Entrenching rights in the United States and Canada

By Brian Rayment QC

Four main models are known in the English speaking world for a comprehensive bill of rights:

(1) an entrenched form of the bill of rights with a power of nullification of inconsistent legislation given to the courts, as in the United States;

(2) an entrenched form of the bill of rights with a power of nullification given to the courts, but with a power in the legislature to override the bill of rights in the case of particular laws, as in Canada;

(3) a legislative form of the bill of rights with a power of nullification given to the courts, as was the case in Canada before the Charter of Rights was included in its constitution (but it was applicable only to the Canadian parliament, as distinct from the provinces); and

(4) a legislative form of the bill of rights which allows the courts a dialogue role, but leaves the ultimate decision about what to do with legislation which conflicts with recognised rights to the legislature, as in Victoria and the Australian Capital Territory.

When Victoria set up the committee which recommended the law in question it stipulated that nothing more than the fourth model should be adopted.[1] When the Rudd government established the Australian Human Rights Consultation which reported last year, the terms of reference constrained the Consultation with the requirement that it not recommend a constitutional amendment, thus restricting it to models (3) or (4) in practice. When the Consultation reported, it recommended model (4) and the government promptly rejected the recommendation.

It is not surprising that politicians do not want a bill of rights added to the national or state constitutions, because, as they know, the main reason to have a bill of rights is that we do not trust politicians. From the point of view of a government, it would be a check on its own power, and confer a veto upon the courts in areas upon which the bill of rights impinge. Moreover a constitutional change has the mark of permanence and amendments to the national constitution are notoriously difficult to procure. If the states were to entrench a bill of rights, then the mechanism for their undoing or amendment has usually involved a referendum. The surprise is not that we do not have a bill of rights complying with models (1) or (2), but that others do have a bill of rights in that form, and that the changes in question came about with the consent and active involvement of the legislatures.

Looking at the matter from the point of view of the governed, the generally understood rationale for having a bill of rights in the western world seems to be that there should be limits to how far even a democratically elected government should be allowed to go in taking away or restricting freedoms of individuals and minorities. Therefore the adoption of models (3) or (4) could fall short of the needs which a bill of rights is designed to meet. Placing the ultimate decision about the interference with such rights in the hands of the legislature means that unintentional interferences with such rights may probably be avoided, but that intentional interferences will probably not.

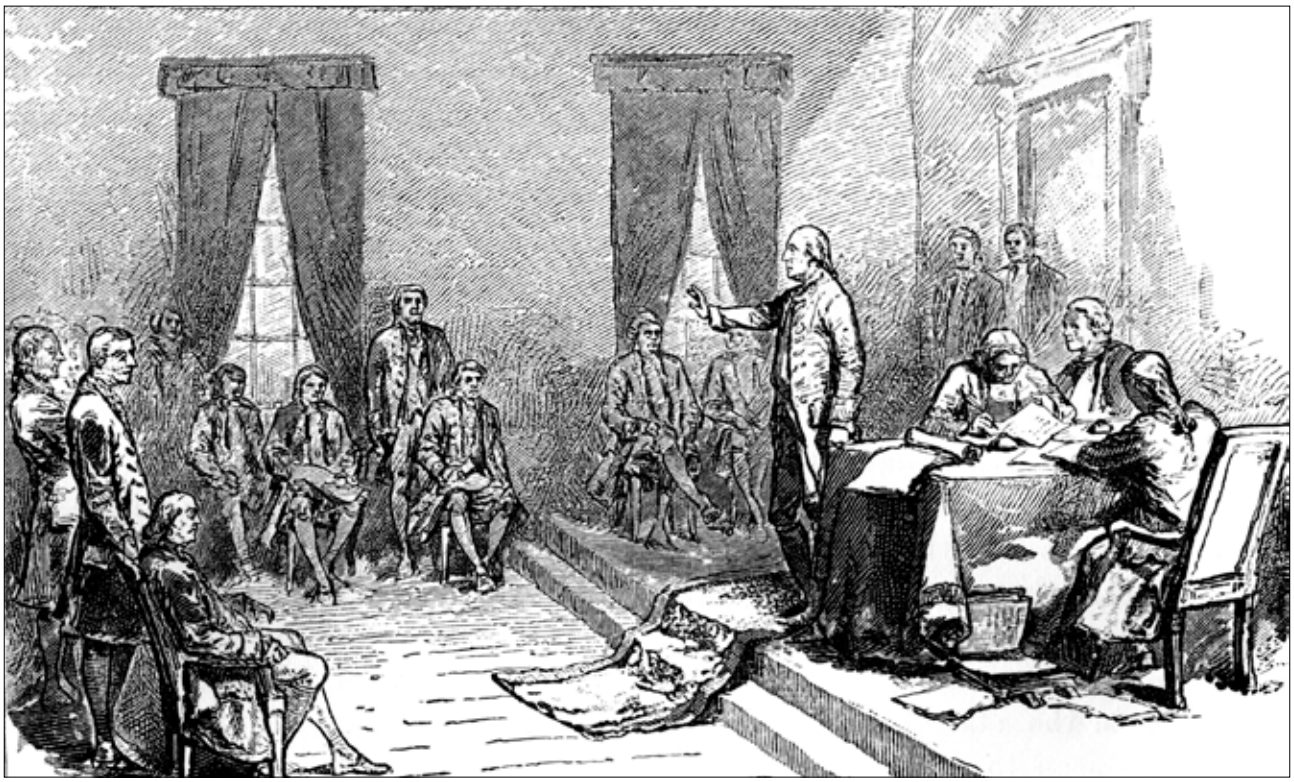
On the other hand, great care is required in the selection of the rights protected if the rights are to be enshrined in the constitution, if models (1) or (2) are adopted, because amendments to the constitution are so difficult to bring about, and guarantees of rights no longer recognised as requiring protection might be difficult to remove. Models (3) or (4) do not have that difficulty.

This paper will seek to recount the main circumstances which led to the introduction of model (1) in the United States, and to the introduction of model (2) in Canada. It will also discuss some Australian responses to each of those developments.

The United States

In the form in which the main body of the Constitution of the United States as we now know it was first written, at the Philadelphia Convention which reported on 17 September 1787, there were some guarantees of individual rights and liberties, but the document omitted all of the first ten amendments to the constitution, which today, together with further amendments added after the Civil War, are known as the Bill of Rights.

The Philadelphia Convention had been charged with

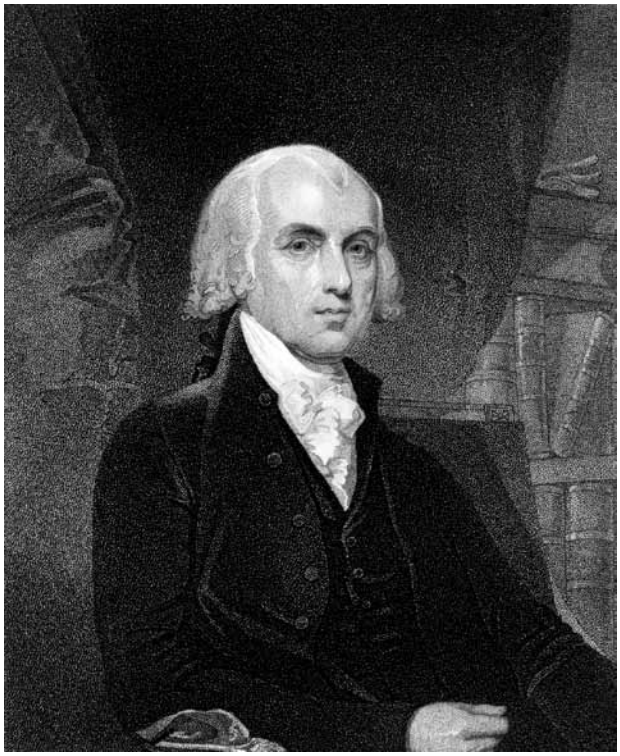


Engraving of the Convention at Philadelphia, 1787, published in *Popular Descriptive Portraiture of the Great Events of Our Past Century*, by R M Devens in 1787. Image: iStockphoto.

'the sole and express purpose of revising the Articles of Confederation'[2], the first constitution of the United States, which was regarded as a flawed and unworkable document. It also had no guarantees of individual rights. The convention created a document which owed little to the first constitution, and Madison was a leading figure in its conception and preparation.[3] The convention met in the absence of the public, and Americans were largely unaware of the task it was performing. It may be that one reason why its deliberations were kept secret was fear that the delegates would be recalled for exceeding their authority.[4] Washington, as president of the convention, spoke very little over the four months of its deliberations, but on one of those occasions, he warned delegates not to let drafts of the constitution fall into other hands.[5] The deliberations took place over the long summer of 1787, and the delegates were anxious to complete their task. Towards the end of the convention, one of Madison's fellow Virginians, George Mason, urged the delegates to include guarantees of individual rights in the draft constitution. He was supported in this proposal by the governor of Virginia, Edmund Randolph, who, like Mason, also had other objections to the convention document.

Mason had, in the same year as the Declaration of Independence, 1776 successfully propounded at the Virginian Constitutional Convention of that year a Declaration of Rights. Madison himself, as a young man, had assisted in the drafting of the clause in the Virginian Declaration of Rights guaranteeing the right to the free exercise of religion.[6] The Virginian Declaration of Rights was influential in others of the thirteen states, all of which debated the inclusion of bills of rights[7] and many of which did include bills of rights in their constitutions. Others, including New York, did not.

The move in the states to include bills of rights in their constitutions was largely due to a desire to avoid the repetition by duly elected state legislatures of the kind of oppression that British rule had brought to the American colonies. The strength of American objection



James Madison. Picture: iStockphoto.com

to that oppression may be seen in the passionate language in which the Declaration of Independence is expressed. Not all states, as noted earlier, adopted such clauses, and a division of opinion about the need for comprehensive protection, and about the rights deserving protection, was evident in the differences between the various state constitutions themselves.

The constitutional debates in the various states of the previous decade, and the various innovative forms of government debated or adopted in the states, including various forms of the bill of rights, had left behind a seasoned group of statesmen and thinkers ready to consider and criticise the document which the convention produced.

Opposing Mason's proposal at the Philadelphia Convention to add a bill of rights, Richard Sherman of Connecticut argued that the rights protected by state constitutions 'are not repealed by this Constitution; and being in force are sufficient'. He asserted something which was later also asserted at the Australian constitutional conventions, that the legislature to be set up under the constitution 'may be safely trusted'.[8] Mason in his reply pointed out that laws of the United States were to be paramount to state bills of rights.[9]

The primary objection to the inclusion of a bill of rights at the convention seems to have been based on the perceived lack of necessity to do so, because of the fact that the federal government was to be one of limited powers, and the belief that the exercise of those powers would not impinge on individual rights.[10]

In the end the convention document was approved by unanimous vote of the delegates voting as states from each of the twelve states attending, and the convention president, George Washington, was first to sign the document. Madison appended his name to the document as one of the Virginian delegates. Both Randolph and Mason refused to do so.

The convention proposed that the document be transmitted to the states for ratification by delegates elected by the people in at least nine states, after which the constitution would come into effect. For this purpose, it desired the Continental Congress (of which Madison was also a member) not to amend the document produced by the convention before its passage to the People's Conventions. At the conclusion of the deliberation of the convention Madison returned to the Continental Congress in New York, where he played a key role in bringing about that result[11], and the convention draft was sent to the states for ratification without comment from the Continental Congress.

While Madison was in New York, he was enlisted by Andrew Hamilton[12] to become one of the writers of letters to New York newspapers under the shared pseudonym 'Publius' (the Public Man). The three writers were Hamilton, Madison and James Jay. The purpose of the correspondence was to urge in New York ratification of the Philadelphia Convention document of 17 September 1787, and the election of delegates to the People's Convention who would favour that course. That correspondence is now known as the Federalist Papers. The use of the pseudonym was convenient in that it enabled Madison not to reveal his southern origins to the readers in New York. The essays were widely distributed throughout the country.

He wrote many of those papers, some[13] referring

incidentally to the omission of a comprehensive bill of rights. Andrew Hamilton himself took up the pen as Publius in Federalist No. 84 which dealt most extensively with that matter, and that paper is regarded as the classic statement of early Federalist objections to the inclusion of the bill of rights in the constitution. He was concerned to answer some of the arguments of those opposed to the ratification of the Philadelphia Convention document, who had also mobilised a campaign in New York and the other states. They were known as the Anti-Federalists. They were mainly opposed to the centralisation of power in the federal government, and the diminution of state power, but they were most effective in urging the adoption of a federal bill of rights. They produced pamphlets, letters and other publications urging the states not to ratify the convention document; they sought the calling of a second convention to rewrite the document produced by the Philadelphia Convention; and they opposed ratification of the Philadelphia Convention document.

Federalist No. 84

Hamilton drew attention first to those provisions of the convention document which did guarantee rights. Chief among them were the right to a jury trial for all crimes (Article III, section 2, cls 3), and the clauses guaranteeing the privilege of habeas corpus, except in cases of rebellion or invasion and forbidding bills of attainder and ex post facto laws (Article 1, section 9).

Hamilton's main argument was that Magna Carta and the Petition of Right assented to by Charles I and the Declaration of Right presented by the Lord and Commons to the Prince of Orange in 1688 were stipulations applying as between kings and their subjects which had no application to constitutions professedly founded upon the power of the people. He said that under a constitution in which the people are sovereign, they surrender nothing and as they retain every thing, they have no need of particular reservations. Democracy itself, he suggested in effect, was a sufficient guarantee of individual liberty.

He characterised the US Constitution as a document intended to regulate the general political interests of the nation, rather than a document intended to regulate every species of personal and private concern. Moreover liberty of the press, he argued, was a subject matter so vague that any definition of it would leave the utmost latitude for evasion. Liberty of the press was one of the rights protected by the Virginia Constitution, for example.

He argued that it would be dangerous to include comprehensive bill of rights provisions in the constitution, because they would operate as exceptions to rights not granted, and afford a colourable pretext for a suggestion to claim more powers than were granted.

To the views asserted in 1788 by Publius in Federalist No. 84 may be contrasted the publication under the pseudonym of the Anti-Federalist writer 'John deWitt' of October 27, 1787. He put it that:

> A people, entering into society, surrender such a part of their natural rights, as shall be necessary for the existence of that society. They are so precious in themselves, that they would never be parted with, did not the preservation of the remainder require it. They are entrusted in the hands of those, who are very willing to receive them, who are naturally fond of exercising of them, and whose passions are always striving to make a bad use of them – they are conveyed by a written compact, expressing those which are given up, and the mode in which those reserved shall be secured. [14]

A key point adverse to the convention document was made by 'Centinel' No. 1[15] (October 5, 1787). He observed that the people should not be precipitated into this form of government unless it is 'a safe and proper one'. He added: 'For remember, of all possible evils, that of despotism is the worst and most to be dreaded'.[16] He described the convention document as setting up in practice a permanent aristocracy, and castigated it for failing to provide for the liberty of the press and for failing to provide for the preservation of jury trial in civil cases.

The constitution without guarantees in the nature of a bill of rights was thus attacked on the ground that it might produce tyranny.

David J Siemers, in his book *Ratifying the Republic* (Stanford University Press 2002)[17], has drawn attention to a pamphlet now persuasively identified as having

been written by Mercy Otis Warren[18] sometime between the ratification by Massachusetts and that of Maryland. Her pamphlet was published under the pseudonym *'A Columbian Patriot'*. She characterised the constitution before its amendment as monarchic, by which she meant tyrannical. As a result of the amendments, she said in later writings, published after the ratification of the Bill of Rights, citizens' rights had been safeguarded and power had been reserved to the states and a monarchical government had been avoided in the United States. The Bill of Rights in its final form was not so satisfactory to other prominent Anti-Federalists.[19]

The Anti-Federalists thus used the argument which had persuaded the majority of the states to include bills of rights in their constitutions: that a failure to do so may cause the people to suffer from the same kind of tyranny from their own legislature as they had under the yoke of the British Crown.

Madison's contributions to the writings of Publius having been completed, he was pressed to return to Virginia, and to seek election as a delegate to the People's Convention for its ratification by his home state. A minimum of nine states was required to ratify the Philadelphia convention, and Virginia was a critical one for several reasons. It was the 'most important state politically in the South if not the nation. It was by far the largest state geographically, comprising what is today Virginia, West Virginia and Kentucky'.[20] Moreover it was the place of residence of George Washington, whom the people desired to have as their first president. If Virginia did not ratify, it would not be part of the union, and Washington's presidency would not have been possible. And Madison learned that Mason would be a delegate to the Virginian convention, and anticipated that his opposition to the document might result in a failure to ratify. Madison went home to seek election to the People's Convention, and was elected.

The course of the proceedings at Richmond, Virginia, which led to the ratification by a narrow majority of the People's Convention of the State of Philadelphia is well documented.[21] One of those who supported Madison at the People's Convention was John Marshall, the future chief justice of the United States.[22] When the vote was cast in favour of ratification, Virginians probably thought theirs was the (critical) ninth state to ratify, because news of the ratification by the actual ninth state, New Hampshire, some four days earlier, had not arrived in Richmond at the time of the vote.[23] Madison played a leading role in the deliberations of the Virginia Ratifying Convention. Throughout that convention he opposed the addition of a bill of rights to the constitution.[24] His main opponent was Patrick Henry, a powerful Virginian politician, a leading Anti-Federalist and an accomplished orator.

In the end it was James Madison who moved at the first US Congress for a series of amendments to the US Constitution which emerged from the Senate as twelve amendments, ten of which became known as the Bill of Rights, after they were ratified by the necessary number of states as amendments to the US Constitution. His position as a Federalist was well known and his sponsorship of the amendments, involving as it did a radical change of his own position, must have been very important to their adoption.

Madison's opposition to a comprehensive bill of rights being included in the constitution may have been overcome by four main factors: First, he recognised that many of the people had grave misgivings about the failure of the convention document to include a bill of rights. The ratification by a number of states, including his own, was a narrow thing because of the absence of a bill of rights.[25] A number of states, while voting for ratification, had expressed the earnest hope that the document would be amended by adding rights protection.

Secondly, Thomas Jefferson, who was at the time minister for France, engaged in correspondence with Madison urging that he support a bill of rights in the new constitution.[26]

Thirdly, when the US Constitution came into force, Madison had stood for the new Congress as a candidate for a Virginian electorate, the boundaries of which were sculpted by Patrick Henry to include Anti-Federalist voters, and Henry encouraged the prominent Anti-Federalist James Monroe to stand against Madison for the seat. (Madison would later appoint Monroe as his

secretary for state and Monroe would succeed Madison as president). Madison was able to secure his election to Congress after promising his electorate that when in Congress, he would seek to add a bill of rights to the constitution.

In the fourth place, Madison feared that if a bill of rights was not added to the constitution, Anti-Federalist forces in a number of states would succeed in a move to call a further constitutional convention to reconsider the constitution and thus potentially undo what had been achieved in Philadelphia.[28] A further convention would be called under Article V if two thirds of the states required it. In the event no such majority was achieved by the Anti-Federalists, following the ratification of the initial Bill of Rights amendments.

For the drafting of the federal Bill of Rights Madison drew upon the constitution of his home state of Virginia, to which, as noted above, he had himself contributed. He proposed some amendments which did not survive the Senate. In particular he proposed that the states should be prohibited from violating the equal rights of conscience or the freedom of the press, or the trial by jury in criminal cases. He regarded that provision as one of the most important[29], but the states' house did not agree. The Civil War amendments made in the following century would achieve Madison's desired result.

By 1791, four years after the convention document, Amendments I-X had been agreed to by the requisite number of states and became part of the constitution.[31]

The fourteenth amendment, made after the Civil War, contained a citizenship clause which provided that all persons born or naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. It continued:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XV, another amendment enacted

following the Civil War, guaranteed the right of citizens of the United States (including, as was particularly intended, that of black Americans in the southern states) to vote and provided that that right 'shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude'.

The right to bear arms

The most controversial right recognised in the United States Constitution is that comprised in Amendment II: 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed'. The provision was held in *District of Columbia v Heller* 554 US 290 (2008) to invalidate a law passed in the federal District of Columbia banning the possession of handguns in the home. On 28 June this year in *McDonald et al v City of Chicago, Illinois et al,* 561 US (2010) the Supreme Court by a 5–4 majority held that the provisions of the second amendment extended to the states by virtue of the fourteenth amendment's due process clause, so that a law in force in Chicago prohibiting the possession of handguns in the home for the purpose of self-defence was invalid.

Madison had originally proposed in the lower house an amendment which used similar language to the second amendment.

The protection is analysed by the Supreme Court as fundamental to the American understanding of ordered liberty, as a part of the basic right of self-defence. In

Heller, the Supreme Court concluded that citizens must be permitted to use handguns 'for the core lawful purpose of self-defense' (slip opinion at p.58). For this view the Supreme Court resorted to letters and papers from Anti-Federalists and to Federalist No. 46, which Madison wrote. The court stated that Anti-Federalists and Federalists alike agreed that the right to bear arms was fundamental to the newly formed system of government. The court in *McDonald* examined materials dating from the time of adoption of the fourteenth amendment following the Civil War, and concluded that the right to keep and bear arms was still recognised in a majority of states at the time of the fourteenth amendment: Slip opinion at p.30.

The *McDonald* majority opinion rejected as a test for the purposes of the fourteenth amendment the view contended for by the respondents that the due process clause protects only those rights 'recognised by all temperate and civilised governments' and ruled that the American experience alone was relevant, even if others might disagree.

If the modern (or modern enlightened) approach in the United States to the bearing of arms is similar to that in this country, which favours significant restrictions being placed upon gun ownership, then there would be plainly a case to seek amendment of the provisions of the second amendment. Such an amendment would today in the USA require the consent of a three-fourths majority of fifty states.

To Australian eyes, the second amendment seems to involve recognition of a right that might have commended itself to people, even a majority of the people, in times past but would not so commend itself today. Perhaps that would be enough to procure an amendment under s 128 if the right had been recognised in the Australian Constitution.

The provision recognising the right to bear arms in a model (1) constitution (and for that matter, such a provision if it were included in a model (2) constitution) certainly signals a possible problem, and the problem exists not only with the selection of rights deserving protection, but also with the language in which such rights are described. The problem is not merely one of changing community attitudes, but of a need to debate and anticipate the possible impact of entrenched rights on possible future circumstances.

That problem is to some extent ameliorated in a country like Australia, which, if it does ever entrench rights similar to those protected in the United States and Canada, can at least have regard to decades of Canadian cases, and in the case of the US, centuries of published authority, enabling a government to see how the courts of those countries have reacted to the application of recognised rights in a great variety of different circumstances. A late entrant to the field can be better off in that respect.

Both models (1) and (2) are premised upon the separation of powers, and involve the courts rather than the people or any tribunal elected by the people ruling about the conflict of laws with rights recognised in the Bill of Rights. The courts in America have become more responsive to public opinion in interpreting the Bill of Rights. Barry Friedman of the New York University School of Law has recently published an analysis of the interplay between public opinion and the decisions of the Supreme Court of the United States, and argues that the Supreme Court has by and large responded to public opinion on a number of Bill of Rights issues. The power given to the court of constitutional interpretation and nullification of laws is one that can be withdrawn by constitutional amendment, and is to that extent conditional. He says:

> The tools of popular control have not dissipated; they simply have not been needed. The justices recognize the fragility of their position, occasionally they allude to it, and for the most part (though, of course, not entirely) their decisions hew rather closely to the mainstream of popular judgment about the meaning of the Constitution. It is hardly the case that every Supreme Court decision mirrors the popular will – and even less so that it should. Rather, over time, as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people. [32]

The view is taken in the United States (and Canada) that judicial review is appropriate in this, as in other, constitutional issues. Despite occasional clashes between government and courts (which are common

on other constitutional and other issues) the courts have been left as the final arbiters on the validity legislation alleged to be in conflict with the bills of rights in both countries.

Australian responses to the adoption of model (1) in The United States

Australia missed its major opportunity to have a bill of rights included in its constitution at the time of the Constitutional Conventions. Not only did we not then adopt one, but by section 128, we placed the choice to introduce possible constitutional change in the hands of politicians. A referendum to amend the constitution must originate in the parliament, and thus therefore submitting it to the vote of the electors must have the support of the government of the day. It must, to be passed, receive the affirmative votes of a majority of the electors in Australia, including a majority in a majority of states.

As is well known, the Australian Constitution is largely concerned with the division of power between the federal government and state governments. In this and other respects it partly resembles the American Constitution as it stood at the time of the Philadelphia draft. The US constitution had much prominence in the debates of the Australasian Federal Convention.

At the early conventions Mr Andrew Inglis Clark, for some time attorney-general for Tasmania, came to be regarded by convention delegates as a specialist on the United States Constitution. He had a special interest in American affairs and American constitutional law. He was the senior Tasmanian delegate to the Federation Conference which met at Parliament House Melbourne on 6 February 1890, and after this Convention concluded he instructed the Tasmanian draftsman to prepare a draft Bill from his notes. That draft Bill is published as an appendix to an article concerning Clark written by John Reynolds at 32 ALJ 62. Importantly, the Bill contained the ancestors of sections 116 and 80 as his sections 46 and 65:

> 46. The Federal Parliament shall not make any Law for the establishment or support of any religion, or for the purpose of giving any preferential recognition to any religion, or for prohibiting the free exercise of any religion.
>
> 65. The trial of all crimes cognisable by any Court established under the authority of this Act shall be by Jury, and every such trial shall be held in the Province where the crime has been committed, and when not committed within any Province the trial shall be held at such place or places as the Federal Parliament may by law direct.

Mr Clark did not in his draft take any other part of the First Amendment than the first part (for his section 46), and did not include in it, in relation to the right of trial by jury, anything corresponding to Amendments V and VI. Indeed the only provision of the Amendments which he seems to have taken up is the first part of the First Amendment.

Reynolds notes in his article[33] in the *Australian Law Journal* that all the delegates at the 1891 Convention received copies of his draft before the opening of the convention.

Importantly, Clark was part of the Drafting Committee established by the 1891 Convention and chaired by Sir Samuel Griffith, which met on board the Queensland Government's steam-paddle-wheeled yacht *Lucinda*, while it cruised on the Hawkesbury River. Presumably Clark's draft was part of the material before that Committee.

Why Clark chose to omit so much from the United States Constitution and its amendments in his draft can only be the subject of speculation. He was, as can now be seen, in a powerful position to have propounded a bill of rights in the drafts of the Australian Constitution but clearly decided not to do so.

As to the provisions which were proposed by Mr Clark, the final form of section 116 was, as Quick and Garran note, substantially the work of Mr H B Higgins at the 1898 Convention session.[34]

The subsequent history of the drafting of the section which we know as section 80 is discussed in *Cheng v The Queen* [2000] 203 CLR 248 at paragraphs [53]-[54]. What is there pointed out is that the delegates had it specifically drawn to their attention that the effect of the section as it is presently worded would be to give the Commonwealth as prosecuting authority a choice as to whether or not to present an indictment for a crime, and only if the prosecution chose to present

an indictment would there be a right to a jury. The delegates who produced that result (which in America, would have appalled Federalists and Anti-Federalists alike) were the Honourable Edmund Barton and the Honourable Isaac Isaacs.

A clearer indication of the view of convention delegates concerning the entrenchment of fundamental rights emerges from other proceedings at the Melbourne Convention in 1898.[35]

The Tasmanian Legislative Assembly had proposed the inclusion of a provision about citizenship which drew upon Section 1 of the Fourteenth Amendment of the United States Constitution, and during the 1898 Convention there was discussion about the clause. The clause proposed by the Legislative Assembly of Tasmania was in the following terms:

> The citizens of each State, and all other persons owing allegiance to the Queen and residing in any Territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all the privileges and immunities of citizens of the Commonwealth, in the several States, and a State shall not make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth, nor shall a State deprive any person of life, liberty, or property without due process of law, or deny to any person within this jurisdiction the equal protection of its law. [36]

Mr Isaac Isaacs (then attorney-general of Victoria) compared the language proposed to the similar language of the fourteenth amendment, and referred to the discussion of it in the United States Supreme Court in *Strauder v West Virginia* 100 US 303 (1879). He referred to the fact that the occasion for the fourteenth amendment was the refusal of the southern states to allow African Americans to vote, but that the clause had been successfully invoked by a Chinese in *Yick Wo v Hopkins* in 118 US 356 (1886) who established his right, in spite of the state legislation, to have the same laundry licence as the Caucasians have.[37] Mr O'Connor (then solicitor general for NSW and also later a member of the High Court) said that he thought that the part of the Tasmanian draft which it was necessary to preserve was this – altering the wording slightly so as to make it read as I think it should read:

> A state shall not deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.[38]

Mr O'Connor also expressed the view[39] that whatever privilege we give to our citizens the administration of the law should be equal to all, whatever their colour. He referred to 'one of the Chinese cases' decided in the US Supreme Court, and Mr Isaacs suggested that its name was the one he had previously referred to, *Yick Wo v Hopkins*.

Mr O'Connor when giving notice that he would move that the provision that a state shall not deprive any person of life, liberty or property without due process of law be added by way of amendment to the motion then before the convention, said:[40]

> In the ordinary course of things such a provision at this time of day would be unnecessary; but we all know that laws are passed by majorities, and that communities are liable to sudden and very often to unjust impulses – as much so now as ever. The amendment is simply a declaration that no impulse of this kind which might lead to the passing of an unjust law shall deprive a citizen of his right to a fair trial.

In the course of the discussion Mr O'Connor's amendment occasioned criticism from the Honourable Mr Isaac Isaacs and others. Mr O'Connor asserted about the clause:[41]

> It is a declaration of liberty and freedom in our dealing with citizens of the Commonwealth. Not only can there be no harm in placing it in the Constitution, but it is also necessary for the protection of the liberty of everybody who lives within the limits of any State.

When asked by Mr Simon whether we did not have that under Magna Carta, Mr O'Connor replied: 'There is nothing that would prevent a repeal of Magna Charter by any State if it chose to do so.' When asked to give examples of any misuse of power in colonial legislatures which might indicate a need for the amendment, Mr O'Connor said that there were matters of history in these colonies which it is not necessary to refer to. Dr Cockburn drew attention to the fact that the Fourteenth Amendment was forced upon the southern states after the Civil War so as to ensure that southern planters would not deny the vote to African American inhabitants. He said:[42]

> I do not believe we shall ever have such a condition of things here as will necessitate such a clause in the Constitution. As it formed no part of the original Constitution of America, as it was only introduced by force of arms and not according to the legal limits of the Constitution, I do not think we should pay it the compliment of initiating it here.

Mr Isaac Isaacs opposed the clause on two grounds. First of all he drew attention to problems that might arise from the adoption of the language proposed (as to 'equal protection'), especially insofar as Factories Acts prohibited the engagement of Chinese labour instead of local labour, if the words 'the equal protection of all laws' were adopted from the language of the fourteenth amendment. He reverted to the case of *Yick Wo v Hopkins* where 'it was held by the Supreme Court that the ordinance of the San Francisco legislature was void, and they went on to say further, even if a legislative protection is fair and apparently equal on the face of it, it (i.e. the Act) will be declared void.' He went on: 'if that is so, to put it in plain language, our factory legislation must be void. It cannot expect to get for this Constitution the support of the workers of this colony or of any other colony, if they are told that all our factory legislation is to be null and void, and that no such legislation is to be possible in the future?' Mr Kingston asked: 'That is the special clause relating to Chinese?' Mr Isaacs replied 'Yes'.[43]

As to the due process provisions he said:[44]

> I understand that Mr O'Connor proposes to introduce that portion. What necessity is there for it? Under our State Constitutions no attempt has ever been made to subject persons to penalties without due process of law. That provision was likewise introduced into the American Constitution to protect the Negroes from persecution, and dozens of cases have been brought in the United States to ascertain what was meant by due process of law. At one time it was contended that no crime shall be made punishable in a summary way, but that in every case there would have to be an indictment and a trial by jury. That was overruled, and it was held that you might have process by information. If we inserted the words 'due process of law' they can only mean the process provided by the State law. If they mean anything else they seriously impugn and weaken the present provisions of our Constitution. I say that there is no necessity for these words at all. If anybody could point to anything that any colony had ever done in the way of attempting to persecute a citizen without due process of law there would be some reason for this proposal. If we agree to it we shall simply be raising up obstacles unnecessarily to the scheme of federation.

Dr Cockburn for South Australia argued that the words in question should not be inserted because they would be a reflection on our civilisation. He asked:[45]

> Have any of the colonies of Australia ever attempted to deprive any person of life, liberty or property without due process of law? I repeat that the insertion of these words would be a reflection on our civilisation. People would say 'Pretty things these States of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustice'.

Mr O'Connor said that he did not think there was presently any such protection. He added:

> We are making a Constitution which is to endure, practically speaking, for all time. We do not know when some wave of popular feeling may lead a majority in the Parliament of a State to commit an injustice by passing a law that would deprive citizens of life, liberty or property without due process of law. If no State does anything of the kind there will be no harm within this provision, but it is only right that this protection should be given to every citizen of the Commonwealth.

Dr Cockburn described the amendment as 'very necessary in a savage race'.[46] Mr Isaacs asked: 'What is the good of it? It is an admission that it is necessary.' Mr O'Connor remarked that Mr Clark of Tasmania thought the amendment of importance and pointed out that it had been put in the United States Constitution. Mr O'Connor added:

> It should also be put in this Constitution, not necessarily as an imputation on any State or any body of States but as a guarantee for all time for the citizens of the Commonwealth that they should be treated according to what we recognise to be the principles of justice and of equality.

Sir Edward Braddon (Tasmania) suggested that the clause as it stood was calculated to do more harm than good: 'It will cause friction between the states and the Commonwealth, and also involve considerable interference with the rights of the several states.'[47] A desire not to alienate state support may be discerned in others of the speeches against Mr O'Connor's motion.

The matter was put to a vote and those in favour of the

amendment proposed numbered 19. Those against numbered 23. Mr Edmund Barton voted in favour of the amendment together with Mr O'Connor, and Mr HB Higgins voted against it together with Mr Isaac Isaacs.

The conclusion seems to be that when it became necessary for the delegates to consider the inclusion of a due process provision in our constitution, they rejected it mainly on the ground that it was not necessary at all and that in effect the state legislatures could be relied upon not to infringe any such requirement. That view, in American terms, would assign the majority at the Melbourne session of the convention to the position originally adopted by the Federalist camp while in the relevant respect future Justices Barton and O'Connor agreed in some respects with the Anti-Federalists, and in effect with views espoused by Madison at the time he moved for the bill of rights amendments in the US Congress.

A significant problem with the stance taken by the delegates in the majority is that they seem both to have asserted that there was no need for any guarantee of due process and equality of treatment in relation to minorities, and also that then existing racially discriminatory legislation in relation to Chinese workers and indigenous persons ought not to be interfered with, because the factory legislation would be invalidated, and workers would not put up with it, and oppose the constitution itself. By contrast, Mr O'Connor expressed himself to be in support of the result arrived at in the case of *Yick Wo v Hopkins*. Mr Isaacs put the matter on to the need to get the constitution through. The assertion that there was no need to give the protection proposed by Mr O'Connor (most simply expressed by Dr Cockburn's reference to the protection being 'very necessary in a savage state') was not, in the debate, measured against the racially discriminatory legislation relating to factories. That seems to be plainly enough, legislation enacted by the representatives of the majority directed squarely against the minority. Pragmatic considerations about getting the constitution through were undoubtedly important. But to reject the O'Connor motion on the ground that the politicians could be trusted not to infringe fundamental rights seems very odd.

It was to be a very long time before Australia prohibited racial discrimination and the problem of state legislation of such a nature persisted until at least 1974. In that year, Queensland passed legislation directed against Aboriginal ownership of large tracts of land and, when sued under the *Racial Discrimination Act* 1975 (Cth), Queensland unsuccessfully attempted in the High Court to have the Act declared to be beyond the power of the Commonwealth in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

A faith at the time of the Constitutional Conventions in the belief that the new federal government could be relied upon not to behave oppressively may also, perhaps, be discerned in the watered down form of the right to jury trial which led to the language used in s 80 which committed the decision as to whether or not a jury would be summoned to the prosecuting authorities.

It is tempting to think that the absence of British tyranny in the dealings with the Australian colonies at the end of the nineteenth century helped to produce the result that the provisions of the bill of rights were largely put to one side at the time of the Constitutional Conventions. We had no recent experience of tyranny at the hands of the empire, and a large measure of self-government. But if that change had occurred by 1900 in the dealings of the imperial parliament, the same was all the more the case thirty years ago in the dealings between the British Crown and Canada. Yet no view such as was adopted at our Constitutional Conventions was taken in Canada in relation to what Canadians described as the 'patriation' of their constitution.

Canada

Canada is another country in which the rule of law was alive and well. Professor Hogg who has written successive volumes of his text *Constitutional Law of Canada* since 1977 (the most recent being a student edition printed in 2010) states in his 4th edition (1997, Toronto, Thomson Canada Ltd) that in order to give an account of the introduction into the Canadian Constitution (The *Canada Act 1982*) of the Charter of Rights it is necessary to refer to the role of the then

Canadian Prime Minister Pierre Trudeau. Professor Hogg says:

> The most prominent of the advocates of a bill of rights was Pierre Elliott Trudeau, who was elected to Parliament in 1965, became Minister of Justice in the Liberal government of Prime Minister Pearson in 1967, and became Prime Minister in 1968. His government, which remained in office with only one brief interruption from 1968 until his retirement in 1984, steadily sought to achieve provincial consent to an amendment of the Constitution which would include a new amending formula and a new bill of rights. That long quest culminated in November 1981 with an agreement which included nine of the ten provinces (Quebec dissenting), and which was followed by the enactment of the Constitution Act, 1982 of which Part I is the Canadian Charter of Rights and Freedoms. [48]

The British government agreed to pass the *Canada Act 1982* after its terms were agreed by the nine provinces and thus Canada obtained its (model (2)) constitutional bill of rights, which bound not only the Canadian parliament but also the provinces.

Mr Trudeau's writings disclose his reasoning process. In his memoirs, he makes reference[49] to having read a number of writers including T H Green in the course of his studies at the London School of Economics. He says that he acquired in those years a conviction that what was important was not the state but the individual.

To understand this reference, Green's work should be situated in its philosophical context.

The provisions of the United States Constitution naturally occasioned great interest among philosophers. Alexis de Tocqueville, writing in the early 19th century, published his analysis of the problem of democracy. In 1835 he published the first part of his influential work, *Democracy in America*. De Tocqueville described the real driving force of democracy as the passion for equality and expressed the fear that the passion for equality was as compatible with tyranny (by the majority) as well as with liberty. He thought that the democratic principle was prone, if left untutored, to a despotism never before experienced.[50]

Much of his analysis was taken up in Britain by John Stuart Mill, who in turn influenced political theory in Britain greatly, especially in the period 1860-1870. The historical sociology of democratic culture on which Mill relied to identify and explain the nature of the threat to liberty posed by democracy was lifted bodily from de Tocqueville's *Democracy in America*.[51]

Mill's *Essay on Liberty* described the struggle between liberty and authority. He said:

> Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant – society collectively, over the separate individuals who compose it – its means of tyrannising are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates; and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways and compel all characters to fashion themselves upon the model of its own.[52]

Mill exercised a dominant role in English thought especially between the years 1860 and 1870. His authority in English universities was compared after his death to that wielded by Hegel in Germany and by Aristotle in the Middle Ages.[53]

Among those who followed Mill and were influenced by him was T H Green, who lectured in the 1880s. He stressed the need of the state to preserve the individual's autonomy of choice but unlike Mill stressed that real freedom consisted in pursuing the right objects, and that one had a duty to take positive steps, including government action, to liberate other people's powers by giving them the opportunity for real freedom too. Freedom for Green had to be understood not in individual terms, but as what the members of a society could achieve co-operatively. Thus he supported a legal restriction on the liquor trade in order to prevent men, women and children from the danger done by

drunkenness. He presented this as a case of limiting '(the negative) freedom of contract of traders in the interest of the positive freedom of all'.[54] The thought of Green, and therefore indirectly of Mill and de Tocqueville, became important for its influence upon Canada's prime minister a century later.

Mr Trudeau was finally able to secure the agreement of nine of the ten Canadian provinces (but not Quebec) to the constitution (including the Charter of Rights) by a reluctant compromise: He agreed to the inclusion in the constitution of a clause permitting the Canadian government or the government of any provinces to override it in their respective statutes. This was the so-called 'notwithstanding' clause contained in section 33 of the Canada Act which provides that parliament (meaning the Canadian Parliament) or the legislature of a province may expressly declare in an act of parliament or of the legislature, as the case may be, that the act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7-15 of this Charter.

Speaking of his opposition to this clause, Trudeau wrote in his memoirs:[55]

> I saw the Charter as an expression of my long-held view that the subject of law must be the individual human being; the law must permit the individual to fulfil himself or herself to the utmost. Therefore, the individual has certain basic rights that cannot be taken away by any Government. So maintaining an unweakened Charter was important to me in this basic philosophical sense. Besides, in another dimension, the Charter was defining a system of values such as liberty, equality and the rights of association that Canadians from coast to coast would share.

As to the latter point he said:[56]

> Canadians have tended to say that they are French Canadians or English Canadians or Ukranian Canadians or whatever, or simply New Canadians. But what of Canada itself? With the Charter in place we can now say that Canada is a society where all people are equal and where they share some fundamental values based upon freedom.

The influence of the philosophical positions referred to earlier on the remarks made by Mr Trudeau is obvious. Trudeau had also, before entering politics, taught constitutional law in a Canadian university.

In his 2010 edition Professor Hogg brings up to date the use which has been made in Canada of the 'notwithstanding' clause. He says that Quebec always included the notwithstanding clause in its legislation until 1985, since it objected in principle to the Charter being made binding upon it, and that since 1985 it has used the clause twelve times. Quebec apart, however, the clause has only been invoked three times, twice by provinces and once by a territory. Thus seven of the ten provinces and two of the territories have never used the clause and nor has the Canadian Parliament.[57]

The Charter of Rights protects freedom of conscience and religion; freedom of thought, belief, opinion and expression including freedom of the press; freedom of peaceable assembly; freedom of association; freedom of mobility, residence in any province and to pursue the gaining of a livelihood in any province; the right to life liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice; the right to be secure against unreasonable search or seizure; certain rights arising upon arrest; the right not to be subjected to cruel and unusual punishments; the privilege against self-incrimination; the right to equality before the law.

There were certain features of the Canadian situation that called for the protection of minorities, including in particular the French Canadians. One of the rights guaranteed by the Charter is the right of English or French linguistic minority populations in a particular province to have their children receive primary and secondary school instruction in that language. Other language rights are conferred by the Charter. The presence of those language rights motivated reform, and provided an opportunity for the inclusion of the Charter of Rights as a whole.

Professor Hogg observed with respect to the Canadian Charter of Rights (and the same could be said of the US Bill of Rights) that: [58]

> The Charter will never become the main safeguard of civil liberties in Canada. The main safeguards will continue to be the democratic character of Canadian political institutions, the independence of the judiciary and a legal tradition of respect for civil liberties. The Charter is no

> substitute for any of these things, and would be ineffective if any of these things disappeared. This is demonstrated by the fact that in many countries with Bills of Rights in their Constitutions the civil liberties which are purportedly guaranteed do not exist in practice.

An Australian Response to model (2) adopted in Canada

Australia has by and large relied upon the 'main safeguard' to which Professor Hogg refers. The present state of affairs in Australia has not, however, been free of criticism. See, for example George Williams', *A Charter of Rights for Australia.* He identifies as major blemishes on Australia's human rights record the failure to protect indigenous people, the homeless, people with a mental illness, children and immigrants, laws on the topic of mandatory sentencing, the right to vote, laws restricting freedom of speech, and anti-terrorist laws.[59] The recommendations of the Australian Human Rights Consultation also involve serious criticism of the current lack of comprehensive protection of rights.

Another significant criticism of the absence of a bill of rights in this country was made by the Honourable Michael McHugh AC QC, in his speech (now published on the New South Wales Bar Association website) entitled 'Does Australia Need a Bill of Rights?' Mr McHugh there reviews existing rights protections in this country and expands upon a view which he expressed on the bench in *Al-Kateb v Godwin* (2004) 219 CLR 562: See in particular [73] at pages 594-595. The circumstances which led to that litigation (indefinite detention with no prospect of release for a stateless man who came here without a visa) certainly sounds like a cruel and unusual punishment, something which the Canadian and United States bills of rights (drawing upon Magna Carta) would make impermissible. Mr McHugh describes himself in the speech as a late convert to the bill of rights.

The Hawke Government established the Constitutional Commission which reported on 30 June 1988. It consisted of Sir Maurice Byers CBE QC, the Honourable E G Whitlam AC QC, the Honourable Rupert Hamer KCMG (former Liberal premier of Victoria), Professor Enid Campbell OBE and Professor Leslie Zines. The final report[60] is a very scholarly document which is held in high regard among constitutional lawyers. The present solicitor-general for the Commonwealth rightly remarked when delivering the annual Sir Maurice Byers address for the NSW Bar Association[61] in 2009 that it should form part of every constitutional lawyer's library. In volume 1 of the report consideration is given to international treaties which Australia has ratified, and to the Canadian position in particular. The report recommended that a range of human rights closely similar to those specified in the Canadian Charter of Rights should be incorporated into our constitution. The report recommends that a new chapter be inserted into the constitution which would guarantee:

- freedom of conscience and religion;
- freedom of thought, belief and opinion; and of expression;
- freedom of peaceful assembly and of association;
- the right of every Australian citizen to enter, remain in and leave Australia;
- freedom of movement and residence in Australia for everyone lawfully within Australia;
- freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief;
- the right not to be subjected to cruel, degrading or inhuman treatment or punishment, or to medical or scientific experimentation without the subject's consent;
- the right to be secure against unreasonable search or seizure;
- the right not to be arbitrarily arrested or detained, and certain other rights when a person has been arrested or detained;
- the rights of a person arrested for an offence and the rights of a person charged with an offence; and
- that no one shall be liable to be convicted of an offence which did not constitute an offence when it occurred.[62]

The reasoning of the committee is detailed and measured. The report also recommends that existing

freedoms, relating to trial by jury, property rights and freedom of religion be extended in a number of respects. The right to jury trial should, the committee recommends be extended to all serious crimes, and not only to crimes punishable by Commonwealth law.[63] It recommended that the guarantee of just terms in s 51(xxxi) should be extended to the states and territories.[64] It reported that freedom of religion should be guaranteed in the states and territories, and should be extended to overcome the result of a number of High Court decisions about the existing guarantee.[65]

Events overtook the final report in that the Hawke Government elected to put certain limited proposals to a referendum in a desire to achieve constitutional amendments at the time of the 1988 Bicentennial and the referendum failed. The report has not subsequently been the subject of action by any government.

The report suggests answers to a number of possible objections to the inclusion of a bill of rights in our constitution including particularly the objection which is often put forward that judges may not be competent or reliable enough to interpret bills of rights provisions.[66] The same question occupied some 90 minutes of televised debate in Canada before the Charter of Rights was finalised.

The report also proposes an answer to the criticism that to give such a role to the High Court might politicise the judiciary. If any future government desires to consider questions relating to the bill of rights, this report should clearly be given serious consideration.

Having set out an account of the suggested objections to judicial review[67] the report continued:

> 9.132 There emerges, therefore, the problem of the legitimacy of judicial review. At its broadest, the argument is that the attempt to transfer controversial issues relating to rights from the sphere of politics to the more benign realm of law is mistaken in principle. As Professor JAG Griffith wrote in 1979, 'law is not and cannot be a substitute for politics'. In his view, such devices as the constitutional entrenchment of rights 'merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a Supreme Court to make certain kinds of political decisions does not make those decisions any less political'.
>
> 9.133 Griffith writes from a radical standpoint. However, the critique of judicial review is by no means the exclusive property of the Left. Liberal Party politician, Mr JM Spender QC, MP, speaking at a conference on Human Rights in 1986, noted 'the immense difficulties that can be encountered when you pass laws, dealing with rights which are so vague in content that the interpreters and the creators of the rights become the courts'. In his view:
>
> > If you want the courts to be creators of rights in a very general sense, that is one thing, but that is very different from our system, and I'm not at all sure that I want that to happen. I believe that the creators of rights should be Parliaments, clearly expressing their intent in statutes which are as precisely drawn as possible.[68]
>
> 9.134 The point is not to deny legitimacy to the judiciary, but to decide upon the appropriate judicial functions in the protection of human rights. Even their sternest critics sometimes admit that the courts present a valid forum for reasoned debate on matters of principle, very different in nature to that offered by Parliament. Amongst other things, the courts provide a forum in which the circumstances of individual cases are of paramount concern. This does not dispel the distrust of the judicial review function held by many of those who are in broad sympathy with the objects of entrenched rights and freedoms, but who, nevertheless, are opposed to the idea of entrenchment.
>
> 9.135 What case then is there to support the legitimacy of judicial review as an integral part of constitutional guarantees?
>
> 9.136 We have already stated that fundamental to liberal democracy is the attempt to reconcile the principle of majority rule with a concern for individual rights. Democracy in this respect is designed not only to reflect the will of the majority, but also to protect the rights of minorities and to ensure that there are adequate checks and balances against the misuse of official power.[69] It can be argued that an independent judiciary determined to interpret the Constitution generously, avoiding 'the austerity of tabulated legalism', is essential to this scheme.[70] The following points can be made in support of the judiciary's role in enforcing constitutionally entrenched rights:
>
> > (a) The Australian judiciary has the confidence and trust of the people and it will be seen popularly as the appropriate body to act as a human rights 'watchdog'. Historically, the High Court has acted in an independent and responsible manner. There is no reason to suppose that in the new circumstances, it will abandon this approach or that it will compromise its impartiality in any way.

(b) The judicial process itself has many advantages in relation to the function of a human rights 'watchdog'. For example, the publicity which will inevitably accompany litigation involving human rights will ensure that the moral and educative purpose of entrenching rights in the Constitution will be realised. The doctrine of binding precedent will further ensure that a declaration made in one case will benefit many other people whose cases will not need to be litigated.[71]

(c) It is an effective system for the protection of rights because politicians and administrators will be restrained from formulating policies and laws which they know will be contested in the courts.

(d) While it is accepted that the new role envisaged for the courts involves a change in our constitutional arrangements, the extent of the change involved needs to be kept in perspective. The claim that judges, in enforcing constitutionally entrenched rights, will be performing a function essentially different from that which they now perform is to overstate the case. According to the Victorian Parliament's Committee on Legal and Constitutional Affairs, in Australia generally 'we are comparatively used to judicial review to prevent these bodies from 'adversely affecting human rights would probably not involve the same degree of intellectual trauma as might be experienced in a legal system where Parliament enjoys unbounded sovereignty, such as that of the United Kingdom.[72] Indeed, since Federation, the High Court has often engaged in judicial review of politically controversial matters, for example, in its interpretation and application of section 92 of the Constitution. Furthermore, in interpreting legislation and applying the common law, judges generally do adjudicate questions of civil liberties.[73] To some extent, judges already make evaluative choices and influence the share and content of the laws.[74] With the constitutional entrenchment of rights, they would have more opportunity to do so, but there is no suggestion that judges will approach the task in an irresponsible or naive way.

(e) In Australia, the power of judicial review will only be granted to the judges if the people so decide at referendum. Any argument which holds that judicial review is undemocratic would be severely weakened if the Constitution is amended. It could be argued, indeed, that the courts would only be enforcing the will of the people.

(f) Similarly, if the argument that the protection of individual and minority rights is a fundamental aspect of liberal democracy is accepted, then the case for the legitimacy of judicial review is further strengthened. This is especially so if it also agreed that the judiciary is an appropriate forum for the adjudication of hard cases involving conflicts between individual rights and social policies or collective interests.

(g) The judiciary will often be in a better position to decide these hard cases in a principled and rational way than a legislature. A judge of an independent judiciary is insulated from the demands of a political majority whose interest the asserted right would affect and so is in a better position to make an impartial evaluation of the arguments.[75] 'Because they are not compelled by electoral self-preservation simply to reflect existing community moral values and prejudices, judges are free to move forward to a more enlightened viewpoint on a controversial subject. They can stake out a position that the people may well accept once they see it spelled out, but that an electorally accountable body would have been loath to risk proposing in the face of current attitudes.'[76] Furthermore, howsoever it decides, a court is expected to offer reasoned justification for its decision.

(h) When courts come to decide issues arising under constitutional guarantees of rights and freedoms, they are concerned primarily with the circumstances of individual cases. Parliaments, in contrast, are concerned with the making of general rules, and in formulating them may not always appreciate how they will work out in practice. Parliaments may, by inadvertence rather than design, enact legislation which trespasses unduly on individual rights and freedoms. Judicial review of parliamentary legislation in the context of concrete cases will often prompt parliaments to review their legislation in the light of the judicial findings.

(i) Finally, the ability of parliaments to perform a 'watchdog' function with respect to legislation and administrative action is far more restricted in fact than the theories of parliamentary sovereignty imply. Problems of time, complexity and the domination of legislatures by executives generally are among the factors which mitigate against a parliament closely monitoring such things.

9.137 Were the courts to be required to undertake the function of interpreting and enforcing new constitutional guarantees some modifications in their approach to the judicial review function might well be considered desirable. For example, a more liberal approach to appearance of persons as amici curiae might be thought desirable;[77] likewise, changes in rules regarding what facts may be judicially noticed and established.[78]

When discussing whether, and if so how, the rights in question should be set out in the constitution, the

report looked at the matter from the point of view of the electorate, rather than of the government. The report explains the basis on which the committee proceeds:

> 9.98. First, we have taken the view that if the electors were to agree that certain rights and freedoms are sufficiently important to merit constitutional protection, they are unlikely to accept that the protective provisions should be capable of alteration otherwise than in accordance with the present procedures which apply to alterations of other provisions of the constitution.
>
> 9.99 Secondly, we have also considered it unrealistic to suppose that electors would wish to have rights and freedoms guaranteed under the Constitution, but then denied the facility to seek enforcement of the constitutional guarantees to the same extent as they can presently seek enforcement of other provisions of the Constitution. In other words, we have proceeded on the basis that constitutional entrenchment of further rights and freedoms would attract the processes of judicial review evolved since Federation.

A matter upon which the commission differed[79] was whether the 'notwithstanding' clause of the Canadian Constitution should be incorporated into the Australian Constitution as part of the bill of rights provisions. Interestingly it was Professor Enid Campbell and Professor Leslie Zines who thought that such a provision should be included, and Sir Maurice Byers, Mr Whitlam and Sir Rupert Hamer took the view preferred by Mr Trudeau that it should be excluded. The majority recommended model (1) and the minority recommended model (2).

Mr Trudeau had to accept the 'notwithstanding' clause in order to secure the consent of those provinces (other than Quebec) that had until then been opposed to the Charter on the ground that it limited the sovereignty of their legislatures.[80] Despite the objection of Quebec, the imperial parliament agreed to make the Canada Act binding throughout Canada.

Interestingly, MrTrudeau himself had found it necessary to suspend the Bill of Rights, which was legislation (in a model (3) form) introduced by his government in 1968 before the Charter. There was a national emergency when, in 1970, a politician and a British diplomat were kidnapped by Quebec Nationalists and it was desired by his government to introduce martial law for a period of time. This his government did with the War Measures Act of 1970. This was no doubt a matter with which he was taxed when he opposed the 'notwithstanding' clause in the Charter.

The matter which divided the Byers Commission is likely to be a very important matter when, if ever, serious consideration is given to the introduction of a bill of rights into our constitution. The power to override is not one which only the federal government may insist upon. A bill of rights in model (1) or (2) must surely also affect the states. The states could today by ordinary statute passed under s 6 of the Australia Acts entrench bill of rights clauses in their constitutions, but there is no hint that any of them wishes to do so, and the only charter of rights legislation which has been put in place so far, in Victoria and the ACT, is legislation which fits within model (4), which not only gives the final say to the parliament, but denies a power of nullification to the courts. A recognition that governments (especially ones considering the amendment of the constitution to add a bill of rights) would be vitally concerned about sovereignty, and might refuse to propound the bill of rights if it were suggested to take the form of model (1) may have influenced the minority view in the Byers Commission. If there is to be a power of overriding, a solution which would go some way towards the preservation of the most important features of a bill of rights may be to limit the power of overriding to cases such including national or state emergency, with, or perhaps even without, a power of judicial review of the occasion for its exercise. Even a non-reviewable limitation would at least permit a government to be held to public account for an abuse of the power. In any event, if the Canadian experience provides any guide, governments in this country may be sparing in their use of any power of overriding which may be included.

Endnotes

1. See Byrnes, Charlesworth and McKinnon, *Bills of Rights in Australia* (UNSW Press, 2009) at 110-111.
2. Quoted by Labunski, *James Madison and the Struggle for the Bill of Rights* (New York, Oxford University Press, 2006) (hereafter Labunski) at p.15.
3. See Garry Wills, *James Madison* (New York, Times Books, 2002) (hereafter Wills) at p.27.
4. This suggestion is made by Wills, at p.36.
5. Labunski, at p.4.

6. This seems to have been inspired by his experience in his student days at Princeton, where religious freedom was practised and defended; and by a disgust at the imprisonment of Baptist preachers at the instance of the established (Anglican) church in Virginia: See Wills at pp. 15-18.
7. Ralph Ketcham in his introduction to the collection entitled *'The Anti-Federalist Papers and the Constitutional Convention Debates'*(Signet Classic, 2003) p.3.
8. Quoted by Labunski, at p.9.
9. The supremacy clause, Article VI.
10. Labunski, at p.9.
11. See Labunski, at 13, 15-22.
12. See Wills, at 29-30.
13. Federalists 38,44,46 and 48.
14. In a letter republished in the collection referred to in n7 at pp 194-198, 195-196.
15. Published in the same collection referred to in n7 at 228-237.
16. At 236.
17. *Op. cit.* at 44-45.
18. Reprinted in *The Complete Anti-Federalist*, ed. Herbert J. Storing (University of Chicago Press, 1981) volume 4 at 270-287, especially at 276. The identification of the author is referred to by Storing at p.270.
19. Patrick Henry, who was Madison's main Anti-Federalist opponent at the Virginia convention which resolved to ratify the Philadelphia Convention document, and others remained dissatisfied with the amendments: see Wills at p.40.
20. Labunski, at p.28.
21. For example, see Labunski, chapters 4 and 5 and sources there cited.
22. Labunski at p. 101.
23. See Labunski, at p.66.
24. Wills, at p.39.
25. In Virginia, 80 were in favour and 88 against a motion calling on the Congress to propose, inter alia a declaration of rights to the States before ratification: Labunski at p. 112.
26. Labunski at p. 62 n60 and sources there cited.
27. Labunski at p. 167-171.
28. Labunski at p.190 describes this as Madison's primary motive for the introduction of the amendments.
29. Labunski at p. 227.
30. Labunski's appendices at pages 265-280 trace the history of the amendments from those proposed by Madison until final ratification.
31. The history of the ratification is traced in Labunski, chapter 10.
32. Friedman, *The Will of the People (*Farrar, Strausand Giroux, New York, 2009) at p.14.
33. 32 ALJ at p.65.
34. Quick and Garran, The Annotated Constitution of the Australian Commonwealth (reprinted by Legal Books 1995) at p.951.
35. I am indebted for the reference to this topic of debate to the work of Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia History Politics and Law* (University of New South Wales Press 2009 at 25).
36. Cited at pages 667 of the Official Record of the Debates of the third session of the Australian Federal Convention, Melbourne 1898.
37. Ibid at pp 668-669.
38. Ibid at p. 673.
39. Also at p. 673.
40. At p.683.
41. Also at p.683.
42. At p.686.
43. The remarks of Mr Isaacs and the interchange with Mr Kingston are at p.687.
44. At pp. 687-688.
45. At p.688.
46. At p.689.
47. At pp. 689-690.
48. *Op. cit*. at page 800.
49. At page 47, Pierre Trudeau, *Memoirs* (McClelland and Stewart, Toronto, 1993).
50. *History of Political Philosophy* edited by Leo Strauss and Joseph Cropsey, Chicago 1987, p. 763.
51. See Alan Ryan, *Mill in a Liberal Landscape*, printed in the *Cambridge Companion to Mill* edited John Skorupuski (Cambridge 1998) at p.499
52. John Stuart Mill *On Liberty* printed in JS Mill *On Liberty and Other Writings* (Cambridge 1989) at p.8.
53. See Skorupski's introduction to the collection referred to in n38 at p.1.
54. See Peter Nicholson, *The Reception and Early Reputation of Mill's Political Thought* (printed as part of the collection referred to in n51 at pp. 484-485).
55. At p.332.
56. Ibid.
57. PW Hogg, *Constitutional Law of Canada* (2010 student edition) (Toronto, Carswell Books,2010) at paragraph 39-4.
58. Hogg, *(*1997 edition), at p.802.
59. George Williams, *A Charter of Rights for Australia,* (UNSW Press, 2007) at 14 and 18-32.
60. *Final Report of the Constitutional Commission*, 2 vols, Australian Government Publishing Service, Canberra, 1988.
61. The paper is printed in *Bar News* (Winter 2009) available on the website of the NSW Bar Association.
62. Chapter 9 of the *Final Report*.
63. Paragraph 9.745.
64. Paragraph 9.747.
65. Paragraphs 9.784-9.834.
66. Paragraphs 9.126-9.137.
67. Paragraphs 9.127-9,131.
68. John Spender 'Politics, Power and a Bill of Rights', L Spender (ed) *Human Rights: The Australian Debate* (1987) 246, 251-2.
69. J McMillan et al, op cit, 335.
70. A Bill of Rights for New Zealand, 44-5.
71. J McMillan et al, op cit, 333.
72. *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*, 92.
73. J McMillan et al, op cit, 335.
74. Consider, for example, the manner in which courts have, in recent times, re-shaped the principles according to which they review administrative action, and, in particular, extended the application and scope of the principles of natural justice.
75. R Dworkin, *Taking Rights Seriously*, (1977) 85.
76. PC Weiler, 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 18 *University of Michigan Journal of Law Reform* 51, 71-2.
77. See Australian Law Reform Commission, *Standing in Public Interest Litigation* (1985) 153-5, 159-61.
78. See Appendix M, 'Fact Finding in Constitutional Cases'.
79. Paragraph 9.212.
80. Hogg *op. cit*. at page 908.