AN AUSTRALIAN BILL OF RIGHTS: GLORIOUS PROMISES, CONCEALED DANGERS

REVIEW ESSAY BY JAMES A THOMSON*

An Australian Charter Of Rights?
by Murray R Wilcox (Law Book Co, Sydney, 1993)

I INTRODUCTION

Wilcox[1] is not Posner.[2] Perhaps, three months (even at Harvard Law School[3]) is simply not sufficient 'to explore' questions relating to Bills of Rights.[4] Super-

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1 Mr Justice Murray Rutledge Wilcox, Judge of the Federal Court (appointed 1984); Chief Justice of the Industrial Relations Court (appointed 1994): *Who's Who in Australia* (30th ed, 1994) 1569. Wilcox's publications and constitutional law opinions include: 'The "Dam Case" — implications for the future' (October 1983) 11(5) *Habitat* 32; 'The North American Experience: A Personal Reflection' in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994) 187-234; *Minister for Arts Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218, 229-56; *Trade Practices Commission v Manfal Pty Ltd* (1990) 97 ALR 231, 232-45.

2 Comparison with Richard A Posner (Judge, US Court of Appeals for the Seventh Circuit, appointed 1981), conveys a sense of the potential for Federal Court judges' publications to engender scholarly debate. Posner has 'delivered more than 650 judicial opinions and become one of [America's] most influential Judges.': Christopher DeMuth, 'The Penn and the Scales' *Wall Street Journal* 15 Feb 1989, A12. From an academic perspective:

> Richard A Posner is law's most successful agenda entrepreneur since Oliver Wendell Holmes, Jr. He has already earned a place in the history of legal studies as a parent of the law and economics movement and as an important contributor to the renaissance of academic interest in statutory interpretation, to the law and literature movement, and to 'practical legal studies' and the pragmatist revival in legal scholarship. Posner's ... book *Sex and Reason* is an important contribution to the growing literature on law and sexuality in general, and law and homosexuality in particular.

William Eskridge Jr, 'A Social Constructionist Critique of Posner's *Sex* and Reason: Steps Toward a Gaylegal Agenda' (1992) 102 *Yale Law Journal* 333-4 (footnotes omitted). By 1992 Posner had published 19 books: Michael Abramowitz, 'Lets Get Fiscal: Author Richard Posner and The Economics of Passion', *Washington Post,* 3 August 1992, D1, D2. See, eg, *The Federal Courts: Crisis and Reform* (1985); *Law and Literature: A Misunderstood Relation* (1988); *The Problems of Jurisprudence* (1990); *Cardozo: A Study in Reputation* (1990); *Economic Analysis of Law* (4th ed, 1992); *Sex and Reason* (1992); *Overcoming Law* (1995). Ensuing book review debates include: Martin Redish, 'The Federal Courts, Judicial Restraint, and the Importance of Analysing Legal Doctrine' (1985) 85 *Columbia Law Review* 1378; Jack Beermann, '*Crisis?* What Crisis?' (1987) 80 *Northwestern University Law Review* 1383; David Papke, 'Problems with an Uninvited Guest: Richard A Posner and the Law and Literature Movement' (1989) 69 *Boston Law Review* 1067; Peter Teachout, 'Lapse of Judgment' (1989) 77 *California Law Review* 1259; Richard Weisberg, 'Entering with a Vengeance: Posner on Law and Literature' (1989) 41 *Stanford Law Review* 1597; James White, 'What Can a Lawyer Learn from Literature?' (1989) 102 *Harvard Law Review* 2014; 'Book Review Exchange' (1989) 83 *Northwestern University Law Review* 977-1025; Sanford Levinson, 'Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner' (1991) 91 *Columbia Law Review* 1221; Nancy Levit, 'Practically Unreasonable: A Critique of Practical Reasons' (1991) 85 *Northwestern University Law Review* 494; Robert Summers, 'Judge Richard Posner's Jurisprudence' (1991) 89 *Michigan Law Review* 1302; Stanley Fish, 'Almost Pragmatism: Richard Posner's Jurisprudence' (1990) 57 *University of Chicago Law Review* 1447; Eric Rakowski, 'Posner's Pragmatism' (1991) 104 *Harvard Law Review*

ficiality, errors and failure to articulate opposing and alternative positions and to expose and grapple with inherent complexities could, in such circumstances, constitute understandable, even if undesirable, consequences. Equally unavoidable might be quotation, without critical and penetrating analysis, of lengthy extracts from judicial opinions.[5] Of course, publishing a preliminary primer on an Australian Charter of Rights might have been Wilcox's only objective. Given the voluminous and expanding Bill of Rights literature,[6] it is difficult and, indeed, unnecessary[7] to confidently rest upon that possibility.

1681; Martha Nussbaum, '"Only Grey Matter"?: Richard Posner's Cost-Benefit Analysis of Sex' (1992) 52 *University of Chicago Law Review* 1689; Martha Ertman, 'Denying the Secret Joy: A Critique of Posner's Theory of Sexuality' (1993) 45 *Stanford Law Review* 1485. Other appraisals include: Lino Graglia, '"Interpreting" the Constitution: Posner on Bork' (1992) 44 *Stanford Law Review* 1019; David Logan, 'The Man in the Mirror' (1992) *Michigan Law Review* 1739 (Posner's judicial and academic work and prospects of appointment to US Supreme Court).

[3] See, eg, Arthur Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967* (1967); Scott Turow, *One L: An Inside Account of Life in the First Year at Harvard Law School* (1977); Joel Seligman, *The High Citadel: The Influence of Harvard Law School* (1978); Richard D Kahlenberg, *Broken Contract: A Memoir of Harvard Law School* (1992); Robert Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* (1992).

[4] Murray R Wilcox, *An Australian Charter of Rights?* (1993) ix ('having the opportunity to spend three months at Harvard Law School in Fall Term 1991, I decided to explore these questions. During that time I read widely and spoke to many people in [the United States of America and Canada]').

[5] Examples include: Wilcox, above n 4, 40-4, 50-2, 56-7, 58-9, 67-8, 76-8, 79-80, 95-7, 98-101, 105-8, 115-7, 132-5, 147-9, 151-5, 161-6.

[6] Bibliographies include: Alice Erh-Soon Tay, *Human Rights for Australia: A Survey of Literature and Developments, and a Select and Annotated Bibliography of Recent Literature in Australia and Abroad* (1986); Report of the Advisory Committee to the Constitutional Commission, *Individual and Democratic Rights under the [Australian] Constitution* (1987) 135-48; [Queensland] Electoral and Administrative Review Commission, *Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms* (August, 1993) 402-69; 'Human Rights Bibliography' (1994) 1 *Australian Journal of Human Rights* 422-30. Older literature includes Gareth Evans, 'Prospects and Problems for an Australian Bill of Rights' (1970) 3 *Australian Yearbook of International Law* 1; Gareth Evans, 'An Australian Bill of Rights' (1973) 45 *Australia Quarterly* 4; Enid Campbell, 'Pros and Cons of Bills of Rights in Australia' (1970) 3 *Justice* 1; Enid Campbell, 'Civil Rights and the Australian Tradition' in Carl Beck (ed), *Law and Justice: Essays in Honor of Robert S. Rankin* (1970) 295-322; Elaine Thompson, 'A Bit of Paper Called a Bill of Rights' in Sol Encel, Donald Horne and Elaine Thompson (eds), *Change the Rules!: Towards a Democratic Constitution* (1977) 84-102; Colin Howard, *The Constitution, Power and Politics* (1980) 140-94. More recent literature includes *Final Report of the Constitutional Commission* (1988) Vol 1, 445-637; Leslie Zines, *Constitutional Change in the Commonwealth* (1991) 33-73; Leslie Zines, *The High Court and the Constitution* (3rd ed, 1992) 323-39; Lynne Spender (ed), *Human Rights: The Australian Debate* (1987); Michael Coper, *Encounters with the Australian Constitution* (1987) 315-58; Senate Standing Committee on Constitutional and Legal Affairs, *A Bill of Rights for Australia: An Exposure Report* (1985); Ken Baker (ed), *An Australian Bill of Rights: Pro and Contra* (1986); 'Bill of Rights — Pro and Con' (Spring 1988) 3(2) *Legislative Studies* 3-18; Nicholas O'Neill and Robin Handley, *Retreat from Injustice: Human Rights Law in Australia* (1994); Peter Bailey, *Human Rights: Australia in an International Context* (1990); Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy* (1990); Alston, above n 1; Symposium, 'Constitutional Rights for Australia?' (1994) 16 *Sydney Law Review* 145-305; Peter Hanks, 'Constitutional Guarantees' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 92-128; Peter Hanks, 'Moving Towards the Legalisation of Politics' (1986) 6 *Law in Context* 80; Christopher Anderson and Gerald Rowe, 'Human Rights in Australia: National and International Legal Perspectives' (1986) 24 *Archiv des Volkerrechts* 56; Hilary Charlesworth, A Constitutional Bill of Rights: North American Experience and Australian Prospect (SJD thesis, Harvard Law School 1985); Hilary Charlesworth, 'The Australian Reluctance About Rights' (1993) 31 *Osgoode Hall Law Journal* 195; Hilary Charlesworth, 'Individual Rights and the Australian High Court' (1986) 4 *Law in Context* 52; Jeffrey Gold-

After a Harvard sojourn, does Wilcox's exegesis — *An Australian Charter of Rights*?[8] — have anything to offer? Among a welter of stimulating assertions and questions in *An Australian Charter of Rights?*, a hint of an answer emerges. For example, Wilcox's Preface confidently proclaims:

> [T]here is no doubt that the composition and decisions of the United States Supreme Court are [in 1993] politically controversial, in a manner and to an extent unknown for Australian Courts. I am sure most Australians would share my view that, if an Australian Charter of Rights would similarly politicise the High Court of Australia, any benefits it offered would be purchased at too high a price.
>
> But need this effect occur? Anyway, what would be the benefits of entrenching some individual rights in the Australian Constitution? The rationale of entrenchment is that the courts are thereby enabled to protect the weak against the strong, the individual against government, minorities against the majority controlling the legislature .... How effectively have American courts discharged

sworthy, 'The Constitutional Protection of Rights in Australia' in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (1992) 151-76; Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994); Leslie Zines and Geoffrey Lindell, 'Form and Substance: "Discrimination" in Modern Constitutional Law' (1992) 21 *Federal Law Review* 136; Peter Bailey, 'Australia - How are you Going, Mate, Without a Bill of Rights? *Or* Righting the Constitution' (1993) 5 *Canterbury Law Review* 251; Peter Bayne, 'The Protection of Rights — an intersection of judicial, legislative and executive action' (1992) 66 *Australian Law Journal* 844; John Craig, 'The "Bill of Rights" Debates in Australia and New Zealand: A Comparative Analysis' (Autumn 1994) 8 (n 2) *Legislative Studies* 67; Geoffrey Kennett, 'Individual Rights, The High Court and the Constitution' (1994) 19 *MULR* 581; Brian Galligan, 'A Bill of Rights for Australia?' (Fall 1991) 17(4) *Intergovernmental Perspective* 53; Brian Galligan, 'Parliamentary Responsible Government and the Protection of Rights' (1993) 4 *Public Law Review* 100; Joseph Fletcher and Brian Galligan, 'Attitudes on Rights and Wrongs and An Australian Bill of Rights', unpublished paper, ANU Conference: 'Reshaping Australian Institutions: Towards and Beyond 2001', 24 August 1993 (opinion polls and empirical research); Sir Gerard Brennan, 'Courts, Democracy and Law' (1991) 65 *Australian Law Journal* 34; John Toohey, '"A Government of Laws, and Not of Men"?' (1993) 4 *Public Law Review* 158. Further literature is below nn 14, 215-33. Evaluation of this Australian debate ought to consider international and comparative human rights perspectives. Scholarship and documents are in Steven Perkins, 'Guide to Researching International Human Rights Law' (1992) 24 *Case Western Reserve Journal of International Law* 379 and below n 17 (comparative). See also below nn 215, 238 (Australian Federal and State human rights legislation).

7 Added to above n 6, Chief Justices Mason and Gibbs extol opposing positions. Initially, Mason opposed a Bill of Rights indicating that 'the clash of interest and values involved in the protection of fundamental human rights is better left for resolution by our politicians in Parliament than by judges in giving effect to a general Bill of Rights.': 'Swearing in of Sir Anthony Mason as Chief Justice' (1988) 162 CLR ix, xi. Ambivalence is in Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation' (1986) 16 *Federal Law Review* 1, 11-3, 28; Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 162-3. Reversal is in Sir Anthony Mason, 'A Bill of Rights for Australia?' (1989) 5 *Australian Bar Review* 79; Sir Anthony Mason, 'The High Court in Sir Samuel Griffith's Time: Contemporary Parallels and Contrasts' (1992) (unpublished address, delivered at Challenge for Australia's Second Century of Federalism Conference, Griffith University, 27 March 1992.) His judicial approach is in *Australian Capital Television Pty Ltd v Commonwealth [No 2]* (1992) 177 CLR 106, 123-47 (*'Australian Capital Television'*). Gibbs' opposing reasons are in Sir Harry Gibbs, 'The Constitutional Protection of Human Rights' (1982) 9 *Monash University Law Review* 1; Sir Harry Gibbs, 'A Constitutional Bill of Rights?' (1986) 45 *Australian Journal of Public Administration* 171; Sir Harry Gibbs, 'Re-Writing the Constitution' in Samuel Griffith Society, *Upholding The Australian Constitution* (1992) ix, xv-xvii; Note 'Sir Harry Gibbs raises doubts on Bill of Rights' (1994) 68 *Law Institute Journal* 72.

8 Wilcox, above n 4. Initial reviews include Kim Rubenstein, 'Book Review' (1994) 68 *Australian Law Journal* 312; Michael Kirby, 'Looking to the courts to fight political paralysis' *Sydney Morning Herald* (Sydney), 27 October 1993, 15; George Williams, 'Book Review' (1994) 17 *University of New South Wales Law Journal* 667.

> those functions [under the Bill of Rights since 1791]? ... What has been [the] effect [of the 1982 Canadian Charter of Rights and Freedoms] on individual and minority rights, and on Canadian Courts?
>
> [A]n independent judiciary [is] an essential prerequisite to effective constitutional rights ....
>
> [W]hat is significant about the [US] Bill of Rights is its history, not its current interpretation. As a model for Australia, the Canadian Charter ... is much more useful; so its judicial interpretation is important.[9]

Ponder, even momentarily, and ask: Isn't the composition of Australian courts, including the High Court, politically controversial? From past, present and future perspectives, information, events and recommendations can easily be garnered in support of an affirmative response.[10] Haven't High Court decisions also engendered political controversy? *Bank Nationalisation,*[11] *Communist Party,*[12] *Franklin Dam,*[13] and *Political Broadcasting*[14] cases are among the obvious judicial

[9] Wilcox, above n 4, viii-ix.

[10] Examples are in Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987); James Thomson, 'Appointing High Court Justices: Some Constitutional Conundrums' in Lee and Winterton, above n 6, 251; Report of the Advisory Committee to the Constitutional Commission, *Australian Judicial System* (1987) 69-76; Final Report, above n 6, 398-402; Michael Lavarch (Commonwealth Attorney-General), *Judicial Appointments: Procedure and Criteria* (Discussion Paper September 1993); Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (May 1994); A Lampe, 'Call for broader mix in choice of judges' *West Australian* (Perth), 14 May 1994, 8. An Australian 'court-packing' plan is in Galligan, above, 145-7. American predecessors are below n 134.

[11] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (High Court); *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 (Privy Council). Political and historical contexts (provided for this case and other cases in these footnotes, illustrate broader contexts in which judicial opinions are rendered and assist in addressing questions such as in the text below accompanying nn 189-93 and below n 278) are in A L May, *The Battle for the Banks* (1968); David Marr, *Barwick* (1980) 52-74; Peter Crockett, *Evatt: A Life* (1993) 5-7, 24-6, 299; Ken Buckley, Barbaro Dale and Wayne Reynolds, *Doc Evatt: Patriot, Internationalist, Fighter and Scholar* (1994) 326-33; Galligan, above n 10, 118-9, 121-4, 135-40, 148, 169-83. Legal analyses include: Zines, *High Court,* above n 6, 100-2, 131; Michael Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983) 92-6, 103-7. See also below nn 220-2.

[12] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. Political and historical contexts are in Galligan, above n 10, 203-7, Marr, above n 11, 78-94; *Seeing Red: The Communist Party Dissolution Act and Referendum 1951: Lessons For Constitutional Reform* (1992); George Williams, The Communist Party Case: A Study in Law and Politics (unpublished LLB Honours thesis, Macquarie University 1991); George Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case' (1993) 15 *Sydney Law Review* 3; Michael Kirby, 'H V Evatt, The Anti-Communist Referendum and Liberty in Australia' (1991) 7 *Australian Bar Review* 93; Crockett, above n 11, 7, 86-8; Buckley, Dale and Reynolds, above n 11, 355-68; Charles Sheldon, 'Public Opinion and High Courts: Communist Party Cases in Four Constitutional Systems' (1967) 20 *Western Political Quarterly* 341, 352-7; George Winterton, 'The Significance of the *Communist Party* Case' (1992) 18 *MULR* 630; Laurence Maher, 'Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia' (1993) 21 *Federal Law Review* 151, 175-83; Toby Miller, 'Sir John Latham and the Communist Party Dissolution Act: A Research Note' (Sept 1983) 15 *Australian Political Science Association* Newsletter 2-3. Legal analyses include Zines, *High Court,* above n 6, 196-222; Winterton, above n 12.

[13] *Commonwealth v Tasmania* (1983) 158 CLR 1. Political and historical contexts are in James Thomson, 'A Torrent of Words: A Bibliography and Chronology on the Franklin Dam Case' (1984) 15 *Federal Law Review* 145. Legal analyses include: H P Lee, 'The High Court and The External Affairs Power' in Lee and Winterton, above n 6, 60, 69-72; Zines, *High Court,* above n 6, 248-59.

[14] (1992) 177 CLR 1. Political context is in K D Ewing, 'The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study' (1992) 22 *University of Western Australia Law Review* 239. Legal analyses include: K D Ewing, 'New constitutional constraints in Aus-

decisions suggesting a negative answer would be incorrect.[15] Join both responses: Isn't the High Court already 'politicise[d]'?[16] However, presume that this has not occurred. Wilcox does not answer the question whether this is a necessary occurrence or proffer any example of a justiciable Charter or Bill of Rights which has not politicised the judiciary.[17] Therefore, does Wilcox's insis-

tralia' [1993] *Public Law* 256; Neil Douglas, 'Freedom of Expression Under the Australian Constitution' (1993) 16 *University of New South Wales Law Journal* 315; Deborah Cass, 'Through the Looking Glass: The High Court and the Right to Speech' (1993) 4 *Public Law Review* 229; H P Lee, 'The Australian High Court and Implied Fundamental Guarantees' [1993] *Public Law* 606, 612-4; George Williams, 'Civil Liberties and the Constitution — A Question of Interpretation' (1994) 5 *Public Law Review* 82. Subsequent cases include *Stephens v West Australian Newspapers Pty Ltd* (1994) 124 ALR 80; *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1. Pending High Court litigation includes: *McGinty v Western Australia* (No P44/93); *Phillip Morris Ltd v Commonwealth* (No M55/94).

[15] Other examples include: *Mabo v Queensland [No 2]* (1992) 175 CLR 1. Political context is in Randal Markey, 'PM blasts judges for Mabo mess', *West Australian* (Perth), 24 May 1994, 1; Geoffrey Baker, 'PM criticises High Court ruling', *Age* (Melbourne), 24 May 1993, 1. Legal analyses include: Fiona Wheeler, 'Common Law Native Title in Australia — An Analysis of *Mabo v Queensland [No 2]*' (1993) 21 *Federal Law Review* 271; Symposium, 'Mabo: The High Court Decision' (August 1993) 8(2) *Australian Property Law Bulletin* 13-51; *Essays on the Mabo Decision* (1993). An overview is in David Solomon, *The Political Impact of the High Court* (1992).

[16] Newspaper examples include: Peter Hartcher, 'High Court flushes out the roundheads', *Sydney Morning Herald* (Sydney), 9 October 1992, 9; Geoff Kitney, 'MPs case stirs Labor anger', *Financial Review* (Sydney), 26 November 1992, 3; Margo Kingston, 'A High Court grappling with change and politics', *Age* (Melbourne), 1 December 1992, 16; Editorial, 'Lawmaking and the judiciary', *Financial Review* (Sydney), 10 November 1993, 18; Jack Waterford, 'Court a victim of its own success', *Canberra Times* (Canberra), 13 November 1993, 15; Ian Fullagar, 'The Role of the High Court: Law or Politics?' (1993) 67 *Law Institute Journal* 72, 73 n 3 (references). Scholarly analyses include: Galligan, above n 10; Maher, above n 12; Jeffrey Goldsworthy, 'Realism About the High Court' (1989) 18 *Federal Law Review* 27; Brian Galligan, 'Realistic "Realism" and the High Court's Political Role' (1989) 18 *Federal Law Review* 40; Jeffrey Goldsworthy, 'Reply to Galligan' (1989) 18 *Federal Law Review* 50.

[17] Broader spectrums and comparative analyses of Bills of Rights may assist. Examples include: James Thomson, 'Comparative Constitutional Law: Entering the Quagmire' (1989) 6 *Arizona Journal of International and Comparative Law* 22, 46-53 (bibliography); Louis Henkin and Albert Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (1989); Richard Claude (ed), *Comparative Human Rights* (1976); Margaret Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (1992); Gary Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (1993); Mary Ann Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* (1987); David Currie, 'Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany' [1989] *Supreme Court Review* 333; Richard Kay, 'Substance and Structure as Constitutional Protections: Centennial Comparisons' [1989] *Public Law* 428; Ronald Krotoszynski, 'Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law' [1990] *Duke Law Journal* 1398; P P Craig, 'Constitutions, Property and Regulation' [1991] *Public Law* 538; Edward Johnson, 'A Comparison of Sexual Privacy Rights in the United States and the United Kingdom: Why We Must Look Beyond the Constitution' (1992) 30 *Columbia Journal of Transnational Law* 697; Alan Ryan, 'The British, the Americans, and Rights' in Michael Lacey and Knud Haakonssen (eds), *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law — 1791 and 1991* (1991) 366; Mathias Reimann, 'Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States' (1988) 21 *University of Michigan Journal of Law Reform* 201; John Guendelsberger, 'Equal Protection and Resident Alien Access to Public Benefits in France and the United States' (1993) 67 *Tulane Law Review* 669; Cynthia Vroom, 'Equal Protection versus the Principle of Equality: American and French Views on Equality in Law' (1992) 21 *Capital University Law Review* 199; Colloquium, 'Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation' (1989) 37 *Buffalo Law Review* 337; Jordan Cooper, 'The Influence of US Jurisprudence on the Interpretation of the Canadian Charter of Rights and Freedoms: An Initial Survey' (1986) 9 *Boston College International and Comparative Law Review* 73; Mary Ann Glendon, '*A Beau Mentir Qui Vient De Loin*: The 1988 Canadian Abortion Decision in Comparative Perspective' (1989) 83 *Northwestern Uni-*

tence on 'an independent judiciary [as] an essential prerequisite' inevitably entail the consequence that an Australian Charter of Rights will 'politicise' the High Court and other Australian judges?

Difficult conundrums also surround the beguiling phrase 'benefits of ... individual rights in the Australian Constitution'. For example, who are 'the weak'? Who are 'the strong'? Easy and obvious retorts are usually given: the economically and socially disadvantaged; racial and ethnic minorities; and women and children. However, what if those groups, individually or in conjunction, control, for example, legislative power? Can others, too politically weak to resist or change, for example, legislation redistributing income or property from them to the politically powerful, invoke a Charter or Bill of Rights as protection?[18] Assume this situation never occurs. Do majorities always control the legislature? At least, three inter-related reasons often mandate a negative answer. First, the concept of the tyranny of the minority over the majority.[19] Second, the prevalence of interest group politics.[20] Third, representatives of the majority may not control the upper House of the legislature because of the representation[21] or electoral[22]

versity Law Review 569; Donald Beschle, 'Judicial Review and Abortion in Canada: Lessons for the United States in the Wake of *Webster v. Reproductive Health Services*' (1990) 61 *University of Colorado Law Review* 537; Robert Harvie and Hamar Foster, 'Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the *Charter*' (1992) 24 *Ottawa Law Review* 39; Christopher Manfredi, 'The Use of United States Decisions by the Supreme Court of Canada Under the Charter of Rights and Freedoms' (1990) 23 *Canadian Journal of Political Science* 499; Anne Bayefsky, 'The Judicial Function under the *Canadian Charter of Rights and Freedoms*' (1987) 32 *McGill Law Journal* 791; Richard Devlin, 'Ventriloquism and the Verbal Icon: A Comment on Professor Hogg's "The Charter and American Theories of Interpretation"' (1988) 26 *Osgoode Hall Law Journal* 1; Symposium, 'Comparative United States/Canadian Constitutional Law' (1992) 55 *Law and Contemporary Problems* 1-302; Marian Mckenna (ed), *The Canadian and American Constitutions in Comparative Perspective* (1993); Graham Zellick, 'The European Convention on Human Rights: Its Significance for Charter Litigation' in Robert Sharpe (ed), *Charter Litigation* (1987) 97-130. As to non-justiciability, 'Directive Principles of State Policy' in Part IV of the Indian Constitution are declared 'not [to be] enforceable in any court' by s 37. Analysis includes Sudesh Sharma, *Directive Principles and Fundamental Rights: Relationship and Policy Perspectives* (1990); Durga Basu, *Shorter Constitution of India* (10th ed, 1989) 268-71. Contrasting views on whether and, if so, to what extent US constitutional rights are or should be justiciable are in James Thomson, 'Mirages of Certitude: Justices Black and Douglas and Constitutional Law' (1992) 19 *Ohio Northern University Law Review* 67, 81-2. Canadian non-justiciable rights proposals are in 'Book Review' (1993) 19 *Queen's Law Journal* 443. Further elaboration is below nn 257-63.

18 Possible examples are below nn 105-10.

19 'Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate': Robert Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1, 3. Elaboration is in Joseph Jaconelli, 'Majority Rule and Special Majorities' [1989] *Public Law* 587, 599-616; John Chapman and Alan Wertheimer (eds), 'Majorities and Minorities' (1990) 32 *Nomos* 1-336.

20 General literature includes: Trevor Matthews, 'Interest Groups' in Rodney Smith (ed), *Politics in Australia* (2nd ed, 1993) 241-61; Cass Sunstein, 'Naked Preferences and the Constitution' (1984) 84 *Columbia Law Review* 1689; Cass Sunstein, 'Interest Groups in American Public Law' (1985) 38 *Stanford Law Review* 29; Cass Sunstein, *The Partial Constitution* (1993) 17-39, 162-94; Mark Tushnet, 'Public Choice Constitutionalism and Economic Rights' in Ellen Paul and Howard Dickman (eds), *Liberty, Property and the Future of Constitutional Development* (1990) 23-48; Thomson, above n 10, 272 n 140 (US interest group and political choice theory).

system. In these circumstances, should majorities be able to invoke, with judicial assistance, a Bill of Rights against minorities? Of course, other questions concerning the effect on individual rights of a Charter or Bill of Rights and of judicial decisions interpreting and enforcing such rights require empirical and sociological, not legal, assessment. On these problems, like all areas in this human rights arena, controversy abounds.[23]

Finally, why is the 'current [judicial] interpretation'[24] of the US Bill of Rights not significant for Australia? Two possibilities might be postulated: it does not form part of the Bill of Rights' history or Wilcox does not like it. Again, assume

[21] For example, Australian and American States, regardless of population or electors, have equal numbers of senators: section 7, para 3 of the Australian Constitution and US Constitution, Art I, s 3.

[22] Campbell Sharman, 'Diversity, Constitutionalism and Proportional Representation' in Michael James (ed), *The Constitutional Challenge* (1982) 91-112; Campbell Sharman, 'The Senate, Small Parties and the Balance of Power' (1986) 21 *Politics* 20.

[23] Empirical and normative assessments of United States Bill of Rights and judicial decisions are in Thomson, 'Mirages of Certitude: Justices Black and Douglas and Constitutional Law', above n 17, 81-2; below nn 122 (free speech) 143-4, 257-67. Preliminary assessments of Canadian Charter Rights and Freedoms are in Wilcox, above n 4, 182-93; Patrick Monahan, 'A Critics' Guide to the Charter' in Sharpe, above n 17, 383-408; Gerry Ferguson, 'The Impact of an Entrenched Bill of Rights: The Canadian Experience' (1990) 16 *Monash University Law Review* 211; Michael MacNeil, 'Courts and Liberal Ideology: An Analysis of the Application of the *Charter* to Some Labour Law Issues' (1989) 34 *McGill Law Journal* 86; Brian Etherington, 'An Assessment of Judicial Review of Labour Laws Under the *Charter:* Of Realists, Romantics, and Pragmatists' (1992) 24 *Ottawa Law Review* 685; F L Morton, Peter Russell and Michael Whithey, 'The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis' (1992) 30 *Osgoode Hall Law Journal* 1; 'Impact of the Charter on the Public Policy Process: A Symposium' (1992) 30 *Osgoode Hall Law Journal* 501-660; Dale Gibson, 'The Deferential Trojan Horse: A Decade of Charter Decisions' (1993) 72 *Canadian Bar Review* 417; below nn 204-9. This engenders fundamental questions and divergent responses: Whether and, if so, to what extent there should be judicial enforcement of constitutional rights? What, if any, contribution does judicial review make to social change? Finally, is there public awareness? For example, a 1987 poll indicated 59 percent of Americans could not identify the Bill of Rights: Ellen Alderman and Caroline Kennedy, *In Our Defense: The Bill of Rights in Action* (1990) 13. Further data is in Herbert McClosky and Alida Brill, *Dimensions of Tolerance: What Americans Believe about Civil Liberties* (1983). See also below n 276 (Australia).

[24] As with other constitutional provisions, the judiciary is not the exclusive, or, necessarily, the ultimate interpreter of a Bill of Rights. Debate on non-judicial constitutional interpretation includes: James Thomson, 'State Constitutional Law: Some Comparative Perspectives' (1989) 20 *Rutgers Law Journal* 1059, 1076 n 83 (references); Lawrence Marshall, 'Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation' (1990) 66 *Chicago-Kent Law Review* 481; Lewis Fisher, 'The Curious Belief in Judicial Supremacy' (1991) 25 *Suffolk University Law Review* 85; David Engdahl, 'John Marshall's "Jeffersonian" Concept of Judicial Review' (1992) 42 *Duke Law Journal* 279; Mark Tushnet, 'The Constitution Outside the Courts: A Preliminary Inquiry' (1992) 26 *Valparaiso University Law Review* 437; The Federalist Society, *Who Speaks for the Constitution? The Debate Over Interpretative Authority* (1992); Frederick Schwarz, 'The Constitution Outside the Courts' (1993) 14 *Cardozo Law Review* 1287; Symposium, 'Elected Branch Influences in Constitutional Decisionmaking' (1993) 56(4) *Law and Contemporary Problems* 1-326; Frederick Schauer, 'The Occasions of Constitutional Interpretation' (1992) 72 *Boston University Law Review* 729 (interpretative principles for non-judicial interpreters). Discussions concerning judicial supremacy include James Thomson, 'Making Choices: Tribe's Constitutional Law' (1986) 33 *Wayne Law Review* 229, 238 n 35, 239 n 42, 244 n 76 (references); James Thomson, 'Is It a Mess? The High Court and the War Crimes Case: External Affairs, Defence, Judicial Power and the Australian Constitution' (1992) 22 *University of Western Australia Law Review* 197, 198 n 4 (references); R Paschal, 'The Continuing Colloquy: Congress and the Finality of the Supreme Court' (1991) 8 *Journal of Law and Politics* 143; David Chang, 'A Critique of Judicial Supremacy' (1991) 36 *Villanova Law Review* 281; H Jefferson Powell, 'Enslaved to Judicial Supremacy?' (1993) 106 *Harvard Law Review* 1197. Other possibilities are below nn 62-3 (USA), 181 (Canada).

Wilcox's approach, to discard 'current [judicial] interpretation', is correct. Even so, isn't it superfluous? The 'current interpretation' is similar to previous interpretations and may, therefore, merely represent a return to the historically predominant method of interpretation and results of judicial decisions.[25]

II UNITED STATES OF AMERICA

Permeating the protection of individual rights — original 1787 Constitution (structural arrangements and substantive provisions),[26] 1791 Bill of Rights (Amendments 1 to 10),[27] 1865-1870 Reconstruction (13th, 14th and 15th)

[25] Literature illustrating this possibility is below nn 143-4.

[26] More expansive than Wilcox's characterisation 'incidental guarantees' (above n 4, 1 n 8) and including Hamilton's and Madison's separation of powers and federalism structural vindications of constitutional rights, are Leonard Levy, 'The Original Constitution as a Bill of Rights' (1992) 2 *Constitutional Commentary* 163; Walter Berns, 'The Constitution as Bill of Rights' in Robert Goldwin and William Schambra (eds), *How Does the Constitution Secure Rights?* (1985) 50-73; Jack Rakove, 'The Madisonian Moment' (1988) 55 *University of Chicago Law Review* 473; Jack Rakove, 'The Madisonian Theory of Rights' (1990) 31 *William and Mary Law Review* 245; Jack Rakove, 'Parchment Barriers and the Politics of Rights' in Lacey and Haakonssen (eds), above n 17, 98, 124-42; Charles Hobson, 'James Madison, the Bill of Rights, and the Problem of the States' (1990) 31 *William and Mary Law Review* 267; Sunstein, 'The Partial Constitution', above n 20, 17-25; Akhil Amar, 'Of Sovereignty and Federalism' (1987) 96 *Yale Law Journal* 1425, 1493-5; R Pace, 'Reconsidering a Founding Father's Admonition Against a Bill of Rights: Has the 200 Year Old Constitutional Experiment Failed?' (1991) 13 *George Mason University Law Review* 499; William Mayton, 'From a Legacy of Suppression to the "Metaphor of the Fourth Estate"' (1986) 39 *Stanford Law Review* 139, 141-7 (free speech protected by 'limitations and dispersals' of governmental power). Why, apart from constitutional amendments (eg, method of electing senators), Madison's structural design, to prevent bad and unjust governmental action or laws, failed is discussed in Richard Stewart, 'Madison's Nightmare' (1990) 57 *University of Chicago Law Review* 335. Criticism of historical and normative premises is in 'Book Note' (1993) 107 *Harvard Law Review* 493. Other criticisms and responses are Raymond Diamond, 'No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-slavery Constitution' (1989) 42 *Vanderbilt Law Review* 93; Edward White, 'Another Look at Our Founding Fathers and Their Product: A Response to Justice Thurgood Marshall' (1989) 4 *Notre Dame Journal of Law, Ethics and Public Policy* 73. See also below n 78 (specific rights).

[27] At least four matters are important. First, the changing Bill of Rights' historiography. Elaboration is in James Hutson, 'The Drafting of the Bill of Rights: Madison's "Nauseous Project' Re-examined' (1987) 3 *Benchmark* 309; James Hutson, 'The Birth of the Bill of Rights: The State of Current Scholarship' (1988) 20 *Prologue* 143; William Fisher, 'The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights' in Lacey and Haakonssen (eds), above n 17, 266-365; Saul Cornell, 'Moving Beyond the Canon of Traditional Constitutional History: Anti-Federalists, Bill of Rights, and the Promise of Post-Modern Historiography' (1994) 12 *Law and History Review* 1 (using post structuralism to contrast Whig, anti-Whig and popular constitutionalism approaches to Bill of Rights' origins). Differing assessments of history and framers' intent include: Bernard Schwartz, *The Bill of Rights: A Documentary History* (1971); Robert Rutland, *The Birth of the Bill of Rights 1776-1791* (rev ed, 1983); P Conley and J Kaminski (eds), *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (1992); Eugene Hickok, *The Bill of Rights: Original Meaning and Current Understanding* (1991); Stephen Schechter and Richard Bernstein (eds), *Contexts of the Bill of Rights* (1990); Lacey and Haakonssen (eds), above n 17; Gordon Wood, 'The Origins of the Bill of Rights' (1991) 101 *Proceedings of the American Antiquarian Society* 255. Detailed historical analyses of individual rights include: Leonard Levy, *Origins of the Fifth Amendment: The Right Against Self Incrimination* (1968); William Miller, *The First Liberty: Religion and the American Republic* (1986); Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (1986); James Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (1992). Others are below nn 61, 125. Legal analyses include: Norman Dorsen (ed), *The Evolving Constitution: Essays on the Bill of Rights and the U.S. Supreme Court* (1987); Michael Meyer and William Parent (eds), *The Constitution of Rights* (1992); Raymond Arsenault, *Crucible of Liberty: 200 Years of the Bill of Rights* (1991);

Amendments[28] and other (for example, 19th, 24th and 26th) Amendments[29] — in the US Constitution[30] is complexity, nuance, debate, dialogue and change.[31]

David Bodenhamer and James Ely (eds), *The Bill of Rights in Modern America: After 200 Years* (1993); Symposium, 'The Bill of Rights in the Welfare State: A Bicentennial Symposium' (1992) 59 *University of Chicago Law Review* 1-565; Symposium, 'The Bill of Rights Yesterday and Today' (1991) 26 *Valparaiso University Law Review* 1-435; Symposium, 'The Bill of Rights at 200 Years: Bicentennial Perspectives' (1990) 31 *William and Mary Law Review* 241-443; Symposium, 'The Bill of Rights: An Historical Perspective' (1992) 16 *Southern Illinois University Law Journal* 213-420; Symposium, 'The Bill of Rights after 200 Years' (1992) 15 *Harvard Journal of Law and Public Policy* 1-190. Narratives on Supreme Court cases include: Peter Irons, *The Courage of Their Convictions* (rev ed, 1990); David Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* (1962); Richard Polengberg, *Fighting Faiths: The Abrams Case, The Supreme Court and Free Speech* (1987). See also below nn 42, 257. Other perspectives include: Thomas Ulen, 'An Economic Appreciation of the Bill of Rights: The Limits and Potential of Law and Economics in Discussing Constitutional Issues' [1992] *University of Illinois Law Review* 189; Daniel Faber, 'Free Speech without Romance: Public Choice and the First Amendment' (1991) 105 *Harvard Law Review* 554, 555-6 (economics and 1st Amendment).

Second, the initial draft of the Bill of Rights (as opposed to Madison's 8 June 1789 proposals to be inserted in, not appended to, the 1787 Constitution) was Roger Sherman's July, 1789 handwritten document: Herbert Mitgang, 'Handwritten Draft of a Bill of Rights Found', *New York Times* (New York), 29 July 1987, A1, C11; Laurence Tribe, *American Constitutional Law* (2nd ed, 1988) 1310 n 14; James Hutson, 'The Bill of Rights and the American Revolutionary Experience' in Lacey and Haakonssen (eds), above n 17, 62, 91; Randy Barnett (ed), *The Rights Retained By the People: The History and Meaning of the Ninth Amendment* (1989) 351-2 (text of Sherman's draft); Helen Veit, Kenneth Bowling and Charlene Bickford, *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (1991) xv, 266-8.

Third, a structural or holistic, rather than an individualistic rights, approach to the Bill of Rights is advocated in Akhil Amar, 'The Bill of Rights as a Constitution' (1991) 100 *Yale Law Journal* 1131; Akhil Amar, 'The Creation and Reconstruction of the Bill of Rights' (1992) 16 *Southern Illinois University Law Journal* 337; Akhil Amar, 'The Bill of Rights and Governmental Structure: Republicanism and Mediating Institutions' (1992) 15 *Harvard Journal of Law and Public Policy* 99; Walter Berns, 'On Madison and Majoritarianism: A Response to Professor Amar' (1992) 15 *Harvard Journal of Law and Public Policy* 113; Geoffrey Miller, 'Liberty and Constitutional Architecture: The Rights — Structure Paradigm' (1993) 16 *Harvard Journal of Law and Public Policy* 87. For example, it has been suggested that '[t]he genius of the American Constitution lies in its use of structural devices to preserve individual liberty.': Steven Calabresi and Kevin Rhodes, 'The Structural Constitution: Unitary Executive, Plural Judiciary' (1992) 105 *Harvard Law Review* 1155.

Fourth, the relevance of and relationship between 4 July 1776 Declaration of Independence, 1787 Constitution, 1791 Bill of Rights and 1865-1870 Reconstruction Amendments are debated in Robert Reinstein, 'Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment' (1993) 66 *Temple Law Review* 361; Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (1978); Garry Wills, *Lincoln at Gettysburg: Words that Remade America* (1992) 99-111, 130-47.

28 The Civil War (1861-1865) and Reconstruction (1865-1877) have a voluminous expanding literature and sinuous historiography, including James McPherson, *The Battle Cry of Freedom: The Civil War Era* (1988); James McPherson, *Ordeal by Fire: The Civil War and Reconstruction* (2nd ed, 1992); James McPherson, *Abraham Lincoln and the Second American Revolution* (1991) (revolutionary nature of Civil War and Reconstruction); Eric Foner, *Reconstruction: America's Unfinished Revolution* 1863-1877 (1988) (revolutionary goals and Reconstruction's fragmentary achievements); Eric Foner 'Reconstruction Revisited' (1982) 10 *Reviews in American History* 82; Harold Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (1973); Harold Hyman and William Wiecek, *Equal Justice Under Law: Constitutional Development 1835-1875* (1982); Earl Maltz, *Civil Rights, The Constitution, and Congress, 1863-1869* (1990). 13th Amendment literature is in Akhil Amar, 'Remember the Thirteenth' (1993) 10 *Constitutional Commentary* 403; Akhil Amar, 'Republicanism and Minimal Entitlements: Of Safety Valves and the Safety Net' (1988) 11 *George Mason University Law Review* 47; Akhil Amar, 'Some Thoughts on Minimal Entitlements and the Thirteenth Amendment' (1992) 55 *Albany Law Review* 643; Alex Kozinski and Eugene Volokh, 'A Penumbra Too Far' (1993) 106 *Harvard Law Review* 1639; James Thomson, 'Using the Constitution: Separation of Powers and Damages for Constitutional Violations' (1990) 6 *Touro Law Review* 177, 179 n 8 (references). 14th Amendment controversies include

Simplicity and dogmatism, therefore, require careful evaluation. For example, even seemingly clear and unambiguous words in the text of the Constitution and its amendments have, through historiographic, hermeneutic and judicial debates, been rendered opaque.[32] Therefore, the 'two reasons' — 'content and structure' — which Wilcox assigns for rejecting the US Bill of Rights as 'a useful model for Australia' are, at best, surprising.

As to the Bill of Rights' content, Wilcox's initial assertion is dogmatic: 'It has never been amended.' Of course, that is a correct, albeit simplistic, proposition if it merely means that there have been no textual changes, via Article V of the US Constitution,[33] to the words of the first ten amendments.[34] However, that tactic

Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (1989) (Northerners opposed slavery while remaining racists); William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988) (nature and limits of 14th Amendment's revision of federalism); David Richards, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments* (1993); Symposium, 'One Hundred Twenty Five Years of the Reconstruction Amendments' (1992) 25 *Loyola of Los Angeles Law Review* 1135-219; Symposium, 'The Reconstruction Amendments: Then and Now' (1992) 23 *Rutgers Law Journal* 231-303. See also below nn 45, 46, 56, 57, 63. 15th Amendment scholarship includes: William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (rev ed, 1969); Earl Maltz, 'The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment' (1994) 17 *Harvard Journal of Law and Public Policy* 223, 230-5.

29 Analyses include: Jennifer Brown, 'The Nineteenth Amendment and Women's Equality' (1993) 102 *Yale Law Journal* 2175; Tribe, above n 27, 1092-4 (24th Amendment), 1085 (26th Amendment); Ward Elliott, *The Rise of Guardian Democracy: The Supreme Court's Role in the Voting Rights Disputes, 1845-1969* (1974) 140, 145, 151, 156; Richard Claude, *The Supreme Court and the Electoral Process* (1970) 78-82.

30 Wilcox mentions (above n 4, 2) but does not discuss American States (below), Australian States (below n 215) or Canadian Provinces (below n 159). American State constitutions contain Bills of Rights. Debates on their history and judicial revival include: Thomson, 'State Constitutional Law: Some Comparative Perspectives', above n 24; Donald Lutz, 'The State Constitutional Pedigree of the U.S. Bill of Rights' (1992) 22 *Publius* 19; G Alan Tarr, 'Church and State in the States' (1989) 64 *Washington Law Review* 73; John Wilson, 'Religion Under the State Constitutions, 1776-1800' (1990) 32 *Journal of Church and State* 753; Angela Carmella, 'State Constitutional Protection of Religous Exercise: An Emerging Post-*Smith* Jurisprudence' [1993] *Brigham Young University Law Review* 275; Alexander Wohl, 'New Life for Old Liberties — The Massachusetts Declaration of Rights: A State Constitutional Law Study' (1990) 25 *New England Law Review* 177; Margaret Blanchard, 'Filling in the Void: Speech and Press in State Courts prior to *Gitlow*' in Bill Chamberlin (ed), *The First Amendment Reconsidered: New Perspectives on the Meaning of Freedom of Speech and Press* (1982) 14-59, 194-204; Stanley Friedelbaum (ed), *Human Rights in the States* (1988); 'Twenty Five Years and Counting: A Symposium on the Florida Constitution of 1968' (1994) 18 *Nova Law Review* 715-1604; 'Emerging Issues in State Constitutional Law' (1993) 66 *Temple Law Review* 1145-328; 'Emerging Issues in State Constitutional Law' (1992) 65 *Temple Law Review* 1119-371; 'Symposium on the Texas Constitution' (1990) 68 *Texas Law Review* 1337-647. More general themes are in Paul Kahn, 'Interpretation and Authority in State Constitutionalism' (1993) 106 *Harvard Law Review* 1147.

31 In addition to literature above nn 26-29 and below n 256, this is illustrated by textbooks: see, eg, Tribe, above n 27, 29, 546-1720.

32 In addition to literature above nn 26-29 and below nn 48-61, debate over US Constitution, Art II, s 1, cl 5 (Presidents must 'have attained .... the Age of thirty-five Years') provides a wonderful example: Anthony D'Amato, 'Aspects of Deconstruction: The "Easy Case" of the Under-Aged President' (1989) 84 *Northwestern University Law Review* 250; Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (1988) 60-2. On 'Congress' in the 1st Amendment, see Thomson, 'Mirages of Certitude', above n 17, 79 n 80 (extends to federal and state executive and judicial action and state legislative action). '[T]he terms used in the Constitution ... are open to numerous interpretations ...': Tushnet, above n 20, 23.

33 Amendment procedures, scope and judicial review are discussed in John Vile, *Contemporary Questions Surrounding The Constitutional Amending Process* (1993); Russell Caplan, *Constitutional Brinksmanship: Amending the Constitution by National Convention* (1988); Sanford

omits the vast textual changes[35] that occurred[36] in the Reconstruction Amendments, especially section 1 of the Fourteenth Amendment, which possibly was at least intended to apply against the States or incorporate into that Amendment the Bill of Rights' provisions,[37] and the important textual changes in the 19th, 24th and 26th Amendments.[38] A second Wilcox content suggestion is also dogmatic:

> [T]he Bill of Rights says nothing about a subject central to modern[39] human rights concern: freedom from discrimination arising out of personal factors

Levinson, 'A Multiple Choice Test: How Many Times Has the U.S. Constitution been Amended?' (1991) 8 *Constitutional Commentary* 409; Akhil Amar, 'Philadelphia Revisited: Amending the Constitution Outside Article V' (1988) 55 *University of Chicago Law Review* 1043; Michael Klarman, 'Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments' (1992) 44 *Stanford Law Review* 759; William Fisher, 'The Defects of Dualism' (1992) 59 *University of Chicago Law Review* 955; Richard Bernstein, 'The Sleeper Awakes: The History and Legacy of the Twenty Seventh Amendment' (1992) 61 *Fordham Law Review* 497; Michael Paulsen, 'A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment' (1993) 103 *Yale Law Journal* 677.

34 Indeed, there is an antipathy to any such amendments. Resistance to proposals to amend the 1st Amendment is a classic example. Details are in Jeff Rosen, 'Was the Flag Burning Amendment Unconstitutional?' (1991) 100 *Yale Law Journal* 1073; Geoffrey Stone, 'Flag Burning and the Constitution' [1989] *Iowa Law Review* 111; Robert Goldstein, 'The Great 1989-1990 Flag Flap: An Historical, Political, and Legal Analysis (1990) 45 *University of Miami Law Review* 19; Murray Dry, 'Flag Burning and the Constitution' [1990] *Supreme Court Review* 69; Frank Michelman, 'Saving Old Glory: On Constitutional Iconography' (1990) 42 *Stanford Law Review* 1337; William Van Alstyne, 'Freedom of Speech and the Flag Anti-Desecration Amendment: Antinomies of Constitutional Choice' (1991) 29 *Free Speech Year Book* 96; Charles Tiefer, 'The Flag-Burning Controversy of 1989: Congress' Valid Role in Constitutional Dialogue' (1992) 29 *Harvard Journal on Legislation* 357; Daniel Pollitt, 'The Flag Burning Controversy: A Chronology' (1992) 70 *North Carolina Law Review* 553; John Vile, 'Proposals to Amend the Bill of Rights: Are Fundamental Rights in Jeopardy?' (1991) 75(2) *Judicature* 62.

35 At least on an American-Australian comparison, eg, 27 amendments added to the US Constitution and 8 successful referendum proposals under s 128 of the Australian Constitution. In addition to above n 33, information is in James Thomson, 'Altering the Constitution: Some Aspects of Section 128' (1983) 13 *Federal Law Review* 323; Brian Galligan and J Nethercote (eds), *The Constitutional Commission and the 1988 Referendums* (1989).

36 Debate on whether Reconstruction Amendments are constitutional is in Thomson, above n 28, 182 n 20 (references); Forrest McDonald, 'Was the Fourteenth Amendment Constitutionally Adopted?' (1991) 1 *Georgia Journal of Southern Legal History* 1.

37 Wilcox discusses this 'incorporation debate' (Wilcox, above n 4, 10, 20-2). However, much more complex disputes ensue. Examples include: Richard Aynes, 'On Misreading John Bingham and the Fourteenth Amendment' (1993) 103 *Yale Law Journal* 57; Akhil Amar, 'The Bill of Rights and the Fourteenth Amendment (1992) 101 *Yale Law Journal* 1193 (historical and normative analysis of theories — total, selective and refined — of incorporation); Raoul Berger, 'Incorporation of the Bill of Rights: Akhil Amar's Wishing Well' (1993) 62 *University of Cincinnati Law Review* 1; Raoul Berger, 'Incorporation of the Bill of Rights: A Response to Michael Zuckert' (1991) 26 *Georgia Law Review* 1 (historical interpretations and theories); Raoul Berger, 'Fantasizing about the Fourteenth Amendment: A Review Essay' [1990] *Wisconsin Law Review* 1043, 1055-7. As Wilcox notes (Wilcox, above n 4, 6, 10), the Bill of Rights, of its own force, does not apply to the States. *Barron v Mayor of Baltimore* 32 US (7 Pet) 243 (1833). Madison's proposal that the Bill of Rights contain a provision binding on the States was defeated. William Miller, *The Business of May Next: James Madison and The Founding* (1992) 254-5; Paul Finkelman, 'James Madison and the Bill of Rights: A Reluctant Paternity' [1990] *Supreme Court Review* 301, 344; Jack Rakove, 'James Madison and the Bill of Rights: A Broader Context' (1992) 22 *Presidential Studies Quarterly* 667, 675; Stuart Leibiger, 'James Madison and Amendments to the Constitution, 1787-1789: "Parchment Barriers"' (1993) 59 *Journal of Southern History* 441, 461, 464, 466.

38 Their history and constitutional consequences are above n 29.

39 This footnote is not in Wilcox's text. Concerns Wilcox mentions have important historical antecedents. Race and colour, especially their manifestation in slavery generated human rights concerns for centuries. Sex discrimination has a similar lineage. Literature includes: Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal*

> such as sex, race, colour and the like. If the [US] Bill of Rights were being penned today, it would no doubt include an anti-discrimination clause.[40]

Placed in the context of post-1865 textual changes, Wilcox's suggestion stimulates a response: Is that, especially the first sentence, a serious assertion? Merely glancing at a few — *Brown v Board of Education*,[41] *Roe v Wade*[42] and *Regents of the University of California v Bakke*[43] — modern US Supreme Court cases suffices to engender a sceptical response. If so, is Wilcox simply indicating absence from the US Constitution and its Amendments of express terminology or reference to these matters? Obviously, that cannot be the intention: the 15th Amendment refers to 'race' and 'color'; the 19th Amendment refers to 'sex' and the 26th Amendment refers to 'age'. Even if those words were not included, the Constitution's terminology, especially the equal protection clause of the Fourteenth Amendment, has been interpreted as 'an anti-discrimination clause.'[44] That, some argue, and others reject, is precisely what those words mean.[45] Pre-

Tradition (1993); Ellis Sandoz (ed), *The Roots of Liberty* (1993); Knud Haakonssen, 'From natural law to the rights of man: a European perspective on American debates' in Lacey and Haakonssen (eds), above n 17, 19; David Brion Davis, *Slavery and Human Progress* (1984); William Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (1977); Eleanor Flexner, *Century of Struggle: The Woman's Rights Movement in the United States* (rev ed, 1975); Brown, above n 29; J R Pole, *The Pursuit of Equality in American History* (2nd ed, 1993).

40 Wilcox's initial assertion, above n 4, 26.

41 347 US 438 (1954) (State imposed racial segregation unconstitutional because of the 14th Amendment's equal protection clause). History, political context, litigation process and US Supreme Court's deliberations are in Richard Kluger, *Simple Justice* (1976); Mark Tushnet, *Making Civil Rights Law* (1994); Mark Tushnet and Katya Lezin, 'What Really Happened in *Brown v Board of Education*' (1991) 91 *Columbia Law Review* 1867; H Victor Kramer, 'President Eisenhower's Handwritten Changes in the Brief on Relief in the School Segregation Cases' (1992) 9 *Constitutional Commentary* 223; Herbert Brownell, '*Brown v Board of Education* — Revisited' [1993] *Journal of Supreme Court History* 21. Legal analyses include: Tribe, above n 27, 1475-8, 1488-9. See also below nn 44 (*Bolling v Sharpe*), 259, 262 (empirical evaluations).

42 410 US 113 (1973) (state laws prohibiting abortion may be unconstitutional under 14th Amendment's due process clause). History, political context, litigation process and US Supreme Court's deliberations are in Marian Faux, *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision that Made Abortion Legal* (1988); Sarah Weddington, *A Question of Choice* (1993); David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v Wade* (1994). Legal analyses include: Laurence Tribe, *Abortion: The Clash of Absolutes* (new ed, 1992); Stephen Carter, 'Abortion, Absolutism, and Compromise' (1991) 100 *Yale Law Journal* 2747. See also below nn 139 (linkage with *Lochner*), 259, 262 (empirical evaluations).

43 438 US 265 (1978) (no equal protection clause requirement that state universities have colour-blind admission policies but specific numerical race based set aside quota unconstitutional). The political context, litigation process and US Supreme Court's deliberations are in Bernard Schwartz, *Behind Bakke: Affirmative Action and the Supreme Court* (1988); Timothy O'Neil, *Bakke & the Politics of Equality* (1985); Joel Dreyfuss and Charles Lawrence, *The Bakke Case: The Politics of Inequality* (1979). Legal analyses include: Tribe, above n 27, 115-7, 221-32; 'A Symposium: *Regents of the University of California v. Bakke*' (1979) 67 *California Law Review* 1-255.

44 Wilcox, above n 4, 26. *Brown v Board of Education* (above n 41) is the classic example. Its effect on non-racial discrimination is discussed in Tribe, above n 27, 1544-601 (aliens, illegitimates, gender, age, disabilities). Reverse incorporation of this 14th Amendment aspect into the 5th Amendment due process clause occurred in *Bolling v Sharpe* 347 US 497 (1954) and is criticised in John Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 32-3.

45 Vigorous controversy over this aspect of Framers' intent includes above n 28; Raoul Berger, *Government by Judiciary* (1977); Raoul Berger, 'McAffee v Berger: A Youthful Debunker's Rampage' (1986) 22 *Willamette Law Review* 1, 20-31 (Framers intended only very limited

cisely at this juncture is the rich and complex mosaic debate over history and constitutional interpretative principles, such as textualism, structure, intention, purpose and context,[46] which are utilised to ascertain and ascribe meaning to words in the Constitution and its amendments.

At the level of 'structure', Wilcox's dogmatism re-emerges: 'The United States Bill of Rights is cast in absolute language' and that gives the Canadian Charter of Rights and Freedoms 'a structural advantage.'[47] Absolutism, as a technique of US constitutional interpretation and adjudication was particularly associated with Justice Hugo Black and his conception of the judicial function.[48] Black's tenure on the US Supreme Court stimulated a wide-ranging debate between absolutionists and those who adumbrated a more flexible interpretative stance.[49] One possibility, cast aside without consideration by Wilcox, is that words and their meaning or meanings are inherently flexible, uncertain and subject to modification and change.[50] Even if that is incorrect, the Bill of Rights does contain words which, as a textual matter, are not absolute. Examples abound: 'respecting' and 'abridging' in the 1st Amendment; 'unreasonable' and 'probable cause' in the 4th Amendment; 'speedy' in the 6th Amendment; and 'excessive' and 'cruel and unusual' in the 8th Amendment.[51] Of course, many American scholars and judges consider that such vital words as 'Congress',[52] 'speech',[53] 'religion',[54] 'press',[55] 'State',[56] 'privileges or immunities',[57] 'due

rights, not desegregation or suffrage); Raoul Berger, 'Constitutional Interpretation and Activist Fantasies' (1993) 82 *Kentucky Law Journal* 1.

46 Apart from controversies over 14th Amendment history and role of Framers' intentions in constitutional interpretation (above nn 28, 45), this debate encompasses Laurence Tribe and Michael Dorf, *On Reading the Constitution* (1991); Philip Bobbitt, *Constitutional Interpretation* (1991); Charles Black, *Structure and Relationship in Constitutional Law* (1969); Thomson, 'Comparative Constitutional Law: Entering the Quagmire', above n 17, 35 n 37 (references). See also below n 60. Vociferous debates over Framers' intentions — their ascertainment and role in constitutional interpretation — are in Thomson, 'Making Choices: Tribe's Constitutional Law', above n 24, 233 n 11 (references); Thomson, 'Comparative Constitutional Law: Entering the Quagmire' above n 17, 37 n 44 (references); Charles Lofgren, 'The Original Understanding of Original Intent?' (1988) 5 *Constitutional Commentary* 77; Herman Belz, 'The Civil War Amendments to the Constitution: The Relevance of Original Intent' (1988) 5 *Constitutional Commentary* 115; Raoul Berger, 'The Founders' Views — According to Jefferson Powell' (1989) 67 *Texas Law Review* 1033; Raoul Berger, 'Original Intent: The Rage of Hans Baade' (1993) 71 *North Carolina Law Review* 1151; Jack Rakove (ed), *Interpreting the Constitution: The Debate Over Original Intent* (1990).

47 Wilcox, above n 4, 26.

48 Thomson, 'Mirages of Certitude', above n 17.

49 Ibid. See also Roger Newman, *Hugo Black: A Biography* (1994).

50 Do words 'say' or 'mean' anything? Is language too indefinite, superficial, flexible, contingent or irrelevant to constitute a (neutral) medium of communication? A plethora of responses are in Thomson, 'Comparative Constitutional Law: Entering the Quagmire', above n 17, 34 n 35 (references); Joan Williams, 'Rorty, Radicalism, Romanticism: The Politics of the Gaze' [1992] *Wisconsin Law Review* 131; John Fischer, 'Reading Literature/Reading Law: Is there a Literary Jurisprudence?' (1993) 72 *Texas Law Review* 135; Paul Campos, 'Three Mistakes About Interpretation' (1993) 92 *Michigan Law Review* 388. Further, the concept of 'interpretation' is itself controversial. Differing views are in Thomson, 'Comparative Constitutional Law: Entering the Quagmire', above n 17, 34 n 36 (references); 'Colloquy' (1993) 72 *Texas Law Review* 1-77.

51 'Abridge' and 'abridged' are also in s 1 of the 14th and 15th Amendments. The 1st Amendment usage is discussed in Tribe, above n 27, 789-94.

52 See above n 32.

53 Examples of controversies over the meaning and scope of 'speech' are in Tribe, above n 27, 785-1061; Symposium, 'Freedom of Expression: Theoretical Perspectives' (1983) 78 *North-*

process of law'[58] and 'equal protection of the laws'[59] are far from absolute. Two pieces of evidence suffice: historiography and judicial decisions.[60] Even if none

western University Law Review 937-1357; Symposium, 'Commercial Speech and the First Amendment' (1988) 56 *University of Cincinnati Law Review* 1165-395; Colloquy, 'The First Amendment and the Paratroopers' Paradox' (1990) 68 *Texas Law Review* 1087-1194; 'The New First Amendment' [1990] *Duke Law Journal* 375-586; Symposium (1992) 33 *William and Mary Law Review* 611-894; Peter Tiersma, 'Nonverbal Communication and the Freedom of "Speech"' [1993] *Wisconsin Law Review* 1525; Jeffrey Raskin, 'Dancing on the Outer Perimeters: The Supreme Court's Precarious Protection of Expressive Conduct' (1993) 33 *Santa Clara Law Review* 395; Calvin Massey, 'Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression' (1992) 40 *UCLA Law Review* 103; Stanley Fish, *There's No such Thing as Free Speech and It's a Good Thing, Too* (1993) (reviewed in Cass Sunstein, 'The Professor's New Clothes', *New Republic*, 6 December 1993, 42-6); Cass Sunstein, *Democracy and the Problem of Free Speech* (1993); Frederick Schauer, 'Free Speech and the Cultural Contingency of Constitutional Categories' (1993) 14 *Cardozo Law Review* 865. See also above n 34; below nn 112, 122.

54 Breadth and vagueness of this word are illustrated in Tribe, above n 27, 1179-88.

55 Ambiguities and problems are explored in William Van Alstyne, *Interpretations of the First Amendment* (1984) viii, 50-67; Bill Chamberlin, 'Speech and the Press' in Kermit Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (1992) 808, 810 ('*Speech vs Press*').

56 Context and questions (below n 90) are discussed in 'Symposium on the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1289-609; Maimon Schwarzschild, 'Value Pluralism and The Constitution: In Defense of the State Action Doctrine' [1988] *Supreme Court Review* 129; Barbara Snyder, 'Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations' (1990) 75 *Cornell Law Review* 1053 n 1 (references); Mark Tushnet, 'Public and Private Education: Is there a Constitutional Difference?' [1991] *University of Chicago Legal Forum* 43; Alan Madry, 'State Action and the Obligation of the States to Prevent Private Harm: The Rehnquist Transformation and the Betrayal of Fundamental Commitments' (1992) 65 *Southern California Law Review* 781; Ruth Gavison, 'Feminism and the Public/Private Distinction' (1992) 45 *Stanford Law Review* 1; 'Symposium on the State Action Doctrine' (1993) 10 *Constitutional Commentary* 309-441. Ambiguities and criticisms of the Canadian position (under s 32(1) of the Charter) are noted in Wilcox, above n 4, 38-9, 74 n 281. See below n 180.

57 '[Q]uite inscrutable' is a typical description of this 14th Amendment provision: Ely, above n 44, 98. Controversy over its meaning and scope is in Ely, above n 44, 22-30 ('a delegation to future constitutional decision-makers to protect rights that are not listed' in the Constitution); Tribe, above n 27, 528-45; Berger, 'Constitutional Interpretation and Activist Fantasies', above n 45, 3-6 (limited and specific rights); John Harrison, 'Reconstructing the Privileges or Immunities Clause' (1992) 101 *Yale Law Journal* 1385.

58 Within the 5th and 14th Amendments, this is the most notorious phrase in American constitutional law. Debate on its open-ended and flexible quality includes Ely, above n 44, 14-21; (even if only procedural, not substantive, due process is mandated, judicial judgment about 'what process is due' is constitutionally 'untethered'); Berger, 'Constitutional Interpretation and Activist Fantasies', above n 45, 13-5 (only applies to judicial proceedings); Frank Strong, *Substantive Due Process of Law: A Dichotomy of Sense and Nonsense* (1986). See also below n 99 (substantive due process).

59 Substantial differences over 'equal protection's' meaning and scope are adumbrated in Ely, above n 44, 30-2 ('sweeping mandate to judge ... validity of governmental choices'); Archibald Cox, *The Court and the Constitution* (1987) 250-68 ('majestic phrase ... enabl[ing] the [US Supreme] Court to lead a broadly egalitarian movement permeating American society'); Berger, 'Constitutional Interpretation and Activist Fantasies', above n 45, 8-12, 15-28 (very limited and specific rights).

60 On-going controversies in judicial opinions and scholarly journals (above nn 48-59) provide numerous examples. This illustrates one strand — interpretivism and non-interpretivism — of a more general debate over principles and methodology of constitutional interpretation and decision-making. Should interpreters be 'clause-bound'? Is recourse to materials extrinsic to the Constitution's text and enforcement of non-textual norms permissible? If so, when and where? Discussions include: Ely, above n 44; James Thomson, 'An Endless but Productive Dialogue: Some Reflections on Efforts to Legitimize Judicial Review' (1982) 61 *Texas Law Review* 743; 'Symposium on Democracy and Distrust: Ten Years Later' (1991) 77 *Virginia Law Review* 631-879; Thomas Grey, 'The Uses of an Unwritten Constitution' (1988) 64 *Chicago-Kent Law*

of this is conceded, there are the 9th and 10th Amendments. Both are opaque, perhaps delphic, and each has generated a considerable array of views.[61]

Presume Wilcox's description — 'absolute language' — still remains accurate. Can that characteristic of American constitutional rights, if it is a defect, be corrected? Mitigation, in two further respects, is possible. First, Congress has express constitutional authorisation 'to enforce' several rights 'by appropriate legislation.'[62] Particularly important is that all 14th Amendment provisions including the 'due process' and 'equal protection' clauses are subject to this legislative power.[63] Secondly, as Wilcox recognises, the frequent 'conflict' between consti-

Review 211; Michael Moore, 'Do We Have an Unwritten Constitution?' (1989) 63 *Southern California Law Review* 107; Helen Michael, 'The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?' (1991) 69 *North Carolina Law Review* 421; George Winterton, 'Extra Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223.

[61] For example, is the 9th Amendment a principle of constitutional interpretation to negate an implication, arising from specific rights or prohibitions, that Congress had powers beyond those expressly enumerated in the Constitution or an unenumerated federal constitutional rights repository? Opposing views and variations (including 9th Amendment's relationship to non-interpretivism (above n 60) and natural law) are in Ely, above n 44, 34-41; Tribe and Dorf, above n 46, 54-5, 110-1; Randy Barnett (ed), *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (1989) 399-403 (bibliography); Randy Barnett (ed), *The Rights Retained by the People: Constitutional Interpretation and the Ninth Amendment* (1993); Paul Murphy (ed), *The Right to Privacy and the Ninth Amendment* (1990); Raoul Berger, 'Suzanna and — the Ninth Amendment' [1994] *Brigham Young University Law Review* 51; Raoul Berger, 'The Ninth Amendment, as Perceived by Randy Barnett' (1994) 88 *Northwestern University Law Review* 1508; Calvin Massey, 'The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law' [1990] *Wisconsin Law Review* 1229; Symposium 'Perspectives on Natural Law' (1992) 61 *University of Cincinnati Law Review* 1-222; Terry Brennan, 'Natural Rights and the Constitution: The Original "Original Intent"' (1992) 15 *Harvard Journal of Law and Public Policy* 965; David Mayer, 'The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAffee' (1992) 16 *Southern Illinois University Law Journal* 313; Philip Hamburger, 'Natural Rights, Natural Law, and American Constitutions' (1993) 102 *Yale Law Journal* 907; JoEllen Lind, 'Liberty, Community and the Ninth Amendment' (1993) 54 *Ohio State Law Journal* 1259; John Yoo, 'Our Declaratory Ninth Amendment' (1993) 42 *Emory Law Journal* 967; Cornell, above n 27, 13-6 (divergent anti-federalists' intentions). Cf s 26 of the Canadian Charter of Rights and Freedoms discussed in Peter Hogg, *Constitutional Law of Canada* (3rd ed, 1992) 826-7. Differing interpretations of the 10th Amendment are in John Schmidt, 'The Tenth Amendment: A "New' Limitation on Congressional Commerce Power' (1993) 45 *Rutgers Law Review* 417; H Jefferson Powell, 'The Oldest Question of Constitutional Law' (1993) 79 *Virginia Law Review* 633; Tribe, above n 27, 381-97; Kathryn Abrams, 'On Reading and Using the Tenth Amendment' (1984) 93 *Yale Law Journal* 723.

[62] Section 2 of 13th, 15th, 19th, 24th and 26th Amendments and s 5 of 14th Amendment. Similar legislative power is in s 2 of 23rd Amendment. Cf s 33 (legislative override) of the Canadian Charter of Rights and Freedoms (discussed in Wilcox, above n 4, 39-40, 177-82 and below n 181); s 2(1) (legislative override) of the Canadian Bill of Rights (discussed in Wilcox, above n 4, 30-3 and below n 171) and s 51(36) of Australian Constitution (discussed in Thomson, above n 35, 323 n 4); European Convention on Human Rights, art 15 (derogation procedure); and above n 17, 24 (non-judicial enforcement). Another attempt to reconcile judicial supremacy and non-justiciability over rights is in Francesca Klug and John Wadham, 'The "democratic" entrenchment of a Bill of Rights: Liberty's Proposals' [1993] *Public Law* 579.

[63] Section 5 of the 14th Amendment: 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.' Differing views of Congress' power to adjust, dilute or expand 14th Amendment rights, including Supreme Court interpretations, are in Thomson, above n 28, 197-9; John Hayes, 'Congressional Ratification of Otherwise Unconstitutional Local Affirmative Action: Can Congress Override *Crosson*?' (1990) 35 *New York Law School Review* 681; James Wilson, 'Reconstructing Section Five of the Fourteenth Amendment to Assist Impoverished Children' (1990) 38 *Cleveland State Law Review* 391; Michael McConnell, 'Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?' (1992) 15 *Harvard Journal of Law and Public Policy* 181; P Chuey, '*Rust v Sulli-*

tutionally guaranteed rights is 'accommodated' by the US Supreme Court. One method of achieving such accommodation is by the interpretative technique of balancing.[64] Wilcox, however, prefers express textual qualifications or conditions on constitutional rights.[65] That preference can, of course, be debated.[66] Far less clear is another Wilcox assertion: such textual qualifications or conditions 'frees the law from the gymnastics which American judges undertake' in Bill of Rights litigation. However, those qualifications and conditions add more words to the Constitution's text. That increases the quantity of interpretative material. Isn't one virtually inevitable consequence promotion of more, not less, judicial gymnastics? Non-abatement of Canadian Charter of Rights and Freedom litigation seems to reinforce, rather than refute, that suggestion.[67]

More than 200 years of continuous operation[68] ought to suffice for the historical experience and judicial interpretation and enforcement of US constitutional rights, especially the Bill of Rights and 14th Amendment, to provide some comparative insight into possibilities and permutations that might be associated with 'entrenching some individual rights in the Australian Constitution'.[69] Within that evolution five broad epochs — pre 1776; 1776-1791; 1791-1861; 1861-1937; and 1937-1994 — are discernible. American colonists' experience with rights was one factor in the American Revolution and the 1776 Declaration of Independence.[70] Drafting of State Constitutions containing rights[71] and negotiation

van: Redirecting the *Katzenbach v Morgan* Power' (1993) 16 *University of Puget Sound Law Review* 833; Craig Goldblatt, 'Harmless Error as Constitutional Common Law: Congress's Power to Reverse *Arizona v Fulminante*' (1993) 60 *University of Chicago Law Review* 985; Matt Pawa, 'When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment' (1993) 141 *University of Pennsylvania Law Review* 1029.

64 Would 'juggling' be a better description? References, explanations and critiques are in David Faigman, 'Madisonian Balancing: A Theory of Constitutional Adjudication' (1994) 88 *Northwestern University Law Review* 641; Symposium, 'Individual Rights and The Powers of Government' (1993) 27 *Georgia Law Review* 343-501. Similar Australian methodologies are in Brian Fitzgerald, 'Proportionality and Australian Constitutionalism' (1993) 12 *University of Tasmania Law Review* 263. Cf below n 179 (balancing under Canadian Charter); above n 27 (structural approach).

65 Wilcox, above n 4, 27.

66 For example, is it more difficult for people to empathise with long convulated legal texts? The beauty of the US Bill of Rights, compared to the Canadian Charter of Rights and Freedoms and international human rights treaties, is its brevity, crisp language (but see above nn 50-61) and simplicity.

67 Below nn 186-93. '[G]ymnastics' is in Wilcox, above n 4, 27.

68 Was the Bill of Rights (and aspects of the Constitution) 'suspended' during the Civil War? Discussions include: Mark Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (1991); James Randall, *Constitutional Problems Under Lincoln* (rev ed, 1951).

69 Wilcox, above n 4, viii. Assessment of comparative constitutional law is in Thomson, 'Comparative Constitutional Law: Entering the Quagmire', above n 17.

70 General discussions include: Wood, above n 27; Wills, *Inventing America: Jefferson's Declaration of Independence* above n 27; Bernard Bailyn, *The Ideological Origins of the American Revolution* (enlarged ed, 1992); Gordon Wood, *The Creation of the American Republic 1776-1787* (1969); Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* (1992).

71 History and collections of state constitutions are in James Thomson, 'State Constitutional Law: American Lessons for Australian Adventures' (1985) 63 *Texas Law Review* 1225, 1230 nn 22, 25; Thomson, 'State Constitutional Law: Some Comparative Perspectives', above n 24, 1066 n 23, 1069 n 36; Donald Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (1980). See also above n 30.

and ratification of the 1787 Constitution and 1791 Bill of Rights occurred in the second epoch. Subsequently, postulating, particularly for interpretative purposes,[72] the intentions of those who created these federal constitutional rights has been an ongoing and, more than occasionally, acrimonious debate.[73]

1791-1861

Insignificance of written constitutional rights is the message conveyed by Wilcox's rendition of the 1791-1861 period.[74] Three factors, Wilcox suggests, are responsible for that conclusion. First, the Bill of Rights applied only to Congress and other branches of the federal government, not to the States.[75] Second, the US Supreme Court invalidated only two pieces of congressional legislation.[76] Finally, '[t]he 1776-1791 obsession with constitutional rights' was replaced with 'apathy'.[77] Another, somewhat antithetical, account might, however, be advanced. First, rights in the 1787 Constitution applied to States.[78] Second, States, not Congress or the federal executive, were the dominant sphere of governmental authority. Political battles between Federalists and Jeffersonians indicated the emerging, but still subordinate, possibilities of expanding federal influence, power and activity.[79] Paucity of federal action, including congressional legislation,[80] therefore, might account for the absence of US Supreme Court decisions invalidating, for Bill of Rights contraventions, exercises of federal power. Another, perhaps more powerful reason was that these battles were not only fought in judicial arenas. Debate on the constitutionality of the Alien and Sedition

[72] See above n 46 (Framers' intentions).

[73] See, eg, above n 28 (Reconstruction Amendments, especially the 14th Amendment).

[74] Wilcox, above n 4, 6-8.

[75] Ibid 6. Details are in above n 37.

[76] Wilcox, above n 4, 7-8 (referring to *Marbury v Madison* 5 US (1 Cranch) 137 (1803) and *Dred Scott v Sanford* 60 US (19 How) 393 (1857) (*Dred Scott*). Legal and historical analyses include: Robert Clinton, *Marbury v Madison and Judicial Review* (1989); Akhil Amar, '*Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court' (1989) 56 *University of Chicago Law Review* 443; James O'Fallon, 'Marbury' (1992) 44 *Stanford Law Review* 219 (rejecting traditional statesmanship view of Marbury); Don Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978). Possible examples of pre-1803 Supreme Court review of congressional legislation are in Engdahl, above n 24, 287-89.

[77] Wilcox, above n 4, 6.

[78] US Constitution, Art 1, s 10, cl 1 (Bill of Attainder, Ex post facto laws, impairment of contracts) and Art IV s 2 (Privileges and Immunities). Discussed in Tribe, above n 27, 528-45, 613-63; Samuel Olken, 'Charles Evans Hughes and the *Blaisdell* Decision: A Historical Study of Contract Clause Jurisprudence' (1993) 72 *Oregon Law Review* 513.

[79] General analyses include: Dumas Malone, *Jefferson and His Time* (1962) vol 3, (1970) vol 4; Leonard White, *The Federalists: A Study in Administrative History 1789-1801* (1948); Leonard White, *The Jeffersonians: A Study in Administrative History 1801-1829* (1951); Merrill Peterson, *The Great Triumvirate: Webster, Clay, and Calhoun* (1987); Stanley Elkins and Eric Mckitrick, *The Age of Federalism: The Early American Republic, 1788-1800* (1993).

[80] However, some major federal legislation, such as the Judiciary Act 1789, was enacted: Charlene Bickford and Helen Veit (eds), *Documentary History of the First Federal Congress of the United States of America* (1986) vols 4-6 (all Congressional Bills and Resolutions). Discussions include: Maeva Marcus (ed), *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789* (1992); Wilfred Ritz, *Rewriting the History of the Judiciary Act of 1789* (1990); Wythe Holt, 'Judiciary Act of 1789' in Hall, above n 55, 472-4.

Acts[81] *vis à vis* the 1st Amendment is the seminal example.[82] Their judicial interment in *New York Times* v *Sullivan*[83] only confirmed what Jefferson's presidential pardons had previously recognised and achieved.[84] Finally, even if 'apathy' prevailed in the federal sphere, did States' Bills of Rights have a significant influence? Did State Courts actively enforce those rights?[85] Especially if States were the predominant utilisers of governmental power, isn't that important?

1861-1937

More and greater controversies swirl around the 1861-1937 epoch. Frenetic debate and multifarious conclusions are engendered, for example, over what occurred in and what was intended by the Civil War (1861-1865) and the Reconstruction (13th, 14th and 15th) Amendments.[86] Two outstanding examples exist. First, were the Bill of Rights provisions intended to be incorporated into the Fourteenth Amendment so that States, like federal institutions, were subject to those provisions? Whatever the correct historical answer might be,[87] judicial exegesis has not 'effect[ed] a global application of the 1791 amendments to the States'.[88] Rather, by an incremental process starting in 1897 and only gaining real momentum in the 1960s, the US Supreme Court has, via the 14th Amendment, applied 'almost all' Bill of Rights provisions to the States.[89] Second, was the 14th Amendment's equal protection clause intended to render State[90] racial segregation unconstitutional? Again, historiography, with divergent methodol-

[81] Federalists' enactment of this congressional legislation, Jeffersonian responses and scholarly debate are in Walter Berns, 'Freedom of the Press and the Alien and Sedition Laws: A Reappraisal' [1970] *Supreme Court Review* 109; David Yassky, 'Eras of the First Amendment' (1991) 91 *Columbia Law Review* 1699, 1710-3; Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991) 56-66, 144-6; Powe, above n 55, 54-66.

[82] Debates on constitutionality of other congressional legislation also occurred, for example, Federalists' attack on 1802 repeal of 1801 Judiciary Act. O'Fallon, above n 7, 221-41; Kathryn Preyer, 'Judiciary Acts of 1801 and 1802' in Hall, above n 55, 474-5.

[83] 376 US 254 (1963). The 1798 Sedition Act's constitutionality was never decided by the Supreme Court. However, 'the [Jeffersonians'] attack upon its validity has carried the day in the court of history.': 376 US 254 (1963), 276. Elaboration is in Lewis, above n 81, 144-6.

[84] Acting under s 2 of Art II of the US Constitution immediately on becoming President, Jefferson pardoned those convicted under the Sedition Act. Details, including Jefferson's view of that Act's invalidity, are in Lewis, above n 81, 65; Malone, above n 79, 153-6 (vol 4).

[85] Preliminary assessments are in above n 30.

[86] See above nn 28, 37.

[87] Varying historical answers and theories are in above n 37.

[88] Wilcox, above n 4, 10. However, one Justice advocated a global application — via the 14th Amendment — of the Bill of Rights to the States. *Adamson v California* 332 US 46 (1947), 68-123 (Black J dissenting). Evolution of this position is in Gerald Dunne, *Hugo Black and the Judicial Revolution* (1977) 256-64.

[89] Wilcox, above n 4, 10-1 (citing Tribe, above n 27, 772-3 listing Supreme Court decisions incorporating specific Bill of Rights' provisions into the 14th Amendment). A general account is Richard Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties* (1981).

[90] 14th Amendment's provisions — '[n]o State shall' and 'nor shall any State' — mandate only state, not private, actions can contravene the 14th Amendment. However, does a public/private distinction factually exist? If so, how and where is the distinction to be constitutionally drawn? Discussions, including the possibility of a very nebulous and flexible state action doctrine, are above n 56.

ogy, evidence, premises and conclusions on this issue,[91] has not determined judicial decisions, as *Brown* v *Board of Education*[92] illustrates.

From those beginnings at least three strands emerge. First, despite some exceptions,[93] the US Supreme Court's failure,[94] most notably exemplified by *Plessy* v *Ferguson*,[95] to invalidate, as contravening 14th Amendment requirements, State racial discrimination legislation. In stark contrast, an initial judicial reaction characterised the Reconstruction Amendments' 'pervading purpose' as 'the freedom of the slave race, and the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him'.[96] Subsequent judicial retreats obviously raise serious questions about what, if any, reliance can be placed on judges to enforce a Bill of Rights. A second strand is the US Supreme Court's use of the 14th Amendment's direction not to 'deprive any persons of ... property, without due process of law' to declare State legislation unconstitutional. Wilcox enunciates the traditional orthodox view of the resulting judicial substantive due process doctrine. Only when non-economic personal rights,[97] such as individual 'autonomy',[98] are protected against State

[91] Discussions include: above n 28; Berger, *Government by Judiciary* above n 45; James Thomson, 'Playing With a Mirage: Oliver Wendell Holmes, Jr. and American Law' (1990) 22 *Rutgers Law Journal* 123, 133 n 49 (dispute as to whether Abolitionists' cause encompassed not only abolition of slavery, but also equality of legal rights regardless of race).

[92] See above n 41.

[93] Wilcox, above n 4, 11 n 44 giving three examples of judicial invalidation of State discrimination: *Strauder v West Virginia* 100 US 303 (1880); *Ex parte Virginia* 100 US 339 (1879); *Yick Wo v Hopkins* 118 US 356 (1886). Historical and legal analyses include: Benno Schmidt, 'Juries, Jurisdiction, and Race Discrimination: The Lost Promise of *Strauder v West Virginia*' (1983) 61 *Texas Law Review* 1401; Charles Fairman, *Reconstruction and Reunion 1864-88* (1987) Pt 2, 438-9, 445-51, 704-5; David Bernstein, 'The Supreme Court and "Civil Rights," 1886-1908' (1990) 100 *Yale Law Journal* 725, 726-7, 734; Maltz, above n 28, 246-9. *Yick Wo v Hopkins* in Australia is discussed in Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 20-1.

[94] Debate on whether, following *Dred Scott* (above n 76) and the Civil War, the US Supreme Court was an irrelevant failure or a pivotal institution is in James Thomson, 'Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective' (1983) 62 *Texas Law Review* 559, 562 n 12.

[95] 163 US 537 (1896) (state law requiring racially segregated railway carriages not contravene 14th Amendment's equal protection clause). Discussions include: Owen Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (1993) 352-85; Charles Lofgen, *The Plessy Case: A Legal Historical Interpretation* (1987); T Alexander Aleinikoff, 'Re-Reading Justice Harlan's Dissent in *Plessy v Ferguson*: Freedom, Antiracism, and Citizenship' [1992] *University of Illinois Law Review* 961; Sunstein, *The Partial Constitution* above n 20, 42-5.

[96] *Slaughter-House Cases* 83 US (16 Wal) 36 (1873), 71 (state law establishing a slaughterhouse monopoly for one corporation did not contravene 14th Amendment). Historical and legal analysis is in Charles Fairman, *Reconstruction and Reunion 1864-88* (1971) Pt I, 1320-74; Herbert Hovenkamp, *Enterprise and American Law: 1836-1937* (1991) 116-24 (challenging traditional view that government monopolies resulted from corrupt and venal special interest politics by suggesting this monopoly was an innovative statutory response to excessive pollution).

[97] Can economic or property rights be separated or distinguished from other rights? That a continuous spectrum, not a dichotomy, exists is suggested in Thomson, 'Making Choices: Tribe's Constitutional Law', above n 24, 237-8 n 32; Philippa Strum, *Brandeis: Beyond Progressivism* (1993) 116-49; Herman Belz, 'Property and Liberty Reconsidered' (1992) 45 *Vanderbilt Law Review* 1015 (reviewing Ely, above n 27) ('economic liberty as an attribute of individual rights that is essential to personal and political liberty'); Leonard Levy, 'Property as a Human Right' (1988) 5 *Constitutional Commentary* 169; James Kainen, 'The Historical Framework for Reviv-

laws is the Supreme Court to be applauded.[99] Otherwise, judges, under a due process camouflage, surreptitiously engaged in the conservative enterprise of constitutional protection of property rights, laissez-faire capitalism and other economic interests.[100] Undesirable consequences — hindering regulatory reforms, harming employees and workers, favouring the wealthy to the detriment of the disadvantaged — ensued from adherence to such obsolete ideologies.[101] How was this accomplished? Judges' personal predilections and preferences, in this instance social and economic Darwinism,[102] were simply being converted into federal constitutional law.[103] Vastly different and more congenial views of substantive due process and these Supreme Court decisions, including the notorious *Lochner* v *New York*,[104] are, however, available.

ing Constitutional Protection for Property and Contract Rights' (1993) 79 *Cornell Law Review* 87, 95-6.

> [D]iscontent with the distinction between property and personal rights, which is the heritage of New Deal constitutionalism, spans the political spectrum. Criticisms from the left and the right deny the separation between economic rights and personal liberty. Even the [US] Supreme Court has directly attacked the distinction between property and personal rights.

Kainen, above n 97, 95 (footnotes omitted).

98 Wilcox, above n 4, 18. Culmination of this is indicated in the text accompanying below nn 137-9.

99 Wilcox, above n 4, 17-8, referring to *Meyer v Nebraska* 262 US 390 (1923) (state law forbidding primary schools to teach a foreign language unconstitutional as violating 14th Amendment substantive due process) and *Pierce v Society of Sisters* 268 US 510 (1925) (state law banning private schools similarly unconstitutional). However, there is revisionist perspective which aligns *Meyer* and *Pierce* with the traditional view of *Lochner* (below nn 100-3) but opposes revisionist *Lochner* scholarship (below nn 102, 105-6): Barbara Woodhouse, '"Who Owns the Child?": *Meyer* and *Pierce* and the Child as Property' (1992) 33 *William and Mary Law Review* 995 (suggesting *Pierce* and *Meyer* liberties were to control children and confer freedom from government power over social and economic policy, rather than enhancing intellectual and religious liberty). See generally William Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (1994) 204, 246-9, 286-7; Gerald Gunther, *Learned Hand: The Man and the Judge* (1994) 376-80, 383. Substantive due process doctrine interprets 5th and 14th Amendments due process clauses 'as incorporating a general mandate to review the substantive merits of legislative and other governmental action' and classic examples are *Lochner* (below n 104) and *Roe v Wade* (above n 42): Ely, above n 44, 13. Elaboration is in Herbert Hovenkamp, 'The Political Economy of Substantive Due Process' (1988) 40 *Stanford Law Review* 379, 379-80; Peter Hoffer, 'Due Process, Substantive' in Hall, above n 55, 237-9.

100 Literature espousing this traditional view is in David Bernstein, 'Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation' (1993) 43 *American University Law Review* 85, 89 nn 12-4; Fiss, above n 95, 12-9 (including opposing views).

101 Arguments, details and conclusions are in Bernstein, above n 100.

102 It has been suggested that '[u]ntil recently, most legal scholars and historians incorrectly attributed the origins of laissez-faire jurisprudence to the influence of 'social Darwinism': ibid 88 n 11 (citing references). However, 'Social Darwinism actually had minimal influence on American laissez-faire liberal thought, inside or outside legal circles': ibid. Rather, '*Lochner* era [judicial] antipathy to labor legislation ... benefit[ing] labor unions [has roots in] abolitionist "free labor' ideology [and] the Jackson antimonopoly tradition': ibid 87-8 (footnotes citing references omitted).

103 This illustrates a perennial constitutional law conundrum: how to control and tether judicial discretion and freedom of choice. Solutions are suggested above n 46.

104 198 US 45 (1905) (*Lochner*) (state law prohibiting employees from working more than 60 hours per week unconstitutional 14th Amendment deprivation of 'liberty ... without due process of law'). Historical and legal analyses include: Paul Kens, *Judicial Power and Reform Politics: The Anatomy of Lochner v New York* (1990); Fiss, above n 95, 4, 6-21, 43-8, 155-84 (not traditional 14th Amendment liberty of contract interpretation of *Lochner* but preservation, via contractarian theory, of individual liberty by enforcing constitutional limits on the States' residual police power by requiring a strict means-end connection between that power and the State leg-

One revisionist response is to characterise unconstitutional State laws as 'monopolistic' legislation protecting and benefiting 'politically powerful discriminatory labor unions' with intended and predictable detrimental consequences for the most vulnerable — black, women and immigrant — workers. From this perspective, substantive due process decisions 'often served to protect the most disadvantaged, disenfranchised workers', for example, by opening for them labour markets and reducing discriminatory employment practices. Therefore, '[t]he demise of laissez-faire jurisprudence' is to be regretted, not celebrated.[105] Another revisionist response characterises these State legislative interventions in economic affairs not as progressive or welfare reforms. Rather, they illustrated conservative big business' political power to obtain regulatory measures which trimmed or disciplined, without controlling, the market to prevent adverse and stimulate favourable profit-making conditions.[106] Consequently, substantive due process abrogated unconstitutional advantages commandeered through undue corporate influence in the legislative process. Furthest from Wilcox's regurgitation of orthodoxy is revisionist scholarship extolling laissez-faire constitutionalism. Rehabilitating this doctrine and *Lochner* relies on arguments that the Framers of the Constitution and 14th Amendment intended to erect constitutional protections for economic liberty; that substantive due process has a textual warrant, for example, via the word 'property' in the 14th Amendment; that the Constitution can and should be characterised as an economic document;[107] and that no dichotomy separates economic and personal rights.[108] En-

islation). Other discussions of *Lochner* are in Thomson, above n 91, 159 n 195, 162 n 211; Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993); Liva Baker, *The Justice From Beacon Hill: The Life and Times of Oliver Wendell Holmes* (1991) 415-20 and below nn 105, 109, 110. 'The *Lochner* era .... lasted from approximately 1897 to 1937 [and] collapsed in the 1930s.' Bernstein, above n 100, 86 n 3, 87 n 5 (citing relevant US Supreme Court cases). See also text accompanying n 136.

105 Bernstein, above n 100, 86, 91. 'The benign intentions of *Lochner* era judges are widely recognised [in 1993]' despite continuation of the traditional critical view: Bernstein, above n 100, 88-9. This:

> revisionist scholarship ... attribute[s] to laissez-faire judges and legal commentators a genuine concern for democratic principle in opposing the demands for class legislation that emanated ... from political reformers and business lobbyists. [T]he basic policy objective of laissez-faire constitutionalism — ... to facilitate the formation of investment capital necessary for economic growth — was sound. [D]evelopment of new legal concepts for the protection of property, [for example substantive due process] determination of the reasonableness of state police power regulations [was reasonable].

Belz, above n 97, 1018. An example is Bernstein, above n 93. Other 'substantial and successful' revisionist scholarship is in Barry Cushman, 'Rethinking the New Deal Court' (1994) 80 *Virginia Law Review* 201, 203 n 2. See also Michael Brodhead, *David J Brewer: The Life of a Supreme Court Justice, 1837-1910* (1994) 151-5 ('the Court's usually favorable response to labor legislation in this [1901-1910] period').

106 Details of such '[r]evisionist accounts of [American] politics of the 1890s and 1900s' are in Fiss, above n 95, 13-5. One detailed account is Keith Poole and Howard Rosenthal, 'The Enduring Nineteenth Century Battle for Economic Regulation: The Interstate Commerce Act Revisited' (1993) 36 *Journal of Law and Economics* 837.

107 Thomson, above n 24, 1071 n 52 (references); Ulen, above n 27, 190 n 3 (references); Donald Boudreaux and A Pritchard, 'Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process' (1993) 62 *Fordham Law Review* 111. Other paradigmatic visions — republican; religious; rights-remedies; structures, institutions and powers; and slavery — of the Constitution are in Thomson, above n 28, 182-8.

108 See above n 97.

trepreneurial liberty is, therefore, constitutionally mandated and courts are required to facilitate and maintain conditions necessary for economic growth. Unrestricted markets are desirable not only as an attribute of personal liberty but also because implementation of free market ideology promotes the community's and individuals' economic welfare.[109] If successful, such revisionism will repudiate the revulsion which has characterised these instances of judicial review.[110]

[109] Framers' intentions regarding constitutional protection of property rights are discussed in Ely, above n 27, 26-58; Belz, above n 97, 1016-7; Michael McConnell, 'Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure' (1988) 76 *California Law Review* 267; David Schultz, 'Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding' (1993) 37 *American Journal of Legal History* 464; Joerg Knipprath, 'Bernard Siegan's *The Supreme Court's Constitution:* An Intentionalist's Indictment of the Judiciary's Role in American Constitutional Evolution' (1989) 18 *Southwestern Law Review* 213, 218-32 (questioning attribution to 14th Amendment's Framers an intention to constitutionalise substantive due process). Literature on this economic analysis strand of the *Lochner* revival is in Kainen, above n 97, 87-102; Thomson, 'Mirages of Certitude', above n 17, 81 n 86; Michael Phillips, 'Another Look at Economic Substantive Due Process' [1987] *Wisconsin Law Review* 265; Thomson, 'Making Choices: Tribe's Constitutional Law', above n 24, 236-7; Hovenkamp, above n 99; Hovenkamp, above n 96. Hovenkamp corrects:

> popular misconceptions about the allegedly nefarious effects of the large business corporation's [late nineteenth century] ascendance ... and of [*Lochner's*] free market ideology [which] [f]or a short time, ... limited the ability of special interests to hamper the beneficial development of the large corporation.

Geoffrey Miller, 'The Rise and Fall of the Classical Corporation' (1992) 59 *University of Chicago Law Review* 1677, 1677-8 (reviewing Hovenkamp, above n 96). Revisionist attempts:

> to rehabilitate *Lochner* and the underlying doctrine of laissez-faire constitutionalism [include arguments] that the [Constitution's] framers ... expected federal courts to safeguard economic liberty [and defences of *Lochner*] on ... ground[s] that ... imposition of maximum-working hours laws on bakeries would drive small immigrant entrepreneurs out of business and diminish competition [and that this] 'legislation was vintage special-interest legislation.'

James Ely, 'Economic Due Process Revisited' (1991) 44 *Vanderbilt Law Review* 213, 214-5 (footnotes omitted). Post 1937 judicial 'resurrection of economic substantive due process' and its possible limits are in Wayne McCormack, 'Economic Substantive Due Process and the Right of Livelihood' (1993-94) 82 *Kentucky Law Journal* 397. State analyses include: Susan Fino, 'Remnants of the Past: Economic Due Process in the States' in Friedelbaum, above n 30, 144-62; Carol Chomsky, 'Progressive Judges in a Progressive Age: Regulatory Legislation in the Minnesota Supreme Court, 1880-1925' (1993) 11 *Law and History Review* 383; Daniel Gordon, 'Economic Liberty as the Basis of Social Liberty: *Bowers* Revised in the Context of State Constitutions' (1992) 19 *Hastings Constitutional Law Quarterly* 1009. Comparative analyses are in Craig, above n 17 (USA-UK); Currie, above n 17 (USA-Germany); Cass Sunstein, 'On Property and Constitutionalism' (1993) 14 *Cardozo Law Review* 907. That '*Lochner* can serve more than one constitutional theory' illustrates the scope and potential for judicial choice and, therefore, poses a fundamental question: 'What is the appropriate role of federal judicial review in American [and Australian] life?': Ely, above n 109, 215. A related fundamental question is in the text accompanying below nn 116-20. Judicial review theories responding to these dilemmas are analysed in James Fleming, 'Constructing the Substantive Constitution' (1993) 72 *Texas Law Review* 211.

[110] Numerical tabulations may be misleading. Cf Wilcox, above n 4, 15 (invalidation 'in an estimated 197 cases' and '228 State statutes held invalid between 1890 and 1937') with Fiss, above n 95, 15 (this traditional view 'is also at odds with a more complete account of the Court's behaviour' including the dissents) and Kainen, above n 97, 99-100 (more cases upholding, against substantive due process challenges, constitutionality of governmental regulation). An overview is provided by Ellen Paul and Howard Dickman (eds), *Liberty, Property and the Foundations of the American Constitution* (1989); Ellen Paul and Howard Dickman (eds), *Liberty, Property and Government: Constitutional Interpretation Before the New Deal* (1989); Paul and Dickman (eds), above n 20.

Freedom of speech[111] constitutes a third strand of the 1861-1937 epoch. Recitation of important US Supreme Court cases[112] persuades Wilcox to conclude that 'the court appeared to deny First Amendment rights, or at least to give them little weight.'[113] Therefore, the lesson concerning 'the ability of courts to protect individual rights'[114] is obvious. But, are those propositions correct? Immediately, a paradox emerges. In substantive due process cases, Wilcox maligns courts for enforcing constitutional rights.[115] With free speech cases, the same castigation is delivered against judicial refusal to enforce constitutional rights. That, of course, exposes a central dilemma[116] of modern American constitutional law: how to reconcile praise for *Brown*[117] with condemnation of *Lochner*.[118] Is it possible to formulate a principled basis from which to advocate judicial abstention regarding economic or property rights and vigilant judicial maintenance of other, for example, free speech and equality, rights?[119] *An Australian Charter of Rights?* does not do so.[120]

A second response is that this third strand is much more ambiguous than the traditional posture, which Wilcox's narrative adopts, concedes. From that perspective, free speech law only developed in the twentieth century's first decade. With few exceptions,[121] the US Supreme Court during the second and third decades affirmed and strengthened a restrictive non-libertarian approach to free

111 'Congress shall make no law ... abridging the freedom of speech, or of the press ...' US Constitution, 1st Amend. One connection between *Lochner* and 1st Amendment free speech is an argument that the latter 'has replaced the due process clause as the primary guarantor of the privileged. Indeed, [the free speech clause] protects the privileged more perniciously than the due process clause ever did': Mark Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363, 1387.

112 Wilcox, above n 4, 18-20. General surveys include: Harry Kalven, *A Worthy Tradition: Freedom of Speech in America* (1988); Tribe, above n 27, 785-1061. Other examples above n 53.

113 Wilcox, above n 4, 18.

114 Ibid.

115 Ibid 12-6.

116 Another dilemma is the allegedly counter-majoritarian nature of judicial review. Varying analyses are in Thomson, above n 28, 187 n 45 (USA); Philip Zylberberg, 'The Problem of Majoritarianism in Constitutional Law: A Symbolic Perspective' (1992) 37 *McGill Law Journal* 27 (Canada).

117 See above n 41.

118 See above n 104.

119 Can economic substantive due process be reconciled with substantive due process vindicating other personal rights and liberties? If so, how? Attempts to expose and address this dilemma include: Fiss, above n 95, 9-12, 19-21; Robert Schopp, 'Education and Contraception Make Strange Bedfellows: *Brown, Griswold, Lochner*, and the Putative Dilemma of Liberalism' (1990) 32 *Arizona Law Review* 335. Conservatives, unlike liberals, may not confront this dilemma because they advocate stringent judicial review under *Lochner* and free speech (below n 128). However, conservatives have opposed *Brown* (above n 41) and *Roe* (above n 42). See also below n 133 (tension between *Lochner* and *Abrams*) and n 135.

120 Attempts to do so are above nn 97, 119.

121 For example, the Holmes-Brandeis libertarian position (adumbrated in Wilcox, above n 4, 19-20 and below nn 132, 133) and some 1930s cases (Daniel Hilderbrand, 'Free Speech and Constitutional Transformation' (1993) 10 *Constitutional Commentary* 133; Geoffrey Berman, 'A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s' (1994) 80 *Virginia Law Review* 291). A notable press freedom vindication is *Near v Minnesota* 283 US 697 (1931) (state prior restraint law unconstitutional); Fred Friendly, *Minnesota Rag* (1981).

speech issues.[122] Change occurred slowly. Only by the 1960s was there an antithetical Bill of Rights jurisprudence — a Supreme Court imposed civil rights revolution[123] — where, for example, First Amendment free speech provisions invalidated federal and State legislation.[124] Others advance an alternative historical exegesis. A robust-free speech tradition developed at least as early[125] as the 1798 *Sedition Act*,[126] the pre-Civil War mailing of antislavery literature, the evolution of academic freedom, early twentieth century labour agitation and the Free Speech League.[127] At least three free speech traditions — conservative libertarian,[128] radical libertarian[129] and civil libertarian[130] — illustrate the vibrancy of this alternative perspective. Added to this intellectual and social milieu -

122 Wilcox, above n 4, 18-20; Tribe, above n 27, 785-9; Fiss, above n 95, 323-51; David Rabban, 'The First Amendment in its Forgotten Years' (1981) 90 *Yale Law Journal* 514; David Rabban, 'The Emergence of Modern First Amendment Doctrine' (1983) 50 *University of Chicago Law Review* 1205; Robert Cover, 'The Left, the Right and the First Amendment: 1918-1928' (1981) 40 *Maryland Law Review* 349; John Braeman, *Before The Civil Rights Revolution: The Old Court and Individual Rights* (1988) 27-38. A fundamental question is raised by this Supreme Court posture: Is judicial review beneficial, disadvantageous or irrelevant to free speech? Debate and various answers are in Howard Hunter, 'Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930' (1986) 35 *Emory Law Journal* 59, 89-90, 135-7; Norman Rosenberg, 'Another History of Free Speech: The 1920s and the 1940s' (1989) 7 *Law and Inequality* 333; Ronald Collins and David Skover, 'Pissing in the Snow: A Cultural Approach to the First Amendment' (1993) 45 *Stanford Law Review* 783; Berman, above n 121, 292-315 (dramatic 1930s change in US society's free speech ideas); Margaret Blanchard, *Revolutionary Sparks: Freedom of Expression in Modern America* (1992). See also nn 125-30; Lili Levi, 'Challenging the Autonomous Press' (1993) 78 *Cornell Law Review* 665.

123 Cortner, above n 37; Archibald Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* (1968). Opposing assessments are in Thomson, above n 46, 236 n 22; Thomson, 'Mirages of Certitude: Justices Black and Douglas and Constitutional Law', above n 17, 81 n 90, 91.

124 Tribe, above n 27, 785-1061; Lewis, above n 81.

125 Pre 1798 free speech disputes, theories and debate over Framers' intentions are in Mayton, above n 26; David Rabban, 'The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History' (1985) 37 *Stanford Law Review* 795 (while retaining seditious libel, Framers expanded free speech protections beyond the narrow view that they merely constitutionalised English common law); Yassky, above n 81, 1703-10; Powe, above n 55, 19-20, 22-50; Larry Eldridge, *A Distant Heritage: The Growth of Free Speech in Early America* (1994).

126 See above nn 81, 83, 84.

127 Elaboration is in Rabban, 'The First Amendment in its Forgotten Years', above n 122, 518 (references); David Rabban, 'The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History' (1992) 45 *Stanford Law Review* 47; Michael Curtis, 'The 1859 Crisis over Hinton Helper's Book, *The Impending Crisis*: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment' (1993) 68 *Chicago-Kent Law Review* 1113.

128 From 1861 to 1917 'conservative libertarians treated freedom of expression and private property as interconnected aspects of personal liberty.': Rabban, above n 127, 52 (referring to Mark Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (1991)). They vigorously advocated free speech and laissez-faire property rights: Gregory Magarian, 'Book Review' (1992) 90 *Michigan Law Review* 1425.

129 Libertarian radicals 'rejected ... competitive individualism of laissez-faire capitalism and ... social harmony in progressive thought [were committed] to individualist anarchism, free-thought, and free love ... and interposed personal sovereignty and rationality ... against the power of church and state.': Rabban, above n 127, 53. Analysis is in Rabban, above n 127.

130 From 1919 to 1990s 'civil libertarians severed the [speech-property] link ... [considering speech, not an individual right, but] a social interest to promote civic debate in the search for truth about issues of public concern': ibid 52 (footnote omitted) (referring to Graber, above n 128).

> [t]he judicial landscape ... was not unrelievedly bleak. A few Supreme Court decisions contained some fragments of theory and hints of a more tolerant attitude toward freedom of expression. In addition, a minority of State and lower federal courts provided substantial protection for free speech, and several evaluated the meaning of the First Amendment with extraordinary care and sophistication ....
>
> [Also] some State Supreme Courts protected political expression, often under the free speech provisions of their State constitutions.[131]

Even more obvious is the fact that the Holmes-Brandeis opinions provided, at least from 1919,[132] foundations for a libertarian free speech jurisprudence.[133]

1937-1994

Of course, Wilcox refers to President Franklin Roosevelt's 1937 'court-packing plan' and to the 'switch in time that saved nine.'[134] Whatever motiva-

131 Rabban, 'The First Amendment in its Forgotten Years', above n 122, 524, 551. State court decisions are in Raban, above n 122, 543-57; Blanchard, above n 30. Federal Court cases are in Note, 'Fighting Words: Finding the First Amendment in Lower Federal Court Records' (1991) 78 *Journal of American History* 240; Rabban, 'The First Amendment in its Forgotten Years', above n 122, 1235-44; Cox, above n 59, 218 (Judge Learned Hand in *Masses Publishing Co v Patten* 244 Fed 535 (1917) (SDNY) rev'd 246 Fed 24 (2d Cir) 'the most liberal judicial opinion of World War I'); Vincent Blasi, 'Learned Hand and the Self-Government Theory of the First Amendment: *Masses Publishing Co. v. Patten*' (1990) 61 *University of Colorado Law Review* 1; Gunther, above n 99, 151-70.

132 *Abrams v United States* 250 US 616 (1919) (convictions, under 1918 congressional espionage legislation, for conspiring and attempting to harm war efforts by publishing and distributing leaflets not breach 1st Amendment) (Holmes and Brandeis JJ dissenting). Discussed in Polenberg, above n 27; Rabban, 'The First Amendment in its Forgotten Years', above n 122, 1304-17; Frederick Lawrence, 'The Coastwise Voyager and the First Amendment: The Fighting Faiths of the *Abrams Five*' (1989) 69 *Boston University Law Review* 897. A major First Amendment question is: Did Holmes J change from a restrictive to libertarian position between March and November 1919? Wilcox, above n 4, 15 unhesitatingly concludes Holmes changed to 'a more liberal position'. Opposing views include: Rabban, 'The First Amendment in its Forgotten Years', above n 122, 1209-13, 1311-7; Rabban, above n 127, 49-50 (despite earlier contrary analysis, Holmes' views changed); Fiss, above n 95, 328-30 (fundamental change); John Wirenius, 'The Road to *Brandenburg*: A Look at the Evolving Understanding of the First Amendment' (1994) 43 *Drake Law Review* 1 (evolutionary progression); Sheldon Novick,' The Unrevised Holmes and Freedom of Expression' [1991] *Supreme Court Review* 303 (no change); Sheldon Novick, 'Holmes and the Art of Biography' (1992) 39 *William and Mary Law Review* 1219, 1228-31 (no change). In 1907, Harlan J may (compared to Holmes, below n 133) have taken a more libertarian position: Hunter, above n 122, 90-2; Rabban, 'The First Amendment in its Forgotten Years', above n 122, 540-1; Fiss, above n 95, 325-6; Thomson, above n 91, 165-6 nn 236-7.

133 Wilcox, above n 4, 15-6, especially 16 n 96. Greater recognition of and elaboration on this development is in Thomson, above n 91, 161 n 206 (references); Rabban, 'The First Amendment in its Forgotten Years', above n 122, 584-6, 591-4; Rabban, 'The Emergence of Modern First Amendment Doctrine', above n 122, 1303-46; G Edward White, *Justice Oliver Wendell Holmes: Law and The Inner Self* (1993) 412-44, 607-8; Helen Garfield, 'Twentieth Century Jeffersonian: Brandeis, Freedom of Speech, and the Republican Revival' (1990) 69 *Oregon Law Review* 527; Strum, above n 97, 116-35. Discussion of and attempt to resolve tensions between Holmes' dissents in *Lochner* (above n 104) (liberty to contract not in 14th Amendment) and *Abrams* (above n 132) (liberty to speak is in 1st Amendment) are in Fiss, above n 95, 326-30.

134 Wilcox, above n 4, 16-7. Different versions and authors of this quip (about Roberts J's change from holding virtually identical legislation invalid in 1936 to valid in 1937) are in Michael Ariens, 'A Thrice-Told Tale, or Felix the Cat' (1994) 107 *Harvard Law Review* 620, 623 n 11. Earlier 'court-packing' is in Sidney Ratner, 'Was the Supreme Court Packed by President Grant?' (1935) 50 *Political Science Quarterly* 343; Richard Friedman, 'The Transformation in Senate Response to Supreme Court Nominations' (1983) 5 *Cardozo Law Review* 1, 16-7; Fairman, above n 96, 719-38.

tions activated these events,[135] its consequences are clear. *An Australian Charter of Rights?*, however, makes an initial mistake. Wilcox boldly asserts: 'the effect of the switch was that substantive due process was dead.'[136] It is not. As Wilcox recognises, at least from 1923,[137] substantive due process protected 'personal autonomy' rights which evolved into 'a constitutional right of privacy.'[138] Here, something ought to be made explicit: that evolution culminated in *Roe v Wade*.[139] Even when concerned with economic interests, substantive due process survives. Legal scholars articulate reasons why it is and should continue to be a central aspect of modern constitutional law.[140] A modicum of judicial support also exists.[141] A second consequence is related to judicial enforcement of the Bill of Rights. Wilcox's summary indicates that -

> during the 1940s and early 1950s [there was] a more consistent recognition of the nature of [civil liberties] issue[s], but still with considerable legislative deference; and, after the appointment of Chief Justice Warren in 1954, [there emerged] a more full-blooded readiness to apply the Bill of Rights, with the court making its own assessment of the justifiability of the legislation rather than deferring to the opinion of the legislature.
>
> ....
>
> [T]he cut-backs [by the Supreme Court under Chief Justices Burger and Rehnquist of the civil liberties protections upheld by the Supreme Court under Chief Justice Earl Warren] are mostly at the margins. There has been no attempt to revive pre-Warren notions. The United States Supreme Court contin-

135 First, Wilcox appears to suggest 'use of the doctrine of substantive due process ... caused a constitutional crisis' which led to Roosevelt's plan: Wilcox, above n 4, 16. However, the most important invalidations of congressional legislation were separation of powers, federalism and commerce clause issues (Bernstein, above n 100, 86 n 3) and Wilcox, above n 4, 16 n 78 cites those cases. For contrasting evaluations of the so-called 1937 constitutional revolution, see Richard Friedman, 'Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation' (1994) 142 *University of Pennsylvania Law Review* 1891; 'Twentieth Century Constitutional History' (1994) 80 *Virginia Law Review* 201-90. Second, Robert's switch 'was not related to Roosevelt's proposal' is Wilcox's conclusion: Wilcox, above n 4, 17. He also suggests 'political factors' may have caused the switch: Wilcox, above n 4, 17 n 82. More complex scenarios are in Ariens, above n 134. For example, linkage between explanations of Roberts' switch and tensions between *Lochner* and *Brown*. Was Frankfurter J, by endeavouring to change the perceived motivation of Roberts' switch from political to principled, trying to preserve the 1937 Supreme Court from looking like *Lochner* to help the 1954 Supreme Court deal with *Brown*? An affirmative response is in Ariens, above n 144. Other suggestions are in Richard Friedman, 'A Reaffirmation: The Authenticity of the Roberts Memorandum, Or Felix the Non-Forger' (1994) 142 *University of Pennsylvania Law Review* 1985; Friedman, 'Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation', above n 135, 1935-53.

136 Wilcox, above n 4, 17.

137 See above n 99.

138 Wilcox, above n 4, 18.

139 410 US 113 (1973). See above n 42 and below n 243 (linkage). *Roe's* 'invalidation of the antiabortion laws of all fifty states ... relied on [the due process] clause.' Ely, above n 44, 15. '[C]ries of "Lochnering" have been most unrelenting with respect to Roe v Wade': Fleming, above n 109, 212 (footnote omitted). Constitutional theorists' criticisms of *Roe*, judicial review theories formulated to justify results in other substantive due process cases and utilization of 'life', rather than 'liberty', due process 5th and 14th Amendment clauses are in Sheldon Gelman, '"Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights' (1994) 78 *Minnesota Law Review* 585. Compare below n 196.

140 See above n 109.

141 See McCormack, above n 109; Fino, above n 109; Gordon, above n 109.

> ues to affirm the doctrine of incorporation. It has not reduced its area of application. The Bill of Rights continues to be a major bulwark of personal liberty, against all governments.[142]

That clearly illustrates one matter: vigorous judicial enforcement of such civil liberties only occurred between 1954 and 1969. Indeed, contrary to the Wilcox position, many legal scholars now argue that the 'cutbacks' significantly reduce, not just 'at the margins,' the Warren Court's expansive interpretation and protection of Bill of Rights provisions.[143] Pressed further, a larger question emerges: Has the accolade 'a major bulwark' ever been an appropriate or correct response to the Bill of Rights, at least in its judicial manifestation? Again, debate, even on the Warren era, ensues.[144]

Evaluation

Given this cacophony, even suggesting that there exists '[t]he American model'[145] is somewhat ambitious. Even so, other claims also proliferate. For example, given the inherent complexity and contingency associated with word meanings and usage,[146] does the proposition that '[d]rafting precision is essential'[147] render a Bill of Rights unachievable? *An Australian Charter of Rights?* also argues

> that politics is substantially concerned with issues of wealth-distribution [and, therefore], any guarantee which, by plain words or possible interpretation, protects property interests is almost certain to propel the courts into the political arena and confrontation with legislatures.[148]

But, cannot politics also be characterised as 'substantially concerned' with protecting, preserving and maintaining human rights? A proliferation of statutory enactments seems to mandate an affirmative response.[149] If so, would not courts

142 Wilcox, above n 4, 24.

143 Differing assessments as to whether a change occurred and, if so, when and at what rates are in Thomson, 'Mirages of Certitude: Justices Black and Douglas and Constitutional Law', above n 17, 76 n 66; 81 n 95. See also Stanley Friedelbaum, *The Rehnquist Court: In Pursuit of Judicial Conservatism* (1994).

144 Divergent perspectives of the Warren Court era (1953-1969) are below nn 258-62. For contrasting views on the Supreme Court's overall performance, see James Thomson, 'Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes' (1982) 13 *MULR* 597, 612-3; Thomson, above n 60, 757; Thomson, 'State Constitutional Law: Some Comparative Perspectives', above n 24, 1066 n 21; Norman Dorsen, 'The Role and Performance of the United States Supreme Court in Protecting Civil Liberties' (1989) 31 *Arizona Law Review* 1, 9-15. Warren and his judicial tenure are in Thomson, 'Making Choices: Tribe's Constitutional Law', above n 24, 236 n 22.

145 Wilcox, above n 4, 25.

146 See above nn 50-61.

147 Wilcox, above n 4, 25.

148 Ibid.

149 Evidence and supporting arguments are in Thomson, above n 60, 757. Congressional legislation is in Bernard Schwartz (ed), *Statutory History of the United States: Civil Rights* (1970); Reginald Govan, 'Honorable Compromises and the Moral High Ground: The Conflict between the Rhetoric and the Content of the Civil Rights Act of 1991' (1993) 46 *Rutgers Law Review* 1. Cf below nn 215, 238 (Australian legislation).

be entering 'the political arena' and, inevitably, thrust into 'confrontation with legislatures'?[150]

Any claim that 'it can be cogently argued that, between 1890 and 1937, the nett [sic] effect of the Bill of Rights was adverse to the interests of ordinary Americans'[151] should recognise that equally cogent opposing arguments and conclusions also exist.[152] To espouse the former view, however, provides a vivid contrast to and, therefore, surreptitiously strengthens the claim that more recently the Bill of Rights has been a 'success'.[153] Initially, Wilcox's reasons seem obvious and correct:

> [C]onstitutional guarantees will not necessarily ensure the maintenance of civil liberties. That maintenance depends upon the values, integrity and courage of judges. The selection of people with those qualities depends in turn, upon the maintenance of a vigorous, open democracy espousing liberal values. The effectiveness of a Bill of Rights, at different periods of American history, seems to have closely reflected the degree to which the United States achieved that condition.[154]

At least, three rejoinders can be proffered. Firstly, is it empirically obvious that maintenance of civil liberties depends on judges? Absence of constitutionally entrenched rights may render courts impotent against parliaments or legislative sovereignty. Yet, civil liberties may still exist. Australian, Canadian, New Zealand and United Kingdom history may constitute only the obvious examples.[155] Even where such rights exist, do courts only operate at the margins? Do the real safeguards and determinants of civil liberties repose elsewhere? Vigilance of the people, community values and historical traditions may be more important and durable than a multitude of good judges.[156] Second, why does Wilcox choose

[150] Wilcox, above n 4, 25.

[151] Ibid. However, as Wilcox appears to recognise, the commerce clause (US Constitution, Art 1, s 8, cl 3) and substantive due process were also involved: Wilcox, above n 4, 16.

[152] See above nn 100-10.

[153] Wilcox, above n 4, 26.

[154] Ibid.

[155] Comparative and empirical literature (above nn 6, 7, 17) provides perspectives on this possibility. Further assessments include: Christopher McCrudden and Gerald Chambers (eds), *Individual Rights and the Law in Britain* (1994); [Australian] Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Rights of People with Mental Illness* (1993).

[156] There is a fear

> that dependence on [judges] will rob the people of the awareness that they ... must be the ultimate defenders of their ... freedom. Judge Hand ... contends that no court can save a people who have lost the desire to defend their .... liberties and that none is needed to protect the rights of those who feel responsible for their own defense ... Professor Freund has pointed out that this argument is based on a false dichotomy between a people ... lost beyond saving or secure beyond help. There are no such people. The question is not whether ... courts can do everything or nothing. It is whether they can do something.

Martin Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* (1966) 25-6 (footnotes omitted). Elaboration is in Learned Hand, *The Spirit of Liberty* (3rd ed, 1960) 164; Learned Hand, *The Bill of Rights* (1959) 73-4; Gunther, above n 99, 405-6, 664-5; Marvin Schick, *Learned Hand's Court* (1970) 184-6; Paul Freund, *The Supreme Court of the United States* (1961) 87-91; Paul Freund, 'The Supreme Court and Fundamental Freedoms' in Leonard Levy (ed), *Judicial Review and the Supreme Court* (1967) 124, 138-9; David Adamany, 'Book Review' [1977] *Wisconsin Law Review* 271, 282.

and make foundational 'liberal values'? As a desirable attribute of democracy such values are being questioned, denigrated and discarded. Other values, such as republicanism and conservatism, are increasingly perceived as better for people and the community.[157] Finally, a formidable implication is manufactured: an effective Bill of Rights determines whether 'a vigorous, open democracy' exists. Again, that linkage is open to empirical refutation and intellectual debate.[158]

III CANADA

Compared to the USA, Canadian experience with constitutional rights[159] has been considerably shorter and, therefore, less vibrant and without the range of historical vicissitudes. In quantity and quality, depth and breadth, the comparison is stark.[160] *An Australian Charter of Rights?* traverses the three major epochs — 1867 to 1960, 1960 to 1982 and 1982 to 1993 — which constitute the history of human rights in Canada. From Confederation in 1867[161] to 1960, Canada

[157] Debates, especially from a constitutional law perspective, on liberalism, republicanism and communalism, are in Thomson, above n 24, 1071 n 52 (references); Fisher, above n 33, 962-3, 972-4; Mark Tushnet, 'Deviant Science in Constitutional Law' (1981) 59 *Texas Law Review* 815; Robin West, 'Progressive and Conservative Constitutionalism' (1990) 88 *Michigan Law Review* 641; Linda Hirshman, 'The Virtue of Liberality in American Communal Life' (1990) 88 *Michigan Law Review* 983; Cynthia Ward, 'The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix' (1991) 91 *Columbia Law Review* 581; Stephen Feldman, 'Republican Revival/Interpretive Turn' [1992] *Wisconsin Law Review* 679; Steven Grey, 'The Unfortunate Revival of Civic Republicanism' (1993) 141 *University of Pennsylvania Law Review* 801; Peter Berkowitz, 'Liberal Zealotry' (1994) 103 *Yale Law Journal* 1363; G Edward White, 'Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy' (1994) 6 *Yale Journal of Law and Humanities* 1; Cornell, above n 27, 16 (fusing, in 9th Amendment context, liberal natural rights views and republican belief in State legislatures' supremacy); Symposium, 'Conceptions of Democracy' (1989) 41 *Florida Law Review* 409-657; 'Symposium on Classical Philosophy and the American Constitutional Order' (1990) 66 *Chicago-Kent Law Review* 3-242; Symposium, 'Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory' (1989) 84 *Northwestern University Law Review* 1-249; Allan Hutchinson and Leslie Green (eds), *Law and the Community: The End of Individualism?* (1989); Derek Phillips, *Looking Backward: A Critical Appraisal of Communitarian Thought* (1993). A more radical suggestion is in Thomson, above n 28, 211 n 192. Canadian communalism is in Leon Trakman, *Reasoning With the Charter* (1991); Allan Hutchinson, 'Talking the Good Life: From Liberal Chatter to Democratic Conversation' in Hutchinson and Green (eds), above 151-80; P Macklem, 'Of Texts and Narratives' (1991) 41 *Toronto Law Journal* 114; Robert Yalden, 'Liberalism and Canadian Constitutional Law: Tensions in an Evolving Vision of Liberty' (1988) 47 *University of Toronto Faculty of Law Review* 132; Allan Hutchinson and Andrew Petter, 'Private Rights/Public Wrongs: The Liberal Lie of the Charter' (1988) 38 *Toronto Law Journal* 278; Allan Hutchinson, 'Money Talk: Against Constitutionalizing (Commercial) Speech' (1990) 17 *Canadian Business Law Journal* 2; Robert Sharpe, 'A Comment on Allan Hutchinson's "Money Talk: Against Constitutionalizing Commercial Speech"' (1990) 17 *Canadian Business Law Journal* 35.

[158] See above nn 155-7.

[159] Wilcox barely mentions provincial human rights protections: Wilcox, above n 4, 32 n 145. Elaboration is in Hogg, above n 61, 770-2; Thomson, 'State Constitutional Law: Some Comparative Perspectives', above n 24, 1083 n 134 (references). Are there provincial constitutions?: see Thomson, 'State Constitutional Law: Some Comparative Perspectives', above n 24, 1062 n 8 (different answers and references).

[160] See above n 17 (comparative analyses).

[161] British North America Act 1867 (UK). Confederation history is in Thomson, 'State Constitutional Law: Some Comparative Perspectives', above n 24, 1069 nn 34, 35 (references).

survived without a federal Bill of Rights. The Canadian Constitution,[162] as Wilcox suggests, contained 'no [express] guarantee of individual rights'.[163] However, it did include structural protections,[164] 'two group-right provisions'[165] and the potential for an 'implied Bill of Rights' to be judicially developed.[166] The Canadian Parliament was more adventurous. Enacted, by that Parliament, in 1960, the Canadian Bill of Rights[167] continues to operate as federal law. However, despite judicial characterisation as a 'quasi-constitutional instrument', the Canadian Supreme Court[168] has only utilised the Bill of Rights to hold inoperative one federal legislative provision.[169] At least from this perspective, this Bill of Rights adventure might be deemed a failure. Confinement also occurs in two other respects: non-applicability of the Bill of Rights 'to rights and freedoms under provincial control'[170] and the Canadian Parliament's ability — via the notwithstanding clause — to expressly declare that federal legislation was to operate despite abridging Bill of Rights requirements.[171]

Reaching the third epoch required constitutionalising rights. That was done in the Canadian Charter of Rights and Freedoms[172] which, except for section 15,[173] became operative on 17 April 1982.[174] Simultaneously, patriation of the Canadian Constitution occurred.[175] Endeavours to accomplish both events were intertwined. Ascertaining the intentions behind the Canadian Charter of Rights and Freedoms, its words, phrases and structure, therefore, requires resort to over a

[162] In 1982, the 1867 BNA Act was renamed Constitution Act 1867. Texts of Constitution Acts 1867-1982 are in Hogg, above n 61, 1301-68.

[163] Wilcox, above n 4, 28.

[164] Ibid ('presumably ... a combination of parliamentary democracy, an independent judiciary and the common law'). A similar view of Australia's Constitution is in *Australian Capital Television* (1992) 177 CLR 1, 180-8 (Dawson J dissenting). The 1787 US Constitution had stronger structural rights protections: see above n 26.

[165] Wilcox, above n 4, 28 (citing ss 93, 133 without historical or legal analysis). Elaborated in Hogg, above n 61, 1203-15, 1219-21; Gordon Bale, 'Law, Politics and the Manitoba School Question: Supreme Court and Privy Council' (1985) 63 *Canadian Bar Review* 461.

[166] Wilcox, above n 4, 28-9. Elaborated in Hogg, above n 61, 774-7 (including post 1982 revival of implied rights); Zines, '*Constitutional Change in the Commonwealth*', above n 6, 43-5 (including post-Charter revival). See below nn 216, 226-32.

[167] Reproduced in Hogg, above n 61, 1369-71. Discussed in Hogg, above n 61, 779-91.

[168] Ibid 201-25; Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (1992).

[169] Wilcox, above n 4, 31-3 (quoting and referring to *R v Drybones* [1970] SCR 282). Elaborated in Hogg, above n 61, 781-7, 789 n 49 (Supreme Court remedies other than inoperative legislation).

[170] Wilcox, above n 4, 31, 33. Cf above nn 78, 159, 165.

[171] Section 2 of the Bill of Rights: Wilcox, above n 4, 31. Only once — Public Order (Temporary Measures) Act 1970 — has a federal Act been expressly exempted: Hogg, above n 61, 782; Patricia Peppin, 'Emergency Legislation and Rights in Canada: The *War Measures Act* and Civil Liberties' (1993) 18 *Queens Law Journal* 129.

[172] Part I (ss 1-34) of the Constitution Act 1982 (reproduced in Hogg, above n 61, 1335-49). General analyses include: Hogg, above n 61, 793-1226; Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (1993); *Canadian Charter of Rights* (Canada Law Book, Looseleaf service with updated bibliography).

[173] Equal protection provision, operative 17 April 1985 because of s 32(2): Wilcox, above n 4, 39; Hogg, above n 61, 1155.

[174] Wilcox, above n 4, 36; Hogg, above n 61, 53.

[175] Hogg, above n 61, 53-9.

decade of debates, negotiations and drafting.[176] Accompanying that historical excursion are questions concerning the relevance of those intentions, for example, for the meaning of the Charter's words and interpretative principles or methodologies usually, though not exclusively, used by courts when confronting constitutional provisions.[177]

In addition to specific rights,[178] the Charter has several important and fundamental features. They include express subjugation of all Charter rights and freedoms to 'reasonable limits prescribed by law';[179] application of those rights and freedoms to federal and provincial executive and legislative authority but not to judicial power or private actions;[180] and express federal and provincial legislative power to enact legislation to operate 'notwithstanding' resulting abrogation of some constitutional rights and freedoms.[181] That litany is not exhaustive. Qualifications or conditions in specific rights, in addition to the 'reasonable limits' proviso, render those rights a good deal less than absolute.[182] Further contributions to that result are made by the varying interpretative strategies enunciated by courts to deal with the Charter.[183] Several consequences emerge. Legislative and judicial interplay is sanctioned. Dialogue, not dominance or supremacy, appears to be envisioned and encouraged. Balance between constitutional rights and other values is sought. Some aspects of Canadian life are rendered immune from federal constitutional rights. Like the US Bill of Rights, which in varying degrees and ways replicates those consequences, perennial questions emerge: which prevails, express rights, legislation or judicial interpretation; who decides, parliaments, the people or courts; and, ultimately, is a constitutional system more

176 Wilcox, above n 4, 33-6; Hogg, above n 61, 53-4, 63-4, 67-8, 794; Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People*? (2nd ed, 1993); Anne Bayefsky (ed), *Canada's Constitution Act, 1982 and Amendments: A Documentary History* (1989).

177 Suggestions are in David Schneiderman, 'Taking Documents Seriously' (1991) 2 *Supreme Court Law Review* (2nd ed) 555; Hogg, above n 61, 824-5, 1286-91; Wilcox, above n 4, 98. See also above n 45.

178 Discussed by Wilcox, above n 4, 56-176 and above n 172.

179 Section 1 discussed by Wilcox, above n 4, 45-56; Hogg, above n 61, 851-89. It has been conceded that:

> the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test' ... Although the nature of [this test] will vary depending on the circumstances, in each case courts will be required to *balance* the interests of society with those of individuals and groups.

R v Oakes [1986] 1 SCR 103, 139 (Dickson J) (quoted in Wilcox, above n 4, 52). Examples of judges 'balancing competing values' are in Wilcox, above n 4, 65-6. Cf above n 64 (judicial balancing under Australian and US Constitutions).

180 Section 32(1) discussed by Wilcox, above n 4, 37-9, 74 n 281; Hogg, above n 61, 829-50. See above nn 56, 90 (US Constitution public/private dichotomy controversies).

181 Section 33 discussed by Wilcox, above n 4, 39-40, 177-82; Hogg, above n 61, 891-901; Gibson, above n 23, 431-4 (s 33 permits 5 year suspension of all overridable constitutional rights by federal, provincial or territorial legsilatures, even by an omnibus statute overriding all such rights in all existing and future legislation, perhaps subject to s 1 judicial review, as discussed in above n 179). Cf above nn 62, 63 (US congressional power).

182 For example, ss 6(3), 7 ('fundamental justice' principles), 8 ('arbitrarily'), 11(a) ('unreasonable'), 11(b) ('reasonable'), 11(c) ('military law'), 15(2) ('affirmative action'), 24 ('appropriate and just').

183 See, eg, above n 179; Wilcox, above n 4, 40-5; Hogg, above n 61, 809-25.

conducive to the people's welfare and happiness with or without a Bill of Rights?

A vast bulk of *An Australian Charter of Rights?* is devoted to strolling through particular aspects — the minutiae — of the Canadian Charter's fundamental features and specific rights. Long quotations from Canadian Supreme Court opinions enunciate, for example, positions individual judges have formulated or taken on substantive issues of law; distinctions and tests which are evolving; and differences of judicial opinion on results in individual cases.[184] Almost inevitably, therefore, most, if not all, of these specifics will, over time, change. In this respect, *An Australian Charter of Rights?* may quickly become obsolete. Of course, that defect can be obviated by a continuing plethora of published judicial and scholarly commentary on the Canadian Charter. Perhaps, more important, significant and long-term benefits can be derived from Wilcox's Canadian excursion by endeavouring to discern 'the universal in the particular.'[185] One generality can immediately be distilled from the already large and rapidly expanding volume of Charter litigation.[186] Judicial 'gymnastics'[187] abounds. The vast latitude and discretion which the Charter's words and phrases, for example, 'reasonable limits ... as can be demonstratedly justified in a free and democratic society,'[188] seemingly gives judges can and has been utilised to convert personal preferences and values into constitutional law.[189] Here, exercises of power and compromises[190] are reminiscent of accusations hurled at American judges in relation to substantive due process cases, such as *Lochner*,[191] and civil liberties decisions under the equal protection clause, for example, in *Brown*.[192] This raises important questions: Do personal preferences influence judicial decisions? If so, how and to what extent? Do judges become politicians? Is constitutional law, even in the Canadian Supreme Court, politics?[193] Of course, such conundrums raise larger jurisprudential debates: Is this inevitable? Can judges be restrained? If so, how and to what extent?[194]

184 See above n 5.

185 James Thomson, 'Beyond Superficialities: Crown Immunity and Constitutional Law' (1990) 20 *University of Western Australia Law Review* 710 (quoting Holmes' aphorism).

186 Figures and discussion are in Gerry Ferguson, above n 23, 217-9; Morton, above n 23; Gibson, above n 23, 425 (1982-1992 'huge body of Charter law').

187 Wilcox, above n 4, 27.

188 Section 1 (above n 179).

189 Traditional examples above n 100. See also above n 103. Others argue that judges do not constitutionalise personal preferences and such preferences and judicial decisions often diverge. Frankfurter J is the classic example: Thomson, above n 17, 74 n 55 (references).

190 Wilcox recognises this occurs on the Canadian Supreme Court: Wilcox, above n 4, 68 ('In fashioning the necessary compromise').

191 See above n 104.

192 See above n 41.

193 This is reminiscent of Critical Legal Studies destruction of any law/politics divide. Canadian scholarship moving towards, away from and past this position includes: Macklem, above n 157; Allan Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (1988); Michael Mandel, *The Charter of Rights and the Legalisation of Politics* (1986). See also below n 269.

194 Attempts to deal with this issue by creating and destroying Canadian theories of judicial review include: Manfredi, above n 172; Bayefsky, above n 17; Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (1987) 3-138, 245-

Another universal theme inheres in the types of cases involving the Canadian Charter. Their similarity to American, and occasionally Australian, cases is notable. That is, cases involving similar subjects or controversial problems are universally litigated.[195] Prominent examples include abortion;[196] one vote one value electoral systems;[197] pornography;[198] commercial,[199] hate[200] and political[201] speech; religious rest days;[202] and numerous criminal law matters.[203] Given a relevant degree of factual similarity often produces decisional diversity, a broader issue protrudes. Does a Bill of Rights make any difference? If so, what difference? For example, would the same result have eventually emerged or been sustained if the constitution did not contain a Bill of Rights? Given those issues, the Canadian Charter portion of *An Australian Charter of Rights?*, not surprisingly, reveals a third general theme. Are Bills of Rights beneficial?[204] Again, opinions differ. Added to opinion polls, political rhetoric and general literature, is a diversity of academic scholarship on this issue.[205] As Wilcox hints,[206] a strident and articulate opposition, including ideologies associated with the non-conservative political views, deprecates the Canadian Charter.[207] Similar con-

53; Robyn Martin, 'Legitimizing Judicial Review under the *Charter*: Democracy or Distrust?' (1991) 41 *University of Toronto Faculty of Law Review* 62; Allan Hutchinson, 'Waiting for Coraf (or the Beautification of the Charter)' (1991) 41 *University of Toronto Law Journal* 332. See also above nn 45, 46, 60 (American judicial review theories).

195 See above n 17 and below nn 196-203. Comparative constitutional law casebooks are in Thomson, 'Comparative', above n 6, 25 n 6.

196 Glendon, *Abortion*, above n 17; Glendon, '*A Beau*', above n 17; Beschle, above n 17. Discussion (Wilcox, above n 4, 109-11) of Canada's Charter abortion decision (*Morgentaler* [1988] 1 SCR 30) does not refer to *Roe* (above nn 42, 139). However, Wilcox (above n 4) recognises that s 7 of the Charter, on which *Morgentaler* was 'based entirely' (108), has been 'used substantively' (103) and given 'substantive content' (97) and quotes Canadian Supreme Court discussions of the substantive and procedural due process dichotomy (95-6) and their relevance to Canadian constitutional interpretation of this US debate (98-9). However, Wilcox does not elaborate upon the vital issue: What is the significance of this for judicial review and the fundamental questions (above nn 103, 109, 116, 133, 135, and below n 279) it imports into constitutional law?

197 Wilcox, above n 4, 80-5 (Canada); Laurence Tribe, above n 27, 1062-97 (USA); Hanks, above n 6, 96-7; Lee, above n 14, 619-20 (Australia).

198 Daniel Conkle, 'Harm, Morality, and Feminist Religion: Canada's New — But Not So New — Approach to Obscenity' (1993) 10 *Constitutional Commentary* 105 (discussing *R v Butler* [1992] 1 SCR 452 upholding the constitutionality of federal criminal obscenity law under the Canadian Charter's free expression provision).

199 Wilcox, above n 4, 61-3; Hutchinson, above n 157; Sharpe, above n 157; Symposium, 'Commercial Speech', above n 53.

200 Wilcox, above n 4, 64-7; Kozinski and Volokh, above n 28; Massey, above n 53; Wojciech Sadurski, 'Offending with Impunity: Racial Vilification and Freedom of Speech' (1992) 14 *Sydney Law Review* 163, 163-4 (Australia).

201 Wilcox, above n 4, 67-71 (Canada); *Australian Capital Television* (1992) 177 CLR 1 (Australia); and above n 53 (USA).

202 Wilcox, above n 4, 56-60 (Canada); Laurence Tribe, above n 27, 1193 (USA).

203 Wilcox, above n 115-59; Harvie and Foster, above n 17.

204 See above n 23 (normative and empirical assessments). See also below n 207.

205 Wilcox, above n 4, 182-93.

206 Ibid 38 n 156, 74 n 28.

207 See above n 157 (Canadian communalism); 'Book Review' above n 17; Joel Bakan, 'Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)' (1991) 70 *Canadian Bar Review* 307; Monahan, above n 23, 387; Andrew Petter, 'The Politics of the Charter' (1986) 8 *Supreme Court Law Review* 473 (Charter's detrimental effect on the politically, socially and economically disadvantaged); Andrew Petter,

cerns have, of course, been expressed in America[208] and Australia.[209] Inevitably, that generates attempts to amend which, occasionally, result in amendments to the Constitution.[210] Within a decade of the Charter's enactment, major constitutional reform proposals were debated and drafted by Canadians and, in particular, federal and provincial legislatures and governments.[211] That process was long, protracted and often acrimonious. No constitutional amendments, however, eventuated as the 1987 Meech Lake Accord[212] and 1992 Referendum on the Charlottetown Accord[213] were rejected.[214]

IV AUSTRALIA

An Australian Charter of Rights? espouses the traditional view of federal[215] constitutional rights.

> The Australian Constitution contains no Bill or Charter of Rights, so called. It does confer [in sections 8, 24 and 30] what might be called 'democratic rights', relating only to Commonwealth elections. It also contains provisions [in sections 51(xxxi), 80, 116 and 117], each of limited application, in respect of four topics of individual concern.

'Legitimating Sexual Equality: Three Early Charter Cases' (1989) 34 *McGill Law Journal* 358; Brian Etherington, above n 23, 688-91 ('strong pessimism' about the Charter's effect on workers and 'labour law policy'); Jeremy Webber, 'Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms' (1993) 5 *Canterbury Law Review* 207 (ambivalent caution). For a range of assessments, see Peter Bryden, Steven Davis and John Russell (eds), *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life* (1994).

208 See, eg, above nn 26, 27 (Federalists' 1787 opposition to including a Bill of Rights) and below nn 258-63.

209 See above nn 6, 7.

210 For example, in the USA (above nn 28, 29, 34), Canada (above n 176 and below nn 211-4) and Australia (below n 225).

211 Proposed amendments are below nn 212, 213. Amendment powers and procedures are in Hogg, above n 61, 61-95. Are these subject to the Charter?: Hogg, above n 61, 72-3 (negative answer). Possibilities of unconstitutional amendments are above n 33, 34 (USA); James Thomson, 'Reserve Powers of the Crown' (1990) 13 *University of New South Wales Law Journal* 420, 426-7 n 41 (India); The Report of the Republic Advisory Committee, *An Australian Republic: The Options* (1993) vol 1, 118-22.

212 Peter Hogg, *Meech Lake Constitutional Accord Annotated* (1988) (text of Accord).

213 Russell, above n 176, 237-63 (text of Accord).

214 Russell, above n 176, 127-53, 190-227.

215 State constitutional rights might include the possibility 'that [state] legislative power is subject to some restraints by reference to rights deeply rooted in [Australia's] democratic system and the common law': *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10. Discussions include: Wilcox, above n 4, 207; Zines, *Change,* above n 6, 48-52. The only express 'rights' provision in Australian state constitutions is s 46 of the Tasmanian Constitution 1934 (freedom of religion and conscience) (quoted in Hanks, above n 6, 94 n 13). Cf above nn 30 (USA), 159 (Canada). Rejected State Bill of Rights proposals are in [Queensland] Electoral and Administrative Review Commission, above n 6; *Final Report*, above n 6, 459-61; Issues Paper, *A Bill of Rights for the [Australian Capital Territory]* (1993) 91-3; Lou Hill, 'A Bill of Rights for Victoria?' (1986) 60 *Law Institute Journal* 440; Mark Gray, 'A Victorian Bill of Rights: Judicial Review and Other Issues' (Autumn 1991) 61 *Australian Quarterly* 74. State human rights legislation includes: Equal Opportunity Act 1984 (WA); Disability Services Act 1991 (Vic); Equal Opportunity Act 1984 (Vic); Equal Opportunity Act 1984 (SA); Anti-Discrimination Act 1977 (NSW); Anti-Discrimination Act 1991 (Qld); Anti-Discrimination Act 1991 (NT). Analyses include: Louise Thornthwaite, 'The Operation of Anti-discrimination Legislation in New South Wales in Relation to Employment Complaints (1993) 6 *Australian Journal of Labor Law* 31.

> ....
> As recent High Court decisions have demonstrated, some rights are implied by the form of the Constitution.[216]

Perhaps, to bolster arguments for an Australian Charter of Rights, that is, even from the traditional perspective, a very restrictive enumeration of federal constitutional rights. However, other express provisions might also be included. Section 7, for example, gives people the right to directly choose Senators. Section 25 can be characterised as an anti-racial discrimination provision.[217] '[C]ivil conscription' is expressly prohibited in relation to Commonwealth legislative power 'with respect to ... [t]he provisions of ... medical and dental services' in section 51(xxiiiA). Section 109 has been invoked as a protection against some retrospective Commonwealth laws.[218] Strangely, Wilcox also omits the constitutional injunction on federal and state powers that 'trade, commerce, and intercourse among the States ... shall be absolutely free.' Freedom of 'intercourse' has been invoked, even in war-time, against Commonwealth restrictions on personal movement.[219] Perhaps more importantly, section 92, especially when its individual rights theory and the conception that it constitutionalised an economic *laissez faire* doctrine were predominant, has been compared with substantive due process under the American Constitution.[220] Of course, given the High Court's general record on overruling precedents, particularly in section 92 cases,[221] a

216 Wilcox, above n 4, 194, 202. Subsequent High Court decisions on these provisions include: *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 (s 117); *Cheatle v Queen* (1993) 177 CLR 541 (s 80); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 119 ALR 577; *Health Insurance Commission v Peverill* (1994) 119 ALR 675; *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 119 ALR 629; *Re DPP; ex parte Lawler* (1994) 119 ALR 655 (s 51 (xxxi)).

217 States' representation in the House of Representatives reduced if state electoral laws exclude all persons of any race from state elections. Based on the US Constitution, 14th Amendment: John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 455-6; R Lumb, *The Constitution of the Commonwealth of Australia: Annotated* (4th ed, 1986) 58; Patrick Lane, *Lane's Commentary on the Australian Constitution* (1986) 49-50; Sawer, above n 93.

218 *University of Wollongong v Metwally* (1984) 158 CLR 447 (s 109 prevented Commonwealth legislation retrospectively enabling State legislation, previously held inoperative under s 109, to validly operate): discussed in Zines, *High Court,* above n 6, 331-3; Zines, *Change,* above n 6; Lee, above n 14, 618. Other retrospective Commonwealth laws may be valid: *Polyukhovich v Commonwealth* (1991) 172 CLR 501; Thomson, 'Mess', above n 24, 212-4.

219 *Gratwick v Johnson* (1945) 70 CLR 1 (order under National Security (Land Transport) Regulations prohibiting interstate travel without a permit issued at Director-General's discretion held unconstitutional): discussed in Coper, above n 11, 89-90. See also below n 223 (implied right of movement). Further discussions are in *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 1, 191-6 (Dawson, J.). Pending litigation is *Phillip Morris v Commonwealth* (No M55 of 1994); Cheryl Saunders, 'Challenge on Points of Power', *Weekend Australian* (Sydney), 11-12 June 1994, 25 (validity of Tobacco Advertising Prohibition Act 1992 (Cth)).

220 Section 92's individual rights theory is analysed in Zines, *High Court,* above n 6, 100-2; Coper, above n 219, 305-6 ('ostensibly value free interpretation ... entrenched in the Constitution the principle of laissez-faire'); Sir Anthony Mason, 'Law and Economics' (1991) 17 *Monash University Law Review* 167, 175-7; Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 187 (concept of 'reasonable regulation ... import[ed] into [s 92] the range of ideas appropriate to the US due process clause ... when it was given a substantive interpretation').

221 Section 92 'has given rise to ... more overrulings, explicit or disguised, than any other main topic': Sawer, above n 220, 174. Discussion is in Coper, above n 11, 306-7. Volatility of s 92 precedents continued in *Cole v Whitfield* (1988) 165 CLR 360.

return to those views cannot be precluded.[222] Finally, a much stronger and wider-ranging implied rights theory than Wilcox concedes has been articulated.[223]

A newer view promulgates a more robust approach to existing constitutional rights.

> It is often said that the Australian Constitution contains no bill of rights. Statements to that effect, while literally true, are superficial and misleading. The Constitution contains a significant number of express or implied guarantees of rights or immunities. The most important of them is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the 'courts' designated by Ch[apter] III (s 71). Others include: ... s 80; the guarantees against discrimination between persons in different parts of the country in ... ss 51(ii), 51(iii), 86, 88 and 90; ... s 92; ... ss 24 and 25; ... s 116; and the guarantee against being subjected to inconsistent demands by contemporaneously valid laws (ss 109 and 118).
>
> All of those guarantees of rights or immunities are of fundamental importance in that they serve the function of advancing or protecting the liberty, the dignity or the equality of the citizen under the Constitution. Some of them, such as ss 71, 90, 92, 109 and 118 are also integral parts of the very structure of the federation. Section 117 falls into that last-mentioned category.[224]

Perhaps, propelled by the realisation that there may well not be constitutional amendments adding a comprehensive Bill of Rights or a few specific rights,[225] this perspective endeavours to read the Constitution's words, structures, silences and implications in the most rights oriented way possible. Its principal propo-

222 General discussions include: Bryan Horrigan, 'Towards a Jurisprudence of High Court Overruling' (1992) 66 *Australian Law Journal* 199. American analyses include: Michael Gerhardt, 'The Role of Precedent in Constitutional Decisionmaking and Theory' (1991) 60 *George Washington Law Review* 68; Earl Maltz, 'Abortion, Precedent, and the Constitution: A Comment on *Planned Parenthood of Southeastern Pennsylvania v Casey*' (1992) 68 *Notre Dame Law Review* 11; Michael Dorf, 'Dicta and Precedent' (1994) 142 *University of Pennsylvania Law Review* 1997; 'Symposium: Judicial Decisionmaking' (1994) 17 *Harvard Journal of Law and Public Policy* 1, 23-55. See also Hogg, above n 61, 219-21 (Canada, UK, Australia, USA).

223 Elaboration (including adumbration of arguments for and against such judicially created rights) is in Zines, *Change,* above n 6, 39-42, 45-6, 51-2, 54; Zines, *High Court,* above n 6, 330-9; Winterton, above n 60, 223, 227, 228-35, 239; George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Lindell, above n 6, 185; Dennis Rose, 'Judicial Reasoning and Responsibilities in Constitutional Cases' (1994) 20 *Monash University Law Review* 195; O'Neill and Handley, above n 6, 75-84; D Smallbone, 'Recent Suggestions of an Implied "Bill of Rights" in the Constitution, Considered as a Part of a General Trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254; and above n 6 and below nn 226-32. See also above n 215 (*Union Steamship*).

224 *Street v Queensland Bar Association* (1989) 168 CLR 461, 521-2 (Deane J.). Section 44, eg, might also be included: *Sykes v Cleary [No 2]* (1992) 176 CLR 77, 121 ('democratic right' to be elected to Commonwealth Parliament). '[T]he list of rights in the Constitution is surprisingly large, and [Australians] ... have in extraordinary measure overlooked or ignored them': Bailey, above n 6, 79. Elaboration in Bailey, above n 6, 79-105.

225 Rejected constitutional proposals are in *Final Report,* above n 6, 456; Geoffrey Sawer, *Australian Federal Politics and Law: 1929-1949* (1963) 171-3; Galligan and Nethercote, above n 35 (overwhelming 1988 referendum rejection of rights provisions); Hanks, above n 6, 123, 126, 128; Lee, above n 6, 627 ('resounding [referendum] defeat' not a 'clear indicator' denying the High Court a 'popular mandate to [create] new rights'); [Queensland] Electoral and Administrative Review Commission, above n 6, 64-5, 71-6. See also below n 238 (rejected statutory proposals).

nents include Justices Murphy, Deane, Toohey and Gaudron.[226] Others occasionally include Chief Justice Mason and Justice Brennan.[227]

What differentiates Wilcox from real adherents to the traditional view[228] is Wilcox's quickness to grasp and eulogise implied rights which appear attractive. For example, he considers *Nationwide News*[229] and *Australian Capital Television*,[230] where several Justices articulated an implied '[f]reedom of communication in relation to public affairs and political discussion,'[231] to be

> decisions represent[ing] the high-water mark, so far at least, in relation to the implication of human rights guarantees in Australia. They demonstrate the possibility of human rights being constitutionally protected, even in the absence of express words.[232]

But, the result of these cases was stark: those judicially created 'human rights' protected and benefited large media corporations. The latter, not humans, were the aggrieved litigants. Commonwealth legislation, particularly provisions in *Australian Capital Television*, enacted to provide individual electors time to think and reflect free from media interference, was held unconstitutional.[233] One consequence is clear. Large, wealthy and powerful corporations were given constitutional rights and protections. Smaller, poorer and weaker individuals, who had gained legislative protection, were rendered constitutionally vulnerable. That, of course, is reminiscent of American constitutional law between 1861 and 1937. More pertinently, it may be analogous to post 1970 First Amendment law, which has been viewed as 'replac[ing] the due process clause [of the Fourteenth Amendment] as the primary guarantor of the privileged. Indeed, [the First Amendment] protects the privileged more perniciously than the due process clause ever did.'[234] Curbing his enthusiasm, Wilcox recognises that 'a policy question' is involved: 'how far [should] the courts ... go in discerning constitutional implications'?[235] Lurking behind this intellectual conundrum,[236] is, how-

[226] Murphy's position is in Zines, *Change,* above n 6, 45-6; Winterton, above n 60, 223, 227, 228-35; John Goldring, 'Murphy and the Constitution' in Jocelynne Scutt (ed), *Lionel Murphy: A Radical Judge* (1987) 60, 65-6. Deane, Toohey and Gaudron JJ's positions are, eg, in *Australian Capital Television* (1992) 177 CLR 1; *Polyukhovich* (1992) 172 CLR 501; *Leeth v Commonwealth* (1992) 174 CLR 455; *Nationwide News v Wills* (1992) 177 CLR 1; *Lim v Minister for Immigration* (1992) 176 CLR 1; Toohey J, above n 6.

[227] See above n 7 (Mason CJ). Brennan's position is in Brennan, above n 6; Sir Gerard Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response' in Alston, above n 1, 177; and cases in above nn 6, 15, 226.

[228] See, eg, Dawson J (above n 164). However, Wilcox suggests Dawson J may be prepared to imply some constitutional limitations: above n 4, 203 n 745.

[229] (1992) 177 CLR 1.

[230] (1992) 177 CLR 106. See above n 14.

[231] *Australian Capital Television* (1992) 177 CLR 106, 139 (Mason CJ).

[232] Wilcox, above n 4, 207 (footnotes omitted).

[233] See above n 14.

[234] Tushnet, above n 111, 1387. This inequality is explored in Nicholas Wolfson, 'Equality in first amendment theory' (1993) 38 *St Louis University Law Review* 379 ('disparities in speech power'). See also above n 14 (Australia).

[235] Wilcox, above n 4, 208.

[236] Some responses are in ibid 208 (quoting John Doyle and Belinda Wells, 'How Far Can the Common Law Go Towards Protecting Human Rights' in Alston, above n 1, 107, 120); and above nn 223, 226-7.

ever, a much more fundamental problem: should courts be implying constitutional rights at all? Of course, *An Australian Charter of Rights?* concedes that numerous attempts to insert express rights into the Constitution[237] and enact a statutory Bill of Rights[238] have been strongly and consistently rejected by Australian electors and Commonwealth parliamentarians. At least, that appears to indicate a political or democratic response to quandaries over judicial implications. Assume that is correct. Is something more at stake? At this juncture, Wilcox recapitulates the standard intellectual manoeuvres for and against a Bill of Rights.[239] Avoidance of repetition, therefore, requires only selective responses.

To 'easily' cure the danger of courts interpreting the constitutional protection given by a Bill of Rights to expressly adumbrated rights 'as an implied repeal or negation of unspecified rights,' Wilcox suggests its exclusion by a provision akin to 'the Ninth Amendment to the United States Constitution and s 26 of the *Canadian Charter of Rights and Freedoms*.'[240] But, at least the former,[241] may do much more. It was pivotal in the adumbration of constitutional privacy rights[242] which culminated in *Roe v Wade*.[243] Whether the 9th Amendment contains even more — an unlimited repository of unwritten and amphorous constitutional rights — remains a matter of vigorous debate.[244] A suggestion 'that the constitutional recognition of particular rights represents a transfer of State power to the central government'[245] is dealt with by Wilcox reiterating the Constitutional Commission's reply: 'all spheres of government will be equally constrained.'[246] Does that response suffice? If rights were inserted into the Austra-

237 See above n 225.

238 Details, including the Murphy (1973), Evans (1984) and Bowen (1985) Bills, are in [Queensland] Electoral and Administrative Review Commission, above n 6, 65-71; *Final Report*, above n 6, 456-9; Charlesworth, above n 6, 205-10; Issues Paper, above n 215, 89-90. That 'there has been no widespread support for the adoption in Australia of a comprehensive catalogue of fundamental rights, freedoms and values' is clearly evidenced by these and above n 225 referendum rejections: Hanks, above n 6, 128. See also above n 215 (rejected State Bills of Rights). Therefore, are High Court Justices (eg, above nn 226, 227), especially as statutory rights exist, acting too much as counter-majoritarians? Commonwealth human rights legislation includes: the Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Human Rights and Equal Opportunity Act 1986 (Cth); Privacy Act 1988 (Cth); Disability Discrimination Act 1992 (Cth). Analyses include: Charlesworth, 'Reluctance', above n 6, 211-8; Bailey, above n 6, 106-247; Melissa Conley Tyler, 'The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) 19 *MULR* 211.

239 Wilcox, above n 4, 214-48. See also above nn 6, 7.

240 Wilcox, above n 4, 216. A similar suggestion is in *Final Report*, above n 6, 480. Discussed in *Final Report*, above n 6, 480-3.

241 The 9th Amendment's potential as an unenumerated rights repository: above n 61. Is section 26 of the Charter 'equivalent'?: Hogg, above n 61, 827 n 154 (affirmative answer).

242 *Griswold v Connecticut* 381 US 479 (1965) 485 (state law punishing married couple's use of contraceptives held unconstitutional) ('zone of privacy created by [1st, 3rd, 4th, 5th, 9th Amendments which] have penumbras, formed by emanations from [them] that help give them life and substance'). Discussed in Tribe, above n 27, 775-7, 1338, 1348, 1605-6.

243 410 US 113 (1973). See above nn 42, 139. '[T]he Supreme Court ... took the dramatic step of extending *Griswold* ... in *Roe*': Tribe, above n 27, 1341 (footnotes omitted.) 'Six decades of privacy precedents, from *Meyer* [above n 99] ... to *Griswold* [above n 242] ... and *Roe* [above n 42]': Tribe, above n 27, 1422.

244 See above n 61.

245 Wilcox, above n 4, 216.

246 Ibid 217 (quoting *Final Report*, above n 6, 448).

lian Constitution, they would be federal constitutional rights. Therefore, rights litigation could constitute an exercise of federal jurisdiction[247] which, apart from the High Court, might be exclusively vested in the Federal Court.[248] State courts would be unable to decide such cases.[249] Given US experience,[250] might not that involve a transfer of power from State to Commonwealth authority?

In addition to standard arguments concerning a Bill of Rights exacerbation of counter-majoritarian judicial review problems,[251] *An Australian Charter of Rights?* advances an argument — 'the benefit to government of judicial review'[252] — of seemingly irresistible force. Here, reliance is placed on Justice Brennan's assertion:

> There are some issues which, in a pluralist and divided society, are the subject of such controversy that no political party wishes to take the responsibility of solving them. The political process may be paralysed. If governments can create a situation where such issues are submitted to curial decision, political obloquy can be avoided by governments, though it is sometimes transferred to courts, as the continuing controversy over *Roe v Wade* illustrates. However, the judicial method commands a broader acceptance than the political process, and the courts, in the exercise of a jurisdiction under a Bill of Rights, can sometimes cut a political Gordian knot. The desegregation decisions of the [US Supreme Court] provide the classic example.[253]

Can it be true? Are *Roe v Wade*[254] and the desegregation decisions, presumably including *Brown v Board of Education*,[255] being paraded to prove or support the central tenets and foundational premises of this argument for judicially enforced constitutional rights? Slowly and surely — perhaps, inevitably, given the

247 Australian Constitution ss 76(i) and 77(i) enable Commonwealth legislation to vest jurisdiction in the High Court and any federal court 'in any matter ... arising under [the Australian] Constitution.' By s 76(ii), the same effect can be achieved with a Commonwealth statutory Bill of Rights.

248 Ibid s 77(ii).

249 Ibid. A possible exception (based on s 5 of the Commonwealth of Australia Constitution Act 1900 (UK)) is in Lee Harvey and James Thomson, 'Some Aspects of State and Federal Jurisdiction Under the Australian Constitution' (1979) 5 *Monash University Law Review* 228.

250 Ebb and flow (but predominantly the latter) of federal courts' power and jurisdiction (with corresponding state court fluctuations) are in Thomson, 'State Constitutional Law', above n 24, 1087 n 166, 1088 n 177, 1089 nn 178, 180 (Australian and US courts); Martin Redish, *The Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory* (1991); Erwin Surrency, *History of the federal courts* (1987); 'The Federal Courts: Have They Functioned as the Framers Intended?' (1987) 42 *The Record (New York City Bar Association)* 980; Akhil Amar, 'Law Story' (1989) 102 *Harvard Law Review* 688; Martin Redish, 'Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martin Chronicles"' (1992) 78 *Virginia Law Review* 1769; Mary McManamon, 'Felix Frankfurter: the architect of "our federalism"' (1993) 27 *Georgia Law Review* 697.

251 Wilcox, above n 4, 231-5 (referring to Bickel and Thayer). Subsequent elaborations and variations are above n 116; 'One Hundred Years of Judicial Review: The Thayer Centennial Symposium' (1993) 88 *Northwestern University Law Review* 1-468. Attempts to dissolve judicial counter-majoritarianism and responses are also in Wilcox, above n 4, 235-8; and above n 116, 251.

252 Wilcox, above n 4, 236.

253 Brennan, above n 227, 183 (footnote omitted) (quoted by Wilcox, above n 4, 237).

254 410 US 113 (1973): above nn 42, 139, 243.

255 347 US 438 (1954): above n 41.

nature of American constitutional law discourse[256] — *Roe, Brown,* and *Miranda*[257] and, indeed, the whole 1954-1969 Supreme Court rights revolution era are being attacked.[258] Conservatives, of course, from the outset repudiated the Supreme Court's decisions and doctrines and disdained judicial activism.[259] Current denigration is perpetrated by scholars who espouse 'liberal values'[260] and, originally, may have applauded the Supreme Court's decisions.[261] Their arguments and empirical evidence focus precisely on the features of judicial review *An Australian Charter of Rights?* considers to be irresistible. That is, judicial intervention was detrimental, not beneficial, to civil rights and liberties. The Supreme Court interfered with or interrupted political process which, though slower than courts, would, after more extensive debate and discussion, have made decisions. Political initiatives and alternative solutions were irretrievably blocked by judicial review. Judges did not initiate or lead a civil rights revolution. Rather, courts impeded or retarded progress on rights. Those needing meaningful recognition of their rights would have been better off without judicial assistance.[262] Of course, intertwined with these assertions are more general, but no less significant, jurisprudential and utilitarian critiques of rights.[263]

256 That is, the law, history and politics of the US Constitution are continually subject to revision. Dramatic examples include: above nn 28, 61, 97-110, 113-33, 135, 142-4 and below nn 259, 262.

257 *Miranda v Arizona* 384 US 436 (1966) (confessional statements inadmissible, under 5th and 6th Amendments, without prior warning to accused of their rights to consult a lawyer, have a lawyer present during police questioning and freedom from compulsory self-incrimination). History, political context, litigation process and Supreme Court's deliberations are in Liva Baker, *Miranda: Crime, Law and Politics* (1983). Legal analysis is in Louis Seidman, '*Brown* and *Miranda*' (1992) 80 *California Law Review* 673.

258 First, this includes individual judicial decisions, constitutional law doctrine and the general concept of rights. Second, differing assessments proliferate as to when and how much Warren Court era rights decisions have been repudiated: above n 143. Third, political, normative and empirical attacks are below nn 269, 270.

259 Most prominently attacks on *Brown, Miranda* and *Roe*. Details are in Seidman, above n 257; Tribe, above n 42, 142-96; Neal Devins, 'Through the Looking Glass: What Abortion Teaches Us About American Politics' (1994) 94 *Columbia Law Review* 293. See also below n 262. Other attacks on and questions of obedience to Supreme Court decision are in Thomson, 'Making Choices', above n 24, 240 n 50, 241 n 55, 244 n 76; James Thomson, 'Prologue to Power: Selecting Supreme Court Justices' (1986) 12 *Dayton Law Review* 71, 78 n 27; Thomson, 'Mirages of Certitude', above n 17, 70 n 11 (anti-Black and Douglas JJ scholars), 81 n 91 (academic liberals' criticism of constitutional doctrine and judicial power as panacea for social and political ailments); Del Dickson, 'State Court Defiance and the Limits of Supreme Court Authority: *Williams v. Georgia* Revisited' (1994) 103 *Yale Law Journal* 1423; Robert Burt, '*Brown*'s Reflection'(1994) 103 *Yale Law Journal* 1483. Generally, pre-1937, conservatives applauded and liberals denigrated the Supreme Court; 1937-1969 liberals applauded and conservatives denigrated; and post-1969 their positions are, again, reversing: Thomson, 'Making Choices', above n 24, 240 n 48 and below nn 261, 262.

260 Wilcox, above n 4, 26. Wilcox wants 'the maintenance of a vigorous, open democracy espousing liberal values.': Wilcox, above n 4, 26. However, others, articulating different visions and democratic values, disagree: above n 157 and below n 263.

261 Thomson, 'Mirages of Certitude', above n 17, 69 n 10 (pro Black and Douglas JJ scholars), 81 n 90 (pro Warren Court scholars).

262 Expanding political, normative and empirical elaboration (particularly debating *Brown's* empirical and normative significance for the 1960s US civil rights revolution) is in Thomson, 'Mirages of Certitude', above n 17, 81-2; Seidman, above n 257; Mark Tushnet, 'The Bricoleur at the Center' (1993) 60 *University of Chicago Law Review* 1071, 1087-98 (ineffective judicial reform, because of courts' institutional defects, hindering 'development of sensible compromises' in racial discrimination, anti-pornography legislation, abortion and poverty-welfare reform); Cass Sunstein, 'How Independent is the Court?' (22 October 1992) 39(17) *New York*

What if these current attacks are intellectually and empirically wrong? Does the 'benefit' argument prevail? Any response must take into account two more of its features. Not only does it ignore Thayer's[264] warning 'that judicial review would have a debilitating effect upon the sense of responsibility of legislators

Review of Books 47; Steve Bachmann, '*The Hollow Hope*: Can Courts Bring About Social Change?' (1991) 19 *New York University Review of Law and Social Change* 391; Jonathan Simon, '"The Long Walk Home" to Politics' (1992) 26 *Law and Society Review* 923; Neal Devins, 'Judicial Matters' (1992) 80 *California Law Review* 1027; Symposium, 'The Supreme Court and Social Change' (1993) 17 *Law and Social Inquiry* 715-78; Symposium, 'Where's the Politics?' (1992) 34 *William and Mary Law Review* 1-188; Rodney Blackmon, 'Returning to *Plessy*' (1992) 75 *Marquette Law Review* 767; Robert Hayman and Nancy Levit, 'The Constitutional Ghetto' (1993) *Wisconsin Law Review* 627 (continuing demise of *Brown*); 'Twentieth — Century', above n 135, 1-199 (divergent views of *Brown*'s effect); Michael Klarman, 'How *Brown* Changed Race Relations: The Backlash Thesis' (1994) 81 *Journal of American History* 81 (different views of *Brown's* indirect effects); Randall Kennedy, 'Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt' (1986) 86 *Columbia Law Review* 1622 (critiquing suggestion that Supreme Court has advanced civil liberties). More contrasting views on whether and, if so, to what extent there should be judicial enforcement of constitutional rights are in Thomson, 'Mirages of Certitude', above n 17, 82 n 96; Randolph May, 'Book Review' (1989) 39 *Catholic University Law Review* 187; Mark Tushnet, 'Constitutional Cultures' (1990) 24 *Law and Society Review* 199; Richard Kay, 'Constitutional Cultures: Constitutional Law' (1990) 57 *University of Chicago Law Review* 311; Christopher Eisgruber, 'Disagreeable People' (1990) 43 *Stanford Law Review* 275; Lillian BeVier, 'On the Enduring Dilemma of Judicial Review' (1990) 39 Emory Law Journal 1229; David Day, 'The "Assaultive Jurisprudence' — The Free Speech Critique of Robert Nagel's *Constitutional Cultures*' (1991) 39 *Cleveland Law Review* 161; Ian Holloway, 'Book Review' (1992) 15 *Dalhousie Law Journal* 664 (Canadian comparisons). Assessments of judicial decisions' impact include: Thomson, 'Mirages of Certitude', above n 17, 82 n 97 (US and Canada); Donald Songer, 'Alternative Approaches to the Study of Judicial Impact: *Miranda* in Five State Courts' (1988) 16 *American Politics Quarterly* 425; and above nn 23, 207. See also above n 23 (fundamental questions).

263 Criticism of rights, eg, by critical legal and feminist scholars, includes: Fisher, above n 27, 292-5 (overview); Charlesworth, 'Reluctance', above n 6, 224-30; Symposium, 'A Critique of Rights' (1984) 62 *Texas Law Review* 1363-1617; Mark Tushnet, 'The Critique of Rights' (1993) 47 *Southern Methodist University Law Review* 23; Kenneth Minogue, 'What is Wrong with Rights' in Carol Harlow (ed), *Public Law and Politics* (1986) 209-25; Martha Minow, 'Part of the Solution, Part of the Problem' (1987) 34 *UCLA Law Review* 981; Neal Milner, 'The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait' (1989) 14 *Law and Social Inquiry* 631; Cass Sunstein, 'Rightalk', *New Republic*, 2 September 1991, 33; James White, 'Looking at Our Language: Glendon on Rights' (1992) 90 *Michigan Law Review* 1267; Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18; Richard Delgado, 'Enormous Anomaly? Left-Right Parallels in Recent Writing about Race' (1991) 91 *Columbia Law Review* 1541 (black neoconservatives and critical race theory scholars' criticism of liberalism's rights). Responses to such radical and conservative (above n 259) attacks on rights include: Martha Minow, 'Interpreting Rights: An Essay for Robert Cover' (1987) 96 *Yale Law Journal* 1860; Thomson, 'Mirages of Certitude', above n 17, 82 n 100 (minority scholars, including critical race theorists, refutation to sustain 'rights' symbolic and substantive value). See also Richard Delgado and Jean Stefancic, 'Critical Race Theory: An Annotated Bibliography' (1993) 79 *Virginia Law Review* 461. Other perspectives include: Mary Ann Glendon, 'Rights in Twentieth-Century Constitutions' (1992) 59 *University of Chicago Law Review* 519 (comparative analysis); Mark Tushnet, 'Civil Rights and Social Rights: The Future of the Reconstruction Amendments' (1992) 25 *Loyola of Los Angeles Law Review* 1207 (categorisation of civil, political and social rights historically contingent, not normatively immutable); 'Symposium: Individual Rights and the Powers of Government' (1993) 27 *Georgia Law Review* 343-501. Movement from rights to stories is occurring: see, eg, Richard Delgado, 'On Telling Stories in School: A Reply to Farber and Sherry' (1993) 46 *Vanderbilt Law Review* 665; Jane Baron, 'Resistance to Stories' (1994) 67 *Southern California Law Review* 225 (storytelling a method 'outsiders' use to expose location, usage and cultural contingency of power).

264 Jay Hook, 'A Brief Life of James Bradley Thayer' (1993) 88 *Northwestern University Law Review* 1.

and electors.'[265] It also expressly advocates abdication of such democratic and political responsibility. In a representative majoritarian democracy or even in a constitutional democracy,[266] that is not an insignificant step to take.

Ultimately,[267] is confidence in individuals 'the last best, hope'[268] when major reliance is placed on judicial independence, integrity, competency and objectivity? Even if, at least to some degree, that can be achieved,[269] in the final analysis, for Wilcox, does this all come down to the 'public perception of judges'[270] and is this what really matters? Wilcox suggests that

> [m]any decisions of the Australian High Court have considerable political significance. But that fact has not led to a loss of public regard. The court is seen as a group of highly competent, non-political-people. [Wilcox can] see no reason to doubt that this position can be maintained, for all Australian judges, under a Charter [of Rights] provided ... that proper selection processes are adopted and ... that judges follow [the] ... prescription of 'conspicuous objectivity and impartiality in word, conduct and reasoning.'[271]

But, for example, did not public imbroglios surround the tenures of Chief Justice Barwick[272] and Justice Murphy?[273] Haven't there been public revelations

265 Wilcox, above n 4, 232. Critiques and assessments are in 'One Hundred', above n 251.

266 That is, majoritarianism tempered by checks and balances: see, eg, Australian Constitution, ss 2 (Governor-General appointed), 7 (state, not population, basis of Senate representation), 15 (casual senator vacancies appointed), 64 (ministers appointed), 72 (judges appointed).

267 Wilcox, above n 4, 246-8 (selection of judges). Analyses of judicial appointments are in Thomson, 'Appointing High Court Justices', above n 10 (Australia); Thomson, 'Prologue to Power', above n 259 (USA); Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (1994).

268 'We shall nobly save, or meanly lose, the last best, hope of earth.': Abraham Lincoln, 'Annual Message to Congress' (1 December 1862) in Roy Basler (ed), *The Collected Works of Abraham Lincoln* (1953) vol 5, 518, 537. Context is in Mark Neely, *The Last Best Hope of Earth: Abraham Lincoln and the Promise of America* (1993).

269 Can the law/politics and objectivity/subjectivity dichotomy be maintained against, eg, legal realist and critical legal studies attacks? Critiques and responses include: Mark Kelman, *A Guide to Critical Legal Studies* (1987); Allan Hutchinson (ed), *Critical Legal Studies* (1989); 'Symposium on the Renaissance of Pragmatism in American Legal Thought' (1990) 63 *Southern California Law Review* 1569-1853, 1911-28; Symposium, 'The Critique of Normativity' (1991) 139 *University of Pennsylvania Law Review* 801-1075; Drucilla Cornell, 'Taking Hegel Seriously: Reflections on *Beyond Objectivism and Relativism*' (1985) 7 *Cardozo Law Review* 139; James Boyle, 'Is Subjectivity Possible? The Post-Modern Subject in Legal Theory' (1991) 62 *University of Colorado Law Review* 489; Allan Hutchinson, 'Inessentially Speaking (Is there Politics after Postmodernism?)' (1991) 89 *Michigan Law Review* 1549; Allan Hutchinson, 'Doing the Right Thing? Toward a Postmodern Politics' (1992) 26 *Law and Society Review* 773; David Millon, 'Objectivity and Democracy' (1992) 67 *New York University Law Review* 1; Dennis Patterson, 'Postmodernism/Feminism/Law' (1992) 77 *Cornell Law Review* 254; Williams, above n 50. See also above n 193. A specific constitutional law application is above nn 56, 90 (state action doctrine's public/private distinction).

270 Wilcox, above n 4, 248.

271 Ibid (quoting King CJ). However, empirical evidence confirms the conclusion that 'the behaviour of judges over the centuries has been rather erratic [as guardians of liberties].': Zines, *Change*, above n 6, 36.

272 Examples are Barwick's 1975 advice to the Governor-General and 1980 allegations of conflict of interest: James Thomson, 'Book Review' (1983) 6 *University of New South Wales Law Journal* 255; 'Barwick row over court sittings', *Weekend News* (Perth), 26 April 1980, 6; 'Row brewing over Chief Justice', *Sunday Times* (Perth), 27 April 1980, 5; Malcolm Colless and Andrew Fowler, 'Chief Justice faces ALP broadside as family company', *Australian*, 2; Paul Malone, 'Govt ponders Barwick inquiry call', *Financial Review*, 29 April 1980, 1, 4; Anne Summers, 'ALP v Barwick, CJ', *Financial Review*, 30 April 1980, 1, 10; 'No Barwick probe: PM', *West Australian* (Perth), 30 April 1980, 1, 12; Russell Schneider, 'PM rules out Barwick

about the High Court's internal machinations?[274] Is there an implication that US Supreme Court Justices do not follow that 'prescription'? *An Australian Charter of Rights?* garners no empirical research or data on these matters. Do a majority of Australians know that the High Court exists? Do they know anything about its procedures and powers or the Justices? Would their knowledge and interest in courts change if Australia had a Bill of Rights? Then, what would be the 'public perception of judges'[275] in Australia?[276]

V CONCLUSION

Constitutional rights engender endless debate. Recognising questions and postulating answers represents an initial foray into this morass. Flux, not repose, predominates. Unrelenting struggles, between legislatures, executives, courts and the people, to determine the basis and shape the contours of rights will not abate. Bills of Rights, as American and Canadian experience continue to demonstrate, stimulates,

probe', *Australian*, 30 April 1980, 1; 'What the Barwick letter said', *Australian*, 30 April 1980, 4; Editorial, 'When the smearing has to stop', *Australian*, 1 May 1980, 8; Editorial, 'From Mungana to Mundroola', *Financial Review*, 1 May 1980; 'Mundroola's cheap land purchases', *Financial Review*, 1 May 1980.

273 Details of attempts to remove Murphy J under s 72(ii) of the Australian Constitution, are in H P Lee and Vince Morabito, 'Removal of Judges — The Australian Experience' (1992) *Singapore Journal of Legal Studies* 40, 44-51; Harry Evans, 'Australian Senate: Inquiries into the Conduct of a Judge' (July 1985) 66 *Parliamentarian* 115; Harry Evans, 'The "Murphy Affair" produces conflict between Parliament and the Courts' (1986) 67 *Parliamentarian* 47; Harry Evans, 'The "Murphy Affair" ends and the Senate President acts on freedom of speech' (1987) 68 *Parliamentarian* 15; Harry Evans, 'Parliament and the Judges' (Spring 1987) 2(2) *Legislative Studies* 17; Anthony Blackshield, 'The "Murphy Affair"' in Scutt, above n 226, 230. Other examples include Maher, above n 12, 171-2 (Dixon J.).

274 For example, J Richard, *H. B. Higgins: The Rebel as Judge* (1984) 274-5; Clem Lloyd, 'Not Peace But a Sword! — The High Court under J G Latham' (1987) 11 *Adelaide Law Review* 175; Miller, above n 12; Thomson, 'Book Review', above n 272, 257, 260 n 27 (Barwick — Murphy dispute) David Marr, *Barwick* (1980) 281-2, 288 (same). Analyses of the most famous US Supreme Court exposé include: Richard Saphire, 'The Value of *The Brethren:* A Response to Its Critics' (1980) 58 *Texas Law Review* 1475; Ronald Fiscus, 'Studying *The Brethren:* The Legal Realist Bias of Investigative Journalism' [1984] *American Bar Foundation Research Journal* 487. Earlier examples are in Thomson, above n 60, 743 n 2.

275 Wilcox, above n 4, 248.

276 Some empirical data is in *Final Report*, above n 6, 43:

> A survey conducted in April 1987 showed that only some 53.9% of Australians knew that Australia has a written Constitution. In the 18-24 age group, nearly 70% of the respondents did *not* know that [Australia has] a written Constitution. The survey showed that the people most aware of the Constitution and its significance are men ... over 35 years ... who left school at 17 years ... or older, who work full time and are white collar workers.

(Footnote omitted, emphasis in original.) The Constitutional Commission concluded there was 'widespread ignorance of the Constitution and of the major impact which it has on life in Australia.': *Final Report*, above n 6, 43. Other data is in Denis Muller, 'Most want Constitution changed, once they work out what it is', *Sydney Morning Herald*, 3 July 1992, 6; Martin Thomas, 'Nation ignorant of Constitution', *Weekend Australian*, 20-21 March 1993, 1, 2; George Winterton, 'Education vital to machinery of democracy', *Australian*, 19 April 1994, 11; Report of the Civics Expert Group, *Whereas the People: Civics and Citizenship Education* (1994) 128-60. Specifically on Australian's attitudes to human rights, see Fletcher and Galligan, above n 6; Brian Galligan, 'Australia's Political Culture and Institutional Design' in Alston, above n 1, 55, 59; Philip Alston, 'An Australian Bill of Rights: By Design or Default?' in Alston, above n 1, 1, 6. Cf above n 23 (US data). Should public opinion affect constitutional law? For a discussion, see James Wilson, 'The Role of Public Opinion in Constitutional Interpretation' [1993] *Brigham Young University Law Review* 1037 (US perspective).

not dampens, this phenomenon. Without succumbing to routine or revolution,[277] provocative and nuanced narratives and analyses can be proffered. Especially for lawyers, one fundamental example protrudes:[278] adumbrating, constructing and synthesising theories of judicial review, constitutionalism and justice.[279] Celebration, not remorse, is, therefore, possible. If this eventuates, the very best features of Australian constitutional law will be prominently displayed.

[277] Elaborated in Thomson, above n 28, 211 n 192.

[278] Others are in above nn 23, 60, 90, 103, 109, 116, 119, 135, 193, 194.

[279] Should legislators and judges respond to an interest-group and pluralistic conception of the political process?: above n 20. If so, is the judicial role process-perfecting and representation reinforcing?: Ely, above n 44. Or, should courts be above the 'play of interests' and endeavour to discern and protect substantive values?: Tribe, above n 27. If so, do principles of deliberative democracy, albeit external to the Constitution's text (above n 60), provide a requisite source for constructing principles of constitutional interpretation (above nn 46, 64, 179) and theories of judicial review (above n 194)?: Cass Sunstein, 'Liberal Constitutionalism and Liberal Justice' (1993) 72 *Texas Law Review* 305. Or, is such democratically based constitutionalism too partial or thin to adequately protect individual rights?: Fleming, above n 109. That is, which should prevail: republican civic virtue rights of democratic dialogue or liberal protections against governmental intrusions into private spheres?: above n 157. These conundrums implicate two fundamental inquiries. First, not only which rights should be 'trumps' but who — courts, legislatures, voters — should have the ultimate decision? (Above nn 17 (non-justiciability), 62-3 (politics, converted into legislation, may prevail)). For example, should courts have no role (above n 17), some role — ranging from weak (Ely, above n 44) to strong (Tribe, above n 27) theories of judicial review — or the ultimate role (above n 24)? Second, what, if any, relationship exists or should exist between constitutional law theories and theories of justice? Can constitutionalism ensure a good and just society?: Sunstein, above n 279.