IN CELEBRATION OF THE CONSTITUTION[*]

by P A Keane[†]

The Constitution of the Commonwealth of Australia, despite its importance at the heart of our nation, is rarely regarded as a cause for celebration. The boundless pride of citizens of the United States of America in their country's Constitution, contrasts with Australian reticence about the value of our nation's founding instrument. The absence of a Bill of Rights from the Australian Constitution seems to be the principal matter of disappointment and regret. The exclusion of a Bill of Rights from Australia's Constitution was not an oversight; drawing upon the experience of the United States of America, this paper seeks to defend this crucial choice by our Framers. The Australian Constitution provides a framework based on the acceptance that all our citizens are equal in terms of political wisdom. A Constitution which promotes responsibility of the people for their own destiny, and a modest role for the judiciary in that regard, is not to be lamented but celebrated.

The genesis of my topic lies in the suggestion of Aladin Rahemtula that, while the pride of citizens of the United States of America in their country's Constitution knows almost no bounds, Australians tend to be reticent about our nation's founding instrument. There does seem to be a view that, in comparison with the magnificent and much admired American eagle, we have only a small brown bird which, it seems, rewards its study with only the bleak consolation that: "'Tis a poor thing but 'tis my own."

There is no getting away from the modesty of the document, both in form and in substance. It does not announce itself to an amazed world as the self-executing resolve of: "We the People". It is, in sober historical fact, a schedule to an enactment of the Imperial Parliament at Westminster. And, most importantly, it does not contain a Bill of Rights which guarantees the freedom of the individual from tyrannous government, whether that tyranny be of the few or of the many.

Many Australians see this difference between the two Constitutions as a cause for regret, and have urged the adoption of our own Bill of Rights. Some Australian lawyers seemed to feel that they weren't playing in the major leagues without one. About fifteen years ago, there emerged an argument that there is a Bill of Rights implicit in the document or the common law which suffuses its provisions. The feeling seemed to be that, although we had not previously noticed that we had a Bill of Rights, all we needed to do to discover it was to listen very carefully to hear the

---

[*] An address to the National Archives Commission, 12 June 2008.

[†] Judge of Appeal, Court of Appeal, Supreme Court of Queensland.

voices speaking to us from between the lines of the constitutional text.[1] Not surprisingly, enthusiasm for this view seems to have waned; and the current debate is now more focused on the idea of a statutory Charter of Rights. This debate raises quite different issues from those raised by constitutional limitations on legislative power, so I won't enter into that debate.

On this occasion, the manuscripts of the document which our Founders produced remind us of the work of the Griffiths, Kingstons, Inglis Clarks and Bartons in forging a nation out of colonies far from the Mother Country. It was a great achievement.

In today's setting, it is only fitting that we should take a moment to reflect upon the merit of their work, particularly in relation to their decision not to include a Bill of Rights.

The first point to make here is the obvious one, that this great difference between our Constitution and that of the U.S.A. was not a matter of oversight.

Responsible Government

The model of government which dominated the thinking of the Framers was that of a sovereign legislature and a responsible executive government.[2] The tutelary spirit of our Constitution was not Montesquieu, but Albert Venn Dicey. The absence of a Bill of Rights was of a piece with their choice of responsible government rather than a thoroughgoing separation of powers.

Our Framers were not indifferent to the rights of individuals; they were, however, content to entrust those rights to a legislature composed of citizens with an equal stake in individual rights as a check upon executive governments which depended for their existence upon the continuing confidence of the legislature. In 1901 Professor Harrison Moore wrote of our Constitution:

> "The great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power."[3]

The assumption of the Australian Constitution is that, as a matter of practical politics, the participation of all members of what they saw as a community of diverse interests was likely to ensure a practical respect for the rights of others on the part of those who, upon a particular issue or range of issues, might find themselves in the majority in the legislature. Our Framers made the brave judgment that the prospect of a tyrannous majority, of so much concern to members of persecuted minorities, was a chimera in a polity in which there were no rigidly defined social strata and antagonistic societal groupings. In such an historical context, today's minorities will often coalesce into tomorrow's majority. And a majority on today's issue has a powerful interest in not dealing unfairly or disrespectfully with those who may form tomorrow's majority on a different issue.

---

1 Cf *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 403; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 689; Toohey, "A Government of laws, and not of men?" (1993) 4 PLR 158 at 160,165 – 168, 170.

2 Cf *Attorney-General (Cth) v The Commonwealth; Ex rel McKinlay* (1975) 135 CLR 1 at 24.

3 Harrison Moore, "The Constitution of the Commonwealth of Australia", 1st Ed (1902) at 329.

Our Framers' historical judgment was that differences in social, economic and political views would not fall consistently into a rigid alignment so that the essential requirement for a tyranny of the majority did not exist and would not develop. As Sir Owen Dixon said of the Framers' unwillingness "to place fetters upon legislative action":

> "The history of their country had not taught them the need of provisions directed to control of the legislature itself."[4]

So the first thing to note about the Australian Constitution is that it was deliberately crafted to embody an ideal of responsible government and representative democracy in which each citizen participates equally with all others. And this democracy should be trusted to operate without the check upon legislative experimentation which might have been imposed by a Bill of Rights mediated through an (unelected) judiciary. According to this ideal, our democracy is left largely free to make of itself what it will. If the essential character of the U.S. form of democracy can be described shortly as "republican", the Australian democracy might be described as "existentialist".

In embracing this ideal our Framers were taking a gamble on the political wisdom of future generations. They were, at this same time, exhibiting a modest appreciation of their own wisdom. If there is one sentence in all the learned writings about the U.S. Constitution which resonated with the Framers of our Constitution, it is, I suggest, the statement by Chief Justice Marshall in *McCulloch v Maryland*[5] when he spoke of "a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." In a similar vein, Marshall's cousin, and political opponent, Thomas Jefferson, wrote from Paris to James Madison less than two months after the fall of the Bastille: "No society can make a perpetual Constitution or even a perpetual law. The earth belongs always to a living generation."[6]

We have been fortunate that our Framers acted upon this modest view of their own wisdom. Had they not been so modest, there was one principle which would almost certainly have found its way into an Australian Bill of Rights in 1901, as a fetter upon the existential choices of future generations: the White Australia Policy.

The work of the Framers of the Australian Constitution reflects an acceptance of the view that, in ages to come, the country would be confronted by crises, the nature of which could not be foreseen and the solutions for which could not be predicted. Those crises could only be resolved by the collective wisdom of the people of that time. The choices which that generation might make should not be fettered by the supposed wisdom of the past.

Some wise Americans agree. Reviewing more than 150 years of the operation of the US Constitution, Judge Learned Hand, the greatest American judge never to sit upon the Supreme Court, wrote:

> "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of

---

4 Owen Dixon, "Two Constitutions Compared", *Jesting Pilate* (1965) at 102.

5 17 US (4 Wheat) 316, 415 (1819).

6 Thomas Jefferson, Letter to James Madison from Paris, September 6, 1789.

> men and women; when it dies there no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."[7]

And so, to sum up on my first point, our Framers' choice not to fetter legislative experimentation by a Bill of Rights enforced by the unelected judiciary, was not a slip of the pen, but a deliberate choice to embrace an ideal of democracy which reposes a great responsibility on the citizenry to act justly towards their fellows, and confides in the intelligence and decency of that citizenry as the best guarantee that this responsibility will be discharged.

The judiciary

The second thing that should be said about the choice made by the Australian Framers is that it has made it easier for our judiciary to maintain the confidence of the public in the work of the judges as the non-political arm of government.

To require judges to interpret the broad language of the Bill of Rights is to make politicians of judges. Judges of the U.S. Federal and Supreme Courts are called upon by the broad political language of the Bill of Rights to make what are essentially political judgments the truth of which are not amenable to demonstration by reference to evidence or predetermined rules.

The sloganistic language of much of the Bill of Rights gives rise to tensions between politically desirable ends. As Professor Paul Freund said, great constitutional controversies "reflect not so much a clash of right and wrong as a conflict between right and right: effective law enforcement and the integrity of the accused; public order and freedom of speech, freedom of worship and abstention by the State from aiding as well as impeding religion."[8]

The judiciary inevitably become politicised by the necessity to resolve conflicts between right and right by seeking to apply the open-textured statements in the Bill of Rights as tests of the legality of the will of the representatives of the people.

The choice of judges to carry out this task becomes, in turn, a matter of heated political controversy. That is not conducive to the preservation of the confidence of all sides in the work of the judiciary. In particular, the spectacle of nominees to the U.S. Supreme Court being questioned on the course of confirmation hearings in the Senate about their attitudes to abortion and the relationships between Church and State must inevitably harm public confidence in the independence of the judiciary from partisan politics.

It is difficult to say which is worse, the fact that a judge's appointment may depend on his or her personal opinions about subjects on which every citizen is entitled to a personal opinion which is no-one else's business, or that the nominees have been driven to pretending that they have no opinions about these issues because if they do have an opinion it really is everyone else's business.

---

7 Judge Learned Hand, "The Spirit of Liberty" (1974, 3rd edition) at 189 – 190.

8 Paul A Freund, "Constitutional Dilemmas", 45 B.U.L. Rev 13, 22 (1965).

What is tolerably clear though, as a matter of history, is that the Religious Right, perhaps galvanised into action by decisions of the Supreme Court which gave an unduly broad interpretation to the First Amendment prohibition on laws "respecting an establishment of religion or prohibiting the free exercise thereof",[9] now exercise a degree of influence over the appointment of all Federal judges which is truly alarming to those who cling to the post-Enlightenment idea of the secular state. And that influence is not limited in U.S. politics to the appointment of Federal judges. The electoral system itself is now, in large degree, held hostage to the fundamentalist intolerance of a strategically placed minority of voters.

Apart from the tendency of the U.S. arrangements to turn judges into politicians, there is also the problem that judges, required to mediate the broad language of the Bill of Rights, tend to turn into poets. Plato, of course, had no place for poets in his Republic. He would have been particularly concerned by the flights of poetic fancy which the enforcement of the Bill of Rights has elicited from some U.S. judges.

This point can be illustrated by reference to the role of the U.S. Supreme Court in relation to the issue of abortion?

The American Supreme Court's 1973 decision in *Roe v Wade*[10] was based on the proposition that the right to privacy extended to "encompass a woman's decision whether or not to terminate her pregnancy"[11] so as to render invalid a State law prohibiting abortion. This extension of the right of privacy was subject to the possibility that there might be a "compelling state interest"[12] in limiting the efficacy of the right to privacy to invalidate State law.

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v Casey*,[13] the Supreme Court considered the content of the "compelling state interest" limitation upon the power of the right of privacy to trump the laws of the States.

What the judges were doing was seeking to provide content to a judge-made exception to a judge-made principle. I pause to note that this does seem a long way from the judicial function as it is ordinarily understood in the common law tradition.

The decisive opinion in the case was that of Justices Souter, O'Connor and Kennedy. Their Honours supported the implication of the constitutional right to privacy by reference to a view of individual liberty, the content of which Kennedy J explained in the following terms:

> "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[14]

---

9 Cf *West Virginia Board of Education v Barnette*, 319 US 624 (1943).

10 410 US 113 (1973).

11 *Roe v Wade*, 410 US 113 (1973) at 153.

12 *Roe v Wade*, 410 US 113 (1973) at 154.

13 505 US 833 (1992).

14 505 US 833 (1992) at 851. Somewhat more sober is the statement by Professor Freund: "What must be cherished and secured above all – what the Constitution means to be secured – is human personality. Its cultivation is both a civic necessity and a spiritual duty. The right to be oneself, to differ in thought and word, to express one's non-conformity in peaceable persuasion, to be treated by one's fellows wielding public power as a rational subject and not a mere object, to be treated

What do you make of that? Whatever you think of the outcome of the case, you might think that the passage I have cited provides an elusive basis on which to determine the validity or invalidity of laws passed by the elected representatives of the people.

More broadly, one is led to ask how this notion of individual liberty can operate at all in a political context. What if my understanding of my own concept of existence, of meaning, of the universe and the mystery of human life requires me to act to deny others the opportunity to act upon their own understanding? That is, after all, what Justice Kennedy did. Because he was one of a majority of justices of the ultimate appellate court, his view of the meaning of the universe and the mystery of human life was able to trump the different view of many of his fellow citizens and become the law of the land.

Poetic visions have not tended to provide a satisfactory basis for ordering society. Not all of us like the same poems. The great legacy of the Enlightenment is that no-one is entitled to insist that the rest of us must like the same poems that he or she likes, much less that we must, under legal compulsion, order our lives in accordance with them. While a shared adherence to a common set of values is, no doubt, a wholesome force for societal coherence, after the Enlightenment, no-one can claim to insist that the power of the State should be harnessed to enforce his or her visions derived from the poetry of the Bible, or, for that matter, the Koran.

I am sure that it is unnecessary for me to remind this audience of what became of St Luke's charming parable[15] of the rich man whose invited guests did not come to his dinner and so he sent his servants out into the highways and hedges to bring in the poor and the maimed and the lame and the blind to enjoy the feast. This parable can be seen to illustrate the love of God for all of us, no matter how degraded we may be.

St Augustine fixed on two words of the Latin version of the parable, *impelle intrare*: compel them to come in. He saw them as God's statement that love requires his servants to compel infidels and heretics to come into the Church rather than allowing them to go their own way. It was this idea which justified Charlemagne's murderous conversion of the Saxon tribes. Later, it was the watchword of the Inquisition in which the Dominicans loved everyone so much that they were conscience-bound to bring the unwilling to share in the joy of the true faith by the most ferocious means.

Such can be the power of poetry; but it is unlikely that the poetic vision articulated by Kennedy J will endure long enough to cause any serious harm.

By 2003, in the case of *Lawrence v Texas*,[16] Justice Antonin Scalia had taken to referring to this reasoning scathingly as the "sweet-mystery-of-life passage".[17] One

---

even-handedly … rights of Englishmen, and retransformed in eighteenth century America into rights of man, remain the central concern of a civilisation torn between the angel and the dynamo." Paul A Freund, "Individual and Commonwealth in the Thought of Mr Justice Jackson", 8 Stan L Rev 9, 23 – 24 (1955).

15 Luke 14, 16 – 24.

16 539 US 558 (2003).

17 539 US 558 (2003) at 588.

might expect that Justice Kennedy's rhapsodic statement will not long enchant a majority of the Court.

Justice Scalia is, as you all know, the Supreme Court's leading advocate of the originalist approach to constitutional interpretation. That is the theory of constitutional interpretation which looks to interpret the Constitution by reference to contemporary evidence of what the Framers, or some of them, really meant. It has its problems. I want to mention only two of them.

One can understand that a judge might seek refuge from the open-ended uncertainty of the broad statements in the Bill of Rights by fastening upon statements of intent by the Framers; but to look to the statements of men, most of whom were dead before the Industrial Revolution began in earnest, for a definitive statement of how life in the Post-Industrial Age and a global community should best be organised does seem unduly optimistic. Why, for example, would one expect that the notion that what was "usual" in 1783 for the purposes of the Eighth Amendment prohibition upon "cruel and unusual punishments", would remain "usual" in 2008.

Secondly, to look at statements made by some only of the Founders, extrinsic to the constitutional text, in order to understand what the text means, is to assume a level of unanimity among the Founders about matters on which they did not **express**, and may well not have held, a unanimous view.

The principal draftsman of the U.S. Constitution, the redoubtable Gouverneur Morris, himself rejected the idea of trying to resolve uncertainties by looking at the contemporaneous statements of the Founding Fathers outside the constitutional text. In 1803 he wrote the following in a letter replying to a query about the intent of the Framers of the U.S. Constitution on a particular point:

> "It is not possible for me to recollect with precision all that passed in the Convention while we were framing the Constitution; and, if I could, it is most probable that meaning may have been conceived from incidental expressions different from that which they were intended to convey, and very different from the fixed opinions of the speaker."[18]

Anyone who has experience of the process of producing a document in committee will appreciate the force of what Morris wrote.

But I digress. The real point I want to make here, however, is that, whatever may be the merit of originalism as an approach to constitutional interpretation, the conceptual and practical problems which that approach throws up are vastly less troublesome in terms of our Constitution than those which flow from the necessity for someone to interpret the political aspirations expressed in the Bill of Rights.

Bill of Rights, the judicial function and political wisdom

The third thing I want to suggest this evening is that judges are not better fitted by training or experience to give content to the broad aspirational statements of the kind

---

[18] James J Kirschke, "Gouverneur Morris: Author, Statesman, and Man of the World", 2005, at 256 – 257.

found in the Bill of Rights than members of the legislature or, for that matter, other citizens.

Because judicial decision-making occurs after a public hearing of opposing arguments by a disinterested officer who must justify his or her decision by giving reasons for that decision, it is tempting to think that all decision-making should proceed in this way. Especially is that so where the overtly partisan processes of the executive and legislative branches of government seem to be closed to ordinary citizens and to deny them their say.

But the overall record of American judges does not inspire confidence that their attempts to give content to the Bill of Rights are better informed, or more wise, than the judgments of their fellow citizens.

Most recent criticism of what is said to be the liberal activism of the U.S. Supreme Court has come from conservative commentators. Lord McCluskey, who had been the Solicitor-General for Scotland in the Callaghan Labour Government, in his 1986 Reith Lectures summarised, from the perspective of the Left, the low points in the performance of the U.S. Supreme Court as the interpreter of the Bill of Rights. He said:

> "[T]he broad, unqualified statements of rights which the Supreme Court Justices have had to apply did not prevent them, until recently, from taking a narrow legalistic, laissez-faire perspective on freedom so as to strike down as unconstitutional legislation designed to stop the exploitation of workers, women, children or immigrants. They legalised slavery; and when it was abolished, they legalised racial segregation. They repeatedly held that women were not entitled to equality with men. They approved the unconstitutional removal by the Executive of the constitutional rights of Americans of Japanese origin after the bombing of Pearl Harbour."

More recently, a most baleful influence upon the political process in the United States has been the financial power of special interests. Money talks, and, in the United States, it talks very loudly. The Supreme Court, in the name of free speech, has struck down laws which attempt to rein in the power of money to skew elective politics. The idea that free speech is advanced by an insistence that those with sufficient financial power to dominate the airwaves as they see fit is not self-evidently true.

In 1976 the Supreme Court, in *Buckley v Valeo*,[19] held that freedom to spend unlimited sums of money in seeking political office is entitled to the same degree of protection as pure speech. Professor Freund did not welcome that decision. As he said:

> "[Those who make large expenditures for the mass media] are operating vicariously through the power of their purse, rather than

[19] 424 US 1 (1976).

> through the power of their ideas, and I would scale that relatively lower [under the] First Amendment …"[20]

In "Storms Over the Supreme Court" (69 ABAJ 1474, 1480 (1983)), Freund argued that the principle that "money talks" is "faulty, because … we are dealing not with expression in a vacuum, but in an adversary context in which the legislature endeavours to make the context fairer."

When money is allowed to talk without any legislative restraint, it is hardly surprising that actual participation by ordinary people in U.S. elections, both as candidates and as voters, is so low – and that, in consequence, the power of small well-funded groups can hold the electoral process hostage to their views.

On other issues, as well, there is room to doubt that judges, by education or training, can provide the answers to questions of political philosophy. Should the death penalty be struck down as "a cruel and unusual punishment"? Is "flag burning" a form of "free speech" that cannot be the subject of a legislative prohibition? By reference to what evidence and what yardsticks of principle does a judge decide whether a State interest is sufficiently "compelling" to support a legislative restriction upon the termination of a pregnancy? Is the entitlement to privacy, the right to be left alone, which evidently lurks in the shadows of the Bill of Rights, inconsistent with the validity of laws against the possession of dangerous drugs, or suicide or euthanasia?

No doubt, many of us have different views on these questions. Judges, by virtue of their training and experience, don't have any claim to a better, or more wise, view than any other citizen.

On great questions, such as these, the view of Garfield Barwick, the great lawyer and judge, is unlikely to be of any greater value, or more correct, than that of Ben Chifley, the engine driver. Legal training, judicial experience and the application of the judicial method don't provide the wisdom to give a satisfactory answer to these ethical or moral or political questions. As Bob Dylan put it: "Ain't no point talkin' to me/It's just the same as talkin' to you."

Conclusion

In conclusion, can I say with respect to our Framers that we haven't done too badly with our small brown bird of a Constitution. In terms of the issues of the kind which divide the American community, the death penalty has long been abolished in this country. It was abolished by an enlightened citizenry through their elected legislators. Here in Queensland, it was abolished by our grandparents, both grandfathers and grandmothers. It was no accident that we (with New Zealand) led the world in extending the franchise to women – years ahead of the United States and Great Britain. Even in its earliest years, our democracy recognised the injustice and the folly of denying the contribution of the female half of our adult population.

The termination of pregnancy is regulated by legislation: our community is not riven by differences about whether that legislation is constitutionally valid, and our legislators respect limits on the role of the State in this most personal of decisions.

---

[20] Paul A Freund, "Commentary in Albert J Rosenthal", Federal Regulation of Campaign Finance 71, 74 (1972).

Nor is our community riven by differences about the relationship between religion and the State which, though seemingly petty, generate division beyond the possibility of amicable and lasting compromise.

Nor is our society wracked by the more or less regular massacre of ordinary citizens and the nobler politicians, by troubled souls exercising their supposedly inviolable right to have access to a gun.

And our system of elective politics is not held in thrall by the financial power of narrow sectional interests.

In Australia, there are, of course, serious differences between societal groupings; and there are injustices to individuals which may go unremedied. Our political processes may not be as sensitive to the plight of disadvantaged groups or individuals as many of us would like. And, most seriously perhaps, we must acknowledge that it is only in this generation that we have recognised our indigenous citizens as citizens.

But our constitutional arrangements mean that we must, as a community, recognise our problems and accept that solving them is the responsibility of all of us because we can't look to pronouncements from on high to solve our political differences. And that is all to the good because, as citizens, we are all called to work to remedy political injustices. Since Aristotle, citizenship worthy of the name has involved no less: it encompasses both individual privilege and civic responsibility.

Reminded as we are today of the work of our Framers, we may be permitted a brief moment to celebrate the framework they created. We can rightly say, as Pericles said over the Athenian dead, "We do not imitate the constitutions of others, but provide a model for them to follow." It is, I think, a matter of pride that, for us, when we look at the political issues which confront us, we can say: "It has been given to us to face our problems together, so that we can solve them together – all of us."