.³³ Dicey therefore rejected the familiar arguments that this power could be limited by so called entrenched provisions in Britain's Treaties of

²⁹ Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 8th ed, 1982), pp 183-205.

³⁰ Ibid 187-188: at 202.

³¹ Ibid 93: at 202.

³² Ibid 195-196: at 203.

³³ *R (Jackson) v Attorney General* [2005] UKHL 56 [9].

Union or by ‘manner and form’ restrictions contained in prior acts of Parliament.³⁴ What is more, history has thus far supported Dicey’s view.³⁵ Dicey did, however, recognise certain non-legal restrictions on parliamentary sovereignty: the fact that members of Parliament are ordinarily people of conscience and sound mind who would be loath to impose evil laws on the population and the possibility, presumably in the minds of Ministers of Parliament, that the electorate would not obey such laws.³⁶ The likelihood of this state of existence occurring in Britain or in Australia cannot be relied upon. Therefore, despite Dicey’s idealistic concept of the rule of law, most notably its prohibitions on arbitrary governmental action and inequality before the law, the reality is that the enforcement of these prohibitions is solely dependent upon the grace of Parliament in the exercise of its sovereignty.

There is also the question of the Australian government’s lack of accountability for disregarding the law. Although the Attorneys-General are theoretically responsible for enforcing the law and investigating alleged transgressions, including those involving government officials, it is also a fact that he or she is a member of the Cabinet who, on the advice of the Prime Minister, serves at the pleasure of the Governor-General.³⁷ Therefore, notwithstanding the duty of the Attorneys-General to act impartially, there is, at the very least, a perception that his or her impartiality may be compromised when it comes to investigating allegations of corruption on the part of government officials.³⁸ This perception is exacerbated by the fact that commissions are virtually powerless to overcome the government’s resistance to their efforts to obtain witnesses and other evidence needed to investigate allegations of corruption within the government.³⁹ In short, since the government is normally in control of Parliament, it can stifle practically any investigation it wishes.

In addition, comment must be made of Dicey’s view of the common law as a fundamental source of protection for certain political rights

³⁴ W Ivor Jennings *The Law and the Constitution* (University of London Press, 1933).

³⁵ Ibid

³⁶ Joaquin Varela Suanzes, ‘Sovereignty in British Legal Doctrine’ (1999) 6.3 *Murdoch University Electronic Journal of Law* September, [62].

³⁷ lana McCarthy ‘The Evolution of the Role of the Attorney-General’ (2004) 11.4 *Murdoch University Electronic Journal of Law*.

³⁸ Ibid.

³⁹ G Zellick, *Government Beyond Law* (Public Law, 1985).

such as freedom of speech, association, and personal liberty.⁴⁰ Dicey's view is difficult to sustain in Australia, particularly in modern times.

First, while the common law has been of some utility in protecting certain political rights such as freedom of speech, association, and personal liberty,⁴¹ it has provided little protection for social and economic rights. In the area of social rights, for example, it was only in exceptional circumstances that the common law provided protection for the rights of racial minorities.⁴² In the economic sphere, benefits such as welfare and other forms of social security are governed entirely by statute. Second, the courts are aware that Australia is a signatory to the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic and Social Rights*, so it may be argued that there is less of an incentive for the courts to be innovative in developing the common law as a source of protection. Lastly, things have changed considerably since Dicey's commentary on the rule of law at the turn of the Twentieth Century. Since then, Parliament has opted to legislate on most matters rather than rely on the courts to deal with problems by developing common law rules. As a result, it would be reasonable to infer that the courts are probably less inclined to view themselves as major guarantors of human rights; rather, they are more inclined to see Parliament as the major guarantor with the courts merely providing assistance by giving effect to its legislation.⁴³ Therefore, we return to our familiar theme that in reality, the protection of human rights is dependent upon the tender mercies of the various Parliaments whose adherence to the rule of law has been far from exemplary. The question that remains, therefore, is what this portends for the protection of minorities.

⁴⁰ Hilaire Barnett, *Constitutional & Administrative Law* (Routledge, 8th ed, 2011), p 76.

⁴¹ Ibid.

⁴² *Constantine v The Imperial Hotels Ltd* (1944) KB 693 (holding that an innkeeper had committed a common law tort by refusing accommodations to a traveller on account of race; the court held that this was not a legal justification for the refusal); *Scala Ballroom Ltd v Ratcliffe* (1958) 3 All ER 220 (holding that a union had acted lawfully in attempting to persuade its members to refuse to perform at a place of business that excluded black patrons; the court held that this was a legitimate means for the union to protect the interests of its black members).

⁴³ W Finnie, Chris Himsworth & Neil Walker (eds), *Edinburgh Essays in Public Law* (Edinburgh University Press, 1991).

V PROTECTION OF RELIGIOUS, SEXUAL AND RACIAL MINORITIES

The Establishment Clause of the First Amendment to the United States Constitution is more than a form of protection for religious freedom; it is a symbolic expression of tolerance for the views of religious minorities and even those who profess no religious beliefs.⁴⁴ Indeed, many of the settlers who first came to America did so in order to escape the bondage of laws which compelled them to support state sponsored religion.⁴⁵ Unfortunately, these same practices eventually took root on American soil,⁴⁶ particularly in Virginia where the established church's excesses finally culminated in the Virginia Bill for Religious Liberty.⁴⁷ This bill provided that:

... no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested or burdened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief.⁴⁸

The United States Supreme Court has declared that the Establishment Clause of the First Amendment was intended to serve the same objectives as the Virginia statute; namely, to prevent government intrusion on religious liberty.⁴⁹ In *Everson v Board of Education*,⁵⁰ the Court expounded on the meaning of the Establishment Clause:

The "establishment of religion" clause ... means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another... No person can be punished for entertaining or professing religious beliefs or disbeliefs....⁵¹

Particularly appropriate to this discussion is the Supreme Court's decision in *Lee v Weisman*.⁵² In that case, the Court held that a

⁴⁴ *United States Constitution*, amend I provides in pertinent part: 'Congress shall make no law respecting an establishment of religion'.

⁴⁵ *Everson v Board of Education*, 330 US 1, 8-10 (1947).

⁴⁶ Ibid 8-10.

⁴⁷ Ibid 10.

⁴⁸ Ibid 13.

⁴⁹ Ibid 14.

⁵⁰ Ibid 8-10.

⁵¹ Ibid 16.

⁵² 505 US 577 (1992). See also *Santa Fe Independent School District v Doe*

state cannot, consistent with the Establishment Clause, control the content of non-sectarian prayers in its public schools. In reaching its decision, the Court reaffirmed this as the ‘cornerstone principle’⁵³ of the Establishment Clause as originally enunciated in *Engle v Vitale*.⁵⁴ The following passage from Justice Black’s opinion in *Engle* accurately represents the view adopted by the Court in both cases:

The Establishment Clause ... does not depend on any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non observing individuals or not. This is not to say, of course, that laws prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of the government is placed behind a particular religious belief, an indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.⁵⁵

It is against this background and reasoning that the protection of religious minorities in Australia will be evaluated.

Australia’s predilection for favouring the rights of the religious majority is also reflected in its anti discrimination laws. In particular, the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth) provide a comprehensive scheme of protection against most forms of racial and sexual discrimination.⁵⁶ Although the *Racial Discrimination Act* prohibits both direct and indirect forms of discrimination on account of race, colour, descent or ethnic or national origin, the Act is conspicuously silent on the matter of discrimination based on religion. In a nation which is predominantly Christian, who stands to lose the most from such an omission? The answer is self-evident.

(2000) 530 US 290. While this case dealt with the issue of student led prayer, the Court reaffirmed the reasoning of *Lee v Weisman* by holding that any prayer that may be seen as endorsed by a public school is inconsistent with the Establishment Clause

⁵³ *Lee v Weisman*, 505 US 577, 587 (1992).

⁵⁴ *Engle, v Vitale* 370 US 421 (1962) (‘Engle’).

⁵⁵ Ibid 430-431.

⁵⁶ It is noteworthy that the relevant conventions are devoid of any reference to anti-discrimination that is predicated on religious beliefs or the lack thereof. Although the ICCPR includes religion as a basis for non- discrimination, Australia had not ratified that Convention at the time the Commonwealth passed the *Racial Discrimination Act*.

The aforementioned gap in Australia's anti-discrimination laws is a classical illustration of the abuse that can be associated with majoritarian rule. Though Parliament can certainly exercise its prerogative to enact remedial legislation, whether it does so will depend on several factors, including the apparent level of public support for such action. Given the severe time constraints under which it operates, Parliament can only consider a fraction of the total number of legislative proposals during any given legislative session.⁵⁷ Therefore, unless there is endemic public support for a particular proposal, it is unlikely to find its way onto the government's legislative agenda.⁵⁸ It is always possible, of course, that a proposal could be introduced in the form of a private member's bill.⁵⁹ The fact remains, however, that the success of private member's bills depends not only on obtaining a sponsoring Minister of Parliament, but on the government's cooperation in securing its passage.⁶⁰ Although votes on private member's bills are theoretically non-partisan,⁶¹ the reality is that a government supported by a majority in the House of Representatives can usually impose its will on any legislative matter.⁶²

Where the rights of minorities are concerned, particularly unpopular minorities, the chances of generating the necessary public support for protective legislation are remote. Therefore, the impetus for remedial legislation must come from within the ranks of Parliament itself. Given the possible political consequences of championing unpopular causes and the time constraints under which Parliament operates, it appears equally unlikely that protective legislation would rank as a high priority among members of Parliament. Indeed, if representative government is to fulfil the true meaning of its creed, its actions should reflect the will of the majority. When the will of the majority offends minority rights that are considered basic in a free society, the protection of minorities rests in the willingness of elected representatives to defy the wishes of their constituents. Though there are times when Parliament will follow what many consider to be the noble path of defiance, at other

⁵⁷ Bilika H Simamba, *The Legislative Process: A Handbook for Public Officials* (Author House, 2009).

⁵⁸ Julian Fitzgerald, *Lobbying in Australia: you can't expect anything to change if you don't speak up* (Rosenberg Publishing, 2006).

⁵⁹ Matthew Groves and HPLee, *Australian administrative law: fundamentals, principles and doctrines* (Cambridge University Press, 2007).

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

times it will follow the path of political expediency. Perhaps the *Racial Discrimination Act* is an example of the former. Even so, Parliament's failure to act in the sphere of religious discrimination serves as a reminder that the protection of minorities cannot be made to depend on the willingness of Parliament to defy the tenets of majoritarian rule; it also serves to illustrate once again that the rule of 'government according to law' is of limited utility in safeguarding human rights. Indeed, some of the most flagrant abuses of human rights can be clothed with legal authority in a nation where Parliament is supreme and the cabinet is supported by a majority in the House of Representatives.⁶³

With an entrenched Bill of Rights, the rights of minorities need not depend on such factors as the time constraints imposed on Parliament or its willingness to accord conscience a higher priority than political expedience. A Bill of Rights typically consists of general guiding principles that are capable of being adapted to provide solutions for a wide range of disputes.⁶⁴ It is this adaptability that affords a vital source of protection for minorities as new and unforeseen disputes arise.⁶⁵ While there is little question that such adaptability is susceptible to judicial abuse, it may be the only effective and practical means of safeguarding those transcendent values which society regards as basic human rights; that is, it allows minorities the opportunity to persuade a non-elected and independent judiciary that their rights are already protected as opposed to forcing them to rely on the legislature to enact protective legislation.⁶⁶

A case example from the United States provides a useful illustration for this situation.

In *Rogers v Lodge*,⁶⁷ several black citizens brought suit against various county officials in the State of Georgia alleging that the county's 'at large' election scheme violated their rights under the Equal Protection Clause of the Fourteenth Amendment. Specifically, the plaintiffs alleged that the 'at large' scheme was being deliberately maintained for the invidious purpose of diluting the voting power of black citizens. In this case, the elected offices at issue were the five seats on the Burke County

⁶³ A W Bradley, K D Ewing and E C S Wade, *Constitutional and administrative law* (Prentice Hall, 12th ed, 1997), p 99.

⁶⁴ Michael Zander, *A Bill of Rights?* (Sweet & Maxwell, 4th ed, 1997), 38

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ 458 US 613 (1982).

Board of Commissioners which governed the county. Although 38% of the registered voters in Burke County were black, no black had ever been elected to the Board.

The election scheme under attack required each candidate to run for a specific seat on the Board. In order to be elected, a candidate had to receive a majority of votes cast in the general election. If no candidate received a majority, a runoff was held between the two candidates who received the highest number of votes. In addition, voters were only permitted to vote once for any particular candidate. Since the voting in these elections went strictly along racial lines, the result was that no blacks were ever elected.

Although the ‘at large’ system was racially neutral on its face, the Supreme Court held that a law having a disproportionate impact on an identifiable group will be treated as having created a classification along those lines if it is conceived or being maintained for a discriminatory purpose. Finding that this particular scheme was being maintained for such a purpose, the Court held it violative of the Equal Protection Clause.

*Rogers v Lodge*⁶⁸ is a particularly illuminating example of the dangers of majoritarian rule. When the Fourteenth Amendment was ratified in 1868,⁶⁹ it is doubtful that the framers contemplated that the southern states would maintain superficially neutral ‘at large’ voting schemes to deliberately discriminate against black voters and candidates. Although the Supreme Court invalidated these laws, it did so via a constitutional rule that was not developed until more than a hundred years after the Fourteenth Amendment was ratified.⁷⁰ Had it not been for an entrenched right to equal protection of the law couched in broad and adaptable terms, the plight of black voters and candidates in Burke County, Georgia, would have rested on the willingness of Congress to enact protective legislation.

This case illustrates that majorities are not only prone to trample on the rights of minorities, but the lengths to which they are willing to

⁶⁸ Ibid.

⁶⁹ *United States Constitution* amend XIV.

⁷⁰ *Washington v Davis*, 426 US 229 (1976) (‘*Washington*’) (holding that enactments having a disproportionate impact on an identifiable group, coupled with a discriminatory intent, create classifications as to those upon whom the adverse impact is felt). For a recent affirmation, see *Vieth v Jubelirer*, 541 US 267, 333-34 (2004).

go to circumvent laws that are specifically designed to prevent such abuses. It was only the existence of a supreme law and the power of judicial review which prevented these efforts from reaching fruition. An entrenched Bill of Rights consisting of broad guiding principles is often indispensable to the protection of minorities.

VI FREEDOM OF EXPRESSION AND THE PROTECTION OF MINORITIES

In the laws relating to freedom of expression, both Australia and the United States have long recognised that certain governmental interests justify restrictions on speech activity.⁷¹ While such interests must be of sufficient magnitude to outweigh the value of free expression,⁷² it would be difficult, if not impossible, to furnish a finite list of governmental interests which meet this criterion. There is much insight to be gained, however, by an examination of the basic rationale underlying the right of free expression. Although there has yet to be a universally accepted statement of this rationale, an often quoted passage from Justice Holmes' dissenting opinion in *Abrams v United States*⁷³ is most instructive:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation of their own conduct that the ultimate good desired is better reached by free trade and ideas and that the best test of truth is the power of thought to get itself accepted in the competition of the market... It is an experiment, as all life is an experiment... While that experiment is part of our system... we should be eternally vigilant against attempts to check the expression of opinions that we loathe... Only the emergency that makes it immediately dangerous to leave the correction of evil

⁷¹ *Washington*, 426 US 229 (1976) 500, 526.

⁷² J Beatson, Yvonne Cripps and David G T Williams, *Freedom of expression and freedom of information: essays in honour of Sir David Williams* (Oxford University Press, 2000).

⁷³ 250 US 616 (1919) ('*Abrams*').

counsels to time warrants making an exception to the sweeping command, “Congress shall make no law... abridging the freedom of speech”.⁷⁴

The more recent case of *Virginia v Black*,⁷⁵ is typical of similar decisions that have followed *Abrams*.⁷⁶ In that instance, the Court held a Virginia statute restricting ‘cross burning’ to be unconstitutional on the tenet that the act itself ‘may mean only that the person is engaged in core political speech’. With reference to the above and like passages, it was found that the State could only limit ‘cross burning’ to situations where an intention to intimidate could be proven. The fact that ‘cross burning’ was ‘distasteful’⁷⁷ to the majority did not constitute a sufficient reason to forbid the act entirely.

Consonant with this reasoning, Australia and the United States have imposed restrictions on speech which serve overriding government objectives such as the prevention of violence,⁷⁸ protection of consumers from false or misleading advertising,⁷⁹ and protecting persons from

⁷⁴ Ibid 630-631.

⁷⁵ 538 US 343 (2003). See also *McConnell v Federal Electoral Commission*, 540 US 93 (2003).

⁷⁶ 250 US 616 (1919).

⁷⁷ *Virginia v Black*, 538 US 343, 358 (2003).

⁷⁸ In Australia, see *Racial Discrimination Act 1975* (Cth). In the United States, see *Chaplinsky v New Hampshire*, 315 US 568 (1942) (‘*Chaplinsky*’) (upholding a conviction under a statute that was construed as prohibiting face to face words having a natural tendency to provoke violence: the ‘fighting words’ doctrine). For recent discussion of this case and its ‘fighting words’ test, see *Virginia v Black*, 538 US 343, 358-359 (2003). See also *State of Nebraska v Drahota*, 280 Neb. 627 (2010). Although discussion in the latter case is yet to be tested in the United States Supreme Court, it does, however, provide interesting detail on the continued weight of *Chaplinsky*’s authority in American jurisprudence.

⁷⁹ In Australia, *Competition and Consumer Act 2010* (Cth), sch 2, s 18 (Australian Consumer Law). In the United States, see *Central Hudson Gas & Electric Corporation v Public Service Commission*, 447 US 557 (1980) (the Supreme Court conceded that the interest in preventing false or misleading advertising was sufficient to justify regulations on expression). For recent affirmation of this proposition and discussion of instances where it will be constitutionally valid to impose restrictions on false or misleading advertising, see *Thompson v Western States Medical Center*, 535 US 357, 367 (2002).

unwanted intrusions into their personal privacy.⁸⁰ Equally consonant with Justice Holmes' passage, at least in so far as American jurisprudence is concerned, is the cardinal precept that the government may not impinge upon expression solely on the basis of its disagreement with the particular content views expressed.⁸¹ Thus, restrictions on expression may not be justified solely on the ground that they are highly unpopular.

As noted earlier, the theory of freedom of expression assumes the electorate's ability to make sound decisions when exposed to the free marketplace of ideas. In the United States where this theory is enforced through an entrenched provision in the Bill of Rights, this assumption has generally proved to be correct. Highly unpopular organisations such as the Ku Klux Klan and the American Nazi Party, for example, have been in existence for decades. Despite the continual exercise of their First Amendment rights of freedom of speech and association, the overwhelming majority of the American electorate has rejected their ideas and neither organisation has made significant political inroads. There is every reason to believe that Australians are equally capable of exercising sound judgment when exposed to the free marketplace of competing ideas. It seems most unlikely that a nation so profoundly committed to government by the people would accept the notion that its electorate is incapable of distinguishing between ideas that are well reasoned and those which are not. If that is true, then there is absolutely no justification for curtailing the expression of ideas solely on the basis of their unpopularity with a majority of the electorate. If one agrees with this reasoning, it is difficult to dispute the utility of an entrenched Bill of Rights in protecting the rights of minorities in Australia.

On the other hand, Dicey stressed that a Bill of Rights comprised of broad statements of principle will be of little or no utility in safeguarding human rights without an effective enforcement apparatus.⁸² In France, for example, private citizens have no right to challenge laws under the

⁸⁰ In Australia, see *Privacy Act 1988* (Cth). In the United States, see *Hill v Colorado*, 530 US 703 (2000) (upholding a State law prohibiting a person from deliberately approaching another person in the immediate vicinity of health care centres without the prior consent of that person). See also general discussion in *Rowan v Postmaster General*, 397 US 728 (1970) for background on this proposition.

⁸¹ Keith Werhan, *Freedom of Speech: a reference guide to the United States Constitution* (Praeger Publishers, 2004).

⁸² Dicey, above n 30, 198-199.

French Constitution.⁸³ Rather, it is only the government which has the authority to raise constitutional challenges and this can only be done before a law has become effective.⁸⁴ In democracies such as the United States and Germany, however, any person claiming a constitutional deprivation has a right to raise his or her grievance in a court of law.⁸⁵ Presumably, the same would be true in an Australian system of democracy which opted to incorporate an entrenched Bill of Rights into its domestic law. In countries where adequate means exist to enforce entrenched guarantees, the effect is to place the enforcement power and initiative in the hands of those who need it the most: the alleged victims of constitutional violations. Where there are no entrenched rights and the power of the legislature is supreme, those who have the power and primary initiative in safeguarding the rights of minorities may not always be responsive to the needs of minorities’.

VII WHY MIGHT AUSTRALIA NOT WANT AN ENTRENCHED BILL OF RIGHTS?

Opponents of an entrenched Bill of Rights could point to the discrimination against persons of Japanese descent in America during World War II (see below).⁸⁶ The argument is that the entrenched right to equal protection of the law was ineffective to combat the public hysteria and mob mentality that led to such an injustice. Therefore, the argument follows, entrenched rights are really nothing more than a mirage if they can be ignored at a time when they are most needed. This argument is certainly worthy of a response, for it strikes at the very core of the notion that an entrenched Bill of Rights is the only effective means of safeguarding the rights of minorities.

The right to equal protection of the law, however, does not require that the government treat all people alike in all circumstances. What it does require is that any disparate treatment must be non-arbitrary and supported by reasonable justification. When people are treated

⁸³ Walter Cairns and Robert McKeon, *Introduction to French law* (Cavendish Publishing, 1995) 101

⁸⁴ Ibid.

⁸⁵ David P Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press, 1994); Daniel A Farber and Suzanna Sherry, *Judgment calls: principle and politics in constitutional law* (Oxford University Press, 2009).

⁸⁶ Robert S Hirschfield, *The Constitution and the Court: the development of the basic law through judicial interpretation* (Random House, 1962).

differently on account of race, as in the case of Japanese-Americans during World War II, the government's action can only be sustained if it is necessary to achieve a compelling government interest which cannot be achieved through less restrictive means. In two Supreme Court decisions in which the disparate treatment of Japanese-Americans was challenged on equal protection grounds, the Court held that the government had met these criteria.⁸⁷ In the case of *Korematsu v United States*,⁸⁸ for example, Justice Black wrote:

Legal restrictions which curtail the civil rights of a single racial group are immediately suspect... courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such regulations: racial antagonism never can... *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that all citizens of Japanese Ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders as inevitably it must, determined that they should have the power to do this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot by availing ourselves of the calm perspective of hindsight now say at that time that their actions were unjustified [emphasis added].⁸⁹

Despite what we may now think of the treatment of this group of people with our benefit of hindsight, it is difficult to find fault with the Court's reasoning. Therefore, it is hardly justifiable to assert that the right to equal protection of the law was subordinated to the whim of mob mentality at a time when it was severely tested. Whether one agrees with the finding in *Korematsu*⁹⁰ or not, if the measures taken against Japanese-Americans occurred despite the existence of an entrenched Bill of Rights in the United States, one can only imagine the type of treatment that could have resulted without it. Viewed in this way, this

⁸⁷ *Hirabayashi v United States*, 320 US 81 (1943) (upholding a conviction for a violation of a curfew order).

⁸⁸ 323 US 214 (1944) ('*Korematsu*') (upholding a conviction for violating an exclusion order).

⁸⁹ *Ibid* 223.

⁹⁰ 323 US 214 (1944)

example serves to confirm the need of an entrenched Bill of Rights.

In any event, the argument that an entrenched rights cannot withstand severe political pressure is belied by innumerable instances in which the American courts have protected the constitutional rights of unpopular minorities. American courts, for example, have upheld the right to burn the American flag in public,⁹¹ the right to insist that any official prayer be banned from public schools,⁹² and the right of members of the Ku Klux Klan to express their views in public.⁹³ A particularly illuminating example of the advocacy of a Bill of Rights in protecting the rights of unpopular minorities occurred recently in the case of *Snyder v Phelps*.⁹⁴ In that instance the Westboro Baptist Church and its members were sued by the father of a dead American serviceman for intentional infliction of emotional distress (IIED), intrusion upon seclusion and civil conspiracy arising from a protest that was held at his son's funeral. During the protest, members displayed offensive signs condemning acceptance of homosexuality in the armed forces, expressing thanks for the death of American soldiers and other provocative topics. The United States District Court for the District of Maryland initially found for Snyder. The decision was overturned, however, by the United States Court of Appeals for the Fourth Circuit, after which it was brought before the Supreme Court of the United States by certiorari. In writing for the Court, Roberts CJ, with whom seven other Justices concurred, opined that the First Amendment could only provide protection to Westboro if the content of the disputed speech was of a public, as opposed to a private concern.⁹⁵ In holding that the speech was protected by the First Amendment, Roberts CJ wrote:

The “content” of Westboro’s signs plainly relates to broad issues of interest to society ‘at large’, rather than matters of “purely private concern.” *Dun & Bradstreet*, supra, at 759, 105 S.Ct. 2939. The placards read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God

⁹¹ *Texas v Johnson*, 491 US 397 (1989). See *Virginia v Black*, 538 US 343, 358 (2003) for recent affirmation of this proposition.

⁹² *Engle*, 370 US 421 (1962); *Abington School District v Schempp*, 374 US 203 (1963); *Westside Community Board of Education v Mergens*, 496 US 226 (1990).

⁹³ *Brandenburg v Ohio*, 395 US 444 (1969). For recent discussion of this case see *Virginia v Black*, 538 US 343, 366 (2003).

⁹⁴ 131 S.Ct 1207 (2011) (*‘Phelps’*).

⁹⁵ *Ibid* 1215.

Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You’re Going to Hell,” and “God Hates You.” App. 3781-3787. While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro’s position on those issues, in a manner designed, unlike the private speech in *Dun & Bradstreet*, to reach as broad a public audience as possible. And even if a few of the signs—such as “You’re Going to Hell” and “God Hates You”—were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.⁹⁶

Snyder v Phelps is perhaps the most poignant example of an instance in which a Bill of Rights has been required to protect the rights of unpopular minorities. In addressing this issue and acknowledging the plight of Snyder and his family, Roberts CJ emphatically stated:

Speech is powerful. It can stir people to action, move people to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even the hurtful speech on public issues to ensure that we do not stifle public debate.⁹⁷

Those who oppose an entrenched Bill of Rights could also argue that such a concept is so alien to the Australian credos that the judiciary would be incapable of making the adjustment. Specifically, one could argue that judges who have been trained under a system so strongly influenced by the doctrine of parliamentary sovereignty would be so conservative in their interpretation of a Bill of Rights that its utility in safeguarding human rights would be severely emasculated. The response to this argument is two-fold: first, the argument is based on an assumption which has yet to be tested; and secondly, even if this assumption were correct, there is no reason to assume that a new generation of Australian lawyers would be similarly disposed to such a grudging approach to a Bill of Rights.

⁹⁶ *Phelps*, 131 S.Ct 1207(2011) 1216-1217.

⁹⁷ *Ibid* 1220.

VIII THE JUDICIARY

Under the American Constitution, the President is entrusted with the power to appoint judges to the Supreme Court of the United States and the United States Courts of Appeal for the various circuits.⁹⁸ Moreover, in every presidential campaign in the past sixty years, a major issue has arisen as to the type of judges that should be appointed to the federal bench.⁹⁹ Without question, this has been a most divisive issue with various factions of the American electorate in presidential elections. Since presidents are elected by a national constituency, it is only natural that they have attempted to appoint judges who share their philosophy on the role of the judiciary in constitutional adjudication.¹⁰⁰ Therefore, judicial appointments tend to reflect the mood of the American electorate at that particular time.

On the other hand, in the United States, federal judges are appointed for life¹⁰¹ and, therefore, the extent to which any President is able to influence the orientation of the judiciary will depend on several factors, including the number of vacancies that accrue during his or her term in office. Presidents Nixon and Reagan, for example, appointed four and three Justices to the Supreme Court respectively while President Carter made no such appointments. Thus, the factors which impact on the judiciary's orientation at any given point in time include the mood of the country as reflected by the President it elects, the number of vacancies that accrue during a President's term, the President's personal philosophy regarding judicial appointments, and whether there has been a trend toward electing liberal or conservative presidents and, if so, how long that trend has continued. While it is arguable that these variables account for the judiciary's historical resistance to the temporal whims of the electorate, such resistance is not attributable to these factors alone. Respect for the doctrine of *stare decisis*, fidelity to one's oath of office, and personal biases are all no doubt contributing factors. Respect for the *stare decisis* doctrine has been an especially critical factor because it constitutes the backbone of the legitimacy of judicial review in the eyes of the American electorate.

⁹⁸ See generally Denis S Rutkus, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate* (Congressional Research Service, 2010).

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

Though there is a general consensus among the American electorate that politics plays a role in constitutional-decision making, there is also an endemic belief that the judiciary is generally comprised of men and women of integrity who maintain an abiding reverence for established legal principles. Indeed, one should not underestimate the importance of this perception in the American constitutional scheme. Though many consider the judiciary to be a co-equal branch of the federal government, the fact remains that without the aid of the executive branch, it is powerless to enforce its decisions. As former President Andrew Jackson is claimed to have remarked, 'The Chief Justice has made his decision. Now let's see him enforce it'.¹⁰² Though President Jackson's approach has never been put to the test, many attribute this to the American electorate's acceptance of the legitimacy of judicial review. Were such acceptance lacking, an executive's refusal to enforce the judiciary's decisions would entail fewer political risks and, consequently, the potential for a major constitutional crisis would increase dramatically. Apparently cognisant of the fact that their power ultimately depends on maintaining the respect and good will of the American people, the judiciary has typically accorded a high respect to the doctrine of *stare decisis*. Were the judiciary to overrule constitutional precedents on a massive scale, it is possible, if not likely, that the American electorate's view of the legitimacy of judicial review would be greatly undermined as it came to view the judiciary as just another highly politicised branch of government.

There is every reason to believe that respect for the doctrine of *stare decisis*, fidelity to one's oath of office, and personal biases would similarly affect judges in Australia or any other modern democratic society. In any event, there is little question that minorities in the United States have benefited from the protection of an entrenched Bill of Rights, and the same result would surely follow in Australia.

This point is amplified by the fact that there is nothing to prevent the state and federal governments from affording protections that exceed those which are required by an entrenched Bill of Rights in the *Australian Constitution*. Thus, if the judiciary's interpretation of a constitutional protection is more grudging than that of the electorate, the will of the electorate prevails. Similarly, if the electorate is disposed to afford less

¹⁰² Although this quotation is popularly attributed to the then President Andrew Jackson, it has also been rejected by other sources: Paul F Boller and John H George, *They Never Said It: A Book of False Quotes, Misquotes, & False Attributions* (Oxford University Press, 1990) 53

protection than the Constitution requires, the Constitution prevails. In the unlikely event that the judiciary's interpretation of the Bill of Rights were to mirror the will of an electorate bent on the evisceration of minority rights across the board, minorities would still fare no worse than if there were no entrenched Bill of Rights.

IX CONCLUSION

The foregoing was not intended to suggest that the abuse of minorities is commonplace in Australia. On the contrary, Australia can boast one of the finest records on human rights in the modern industrialised world. Its comprehensive laws prohibiting most forms of racial and sexual discrimination, for example, are most commendable and no doubt reflect the conscience and decency of the Australian people. Yet the fact that abuses of minorities occur less often than in most countries is not necessarily cause for celebration. Where human rights are concerned, any protection short of the best that can be achieved is simply unacceptable. History serves as a sobering reminder that no matter how modern, well-informed, or enlightened a society may be, there are certain risks inherent in the notion of majoritarian rule: most notably the risk that the rights of minorities will be accorded less than their proper respect. The Australian, British, German and American experiences, *inter alia*, are replete with instances where this risk has been transformed into an ugly reality.

The foregoing discussion has sought to demonstrate that protecting minorities from this type of abuse is a legitimate objective which can only be adequately achieved through an entrenched Bill of Rights supported by the power of judicial review. Without the aid of such anti-majoritarian devices, the protection of minorities is made to depend on the willingness of elected representatives to flout the tenets of majoritarian rule when the legitimate need arises. As experience has demonstrated, elected officials are often prone to follow the path of political expedience rather than the path of conscience and basic human decency. Given this reality, neither Dicey's idealistic expression of the Rule of Law, nor any other formulation can adequately ensure protection for the rights of minorities under a system in which Parliament is supreme and the government is supported by a majority in the House of Representatives.

This is not to suggest that an entrenched Bill of Rights is an infallible device for protecting human rights. To be effective, a Bill of Rights must be couched in terms that are spacious enough to allow for

adaptation and development as times change and new and difficult problems arise. The dangers that inhere in a supreme law consisting of broad and adaptable principles are as immense as they are obvious. There is little question that entrusting an independent and non-elected judiciary with the responsibility of construing these principles has and will continue to result in abuses. It therefore becomes the responsibility of the electorate, acting through their elected representatives, to devise some effective means of confining such abuses within acceptable limits. The fact remains, however, that it is impractical to expect that a perfect balance between judicial independence and accountability can ever be achieved. What is practical is to accept the notion that although some judicial abuses are inevitable, they are an acceptable price to pay for the protection of principles that society regards as basic human rights.

Given this position, it is regrettable that in a governmental review into the protection of human rights and freedoms in Australia, the idea of an entrenched Bill of Rights was excluded from consideration. This author urges the government to return this matter to the agenda in its 2014 review of Australia's Human Rights Framework.