False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution

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1. *Introduction*

It was not so long ago that most Australian lawyers, judges and lawmakers proudly insisted upon the essentially British character of their antipodean law and legal institutions. In more recent years the "time-honoured" forms of that British legality have been drained, steadily and deliberately, of their officially sanctified aura of authority. Nowadays not even the "invented traditions" of royal pomp and ceremony are sufficient to preserve an ancestral sense of British identity.[1] Throughout the old settler dominions of the British Empire the traditional wellsprings of constitutional legitimacy have dried up. In Australia, significant elements within the nation's political, legal, corporate and media elites have resolved to deliver the constitutional coup de grâce to the imperial past by renouncing their historic allegiance to the British Crown. One need not be a defender of the British monarchy to recognise a curious and disturbing phenomenon associated with the rise of nationalist sentiment among Australia's opinion leaders. As old loyalties fade, the official language of constitutional discourse becomes increasingly shallow, empty and self-contradictory.

Until recently the Crown has been the keystone in the triumphal arch of constitutional authority in Australia. For pre-war jurists such as Sir Owen Dixon (as he eventually became), "the supremacy of the Crown" ultimately made it possible to preserve a stable constitutional balance between "the rival conceptions" of the supremacy of parliament on the one hand, and the supremacy of law on the other.[2] There is no reason to suppose that judges like Dixon were ever ashamed to swear allegiance to the British monarch reigning over them.

Nowadays one gets the definite feeling that most of Her Majesty's judges on the High Court of Australia regard our continued allegiance to the British Crown as a constitutional embarrassment that they would prefer not to mention. Certainly the majority judgments in both *Australian Capital Television v The Comonwealth* (hereinafter political advertising case)[3] and *Nationwide News v Wills* (hereinafter *Nationwide News*)[4] provide substantial aid and comfort to

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1 Cannadine, D, "The Context, Performance and Meaning of Ritual: The British Monarchy and 'The Invention of Tradition'", in Hobsbawn, E and Ranger, T (eds), *The Invention of Tradition* (1983).

2 Dixon, O, "The Law and the Constitution" (1935) 51 *LQR* 590 at 591, 613–4.

3 (1992) 66 ALJR 695.

4 (1992) 66 ALJR 658.

the current official campaign of "creeping republicanism". That program aims to purge everyday life of whatever residual reminders of royal and imperial authority still survive in oaths of allegiance, flags and official nomenclature.

Each step in the symbolic renovation of the Australian nation-state is accompanied by ritual reaffirmations of the "democratic" character of our existing constitutional arrangements. Australia is officially described as a democratic nation-state. The monarchy represents an ancient imperial tradition of rule from above. The hereditary and permanently British character of the monarchy seems out of step with our modern, multicultural and growth-oriented society. Many political insiders and prominent opinion leaders therefore proclaim the constitutional obsolescence of the British monarchy. For those seeking to revamp Australia's corporate image in the boardrooms and capitals of Asia, the British roots of our constitutional traditions appear as little more than absurd and anachronistic leftovers from our imperial and European past. As sources of constitutional legitimacy, monarchy, empire and a common law tradition shared with the other British dominions must make way for the geopolitical realities of nationhood in the postmodern global economy. Working within a similar set of assumptions, the High Court decisions in the political advertising case and *Nationwide News* simply ignore the historic supremacy of the Crown, as celebrated by Dixon, in order to assert the supremacy of the law, as embodied in judicial decisions, over the legislative will of parliament. Both moves are supported by invoking the democratic principle of popular sovereignty.

2. *False Allegiances*

It is not at all obvious that these constitutional developments should be welcomed by strong republicans.[5] The opinion of the Chief Justice in the political advertising case has been cited by the Prime Minister's Republican Advisory Committee in support of the proposition that, in all but the most formal sense, Australia is already a republic.[6] This commonly expressed view fails to take either the Westminster tradition of "constitutional monarchy" or the rival tradition of civic republicanism seriously. Monarchists emphasise the importance of constitutional continuity and the historical legitimacy of the British Crown. Strong republicans are more inclined to fear the despotic potential inherent in the majestic image of an absolute sovereign authority. But both recognise that what the monarchy "stands for" is deeply embedded in our political and legal culture.[7]

We cannot provide ourselves with a shared sense of national and cultural identity, nor can we hope to reconstitute the ruling monarchal traditions of sovereignty from above, by simply pretending that the supremacy of the Crown is not an essential pillar of the existing constitutional order. Careful attention must be paid to the absolutist logic still inherent in the "splendour of the Crown". After all, as Dixon knew, the Crown is simply "the legal expression

5 Fraser, A, "Strong Republicanism and a Citizen's Constitution" in Hudson, W and Carter, D (eds), *The Republicanism Debate* (1993).

6 *An Australian Republic: The Options* (Report of the Republic Advisory Committee, 1993) Vol 1 at 59.

7 Nairn, T, *The Enchanted Glass: Britain and its Monarchy* (1988) at 254.

of the sovereignty of the state".[8] In the orthodox tradition espoused by Dixon, constitutional limits on the powers of Australian governments were grounded in the statutory will of Parliament. Only the imperial Parliament enjoyed the full sovereign capacity to legislate on any subject free of legal limitations. Therefore, only the supreme legislative will of the Empire could lay down legal limitations on the otherwise presumptively plenary powers of the dominion parliaments. The Crown became a metonym for the plenitude of power legally vested in the imperial and dominion governments.

To establish an implied right to freedom of communication, the High Court effectively denies continuing normative force to the central tenets of British legalism in Australia. The High Court's newly minted constitutional limits on the legislative capacity of the Australian government are said to be grounded, not in the supra-national legislative authority of the imperial Parliament, but in a novel, nationalist theory of popular sovereignty. The court appears to assume that an autonomous nation state deriving its authority from its own people must be subject to constitutional curbs unknown to the same state while the Crown reigned supreme in our legal consciousness. Merely by invoking the doctrine of popular sovereignty the court contrives to exorcise the spectre of untrammelled legal despotism always inherent in the positivist and imperialist doctrines of parliamentary supremacy.[9]

But it is one thing for Mason CJ to assert that "sovereign power ... resides in the people",[10] it is quite another to point to a definite moment in the history of the Constitution when sovereign authority passed from the imperial Crown-in-Parliament to the Australian people.[11] Those who insist that Australia is already a republic cannot agree on the date of its creation. Depending upon whose account one accepts, the Australian Commonwealth and its people became sovereign at any one of several possible times. Already in the late nineteenth century, the *Colonial Laws Validity Act* 1867 (UK), had been hailed by some "as one of the charters of colonial legislative independence".[12] Others have since pointed to the passage (1931) or adoption (1942) of the imperial *Statute of Westminster* as the turning point. Justice Murphy famously insisted that from the time of Federation the authority of the Constitution was grounded in "its continuing acceptance by the Australian people".[13] Unfortunately Murphy J's solution deprives the idea of popular sovereignty of any special constitutional significance since, as Dawson J points out, "any form of government which is not arbitrary"[14] could be said to depend "for its continuing validity upon the acceptance of the people".[15]

Such doctrinal uncertainty over whether and when the Australian people finally acceded to its supposedly sovereign status has led some to hope that a

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8 Above n2 at 593.
9 Austin, J, *The Province of Jurisprudence Determined*, introduction by H L A Hart (1955) at 254.
10 Above n3 at 703.
11 Cf Pope, J G, "Republican Moments: The Role of Direct Popular Power in the American Constitutional Order" (1990) 139 *U Penn LR* 287.
12 Castles, A C, *An Introduction to Australian Legal History* (1971) at 411.
13 *Bistricic v Rokov* (1976) 135 CLR 552, per Murphy J at 566.
14 Above n3 at 721.
15 Ibid.

firm date can now be fixed through the abolition of the monarchy as such. But within the respectable ranks of official opinion, few believe this is the moment to rouse the people from their habitual constitutional slumbers. Should they choose to approve the abolition of the monarchy, the Australian people will become "sovereign" yet again without ever having done anything other than, or different from, what they are now permitted to do under the ægis of the Crown. Indeed, even if a majority of the people in a majority of the states approve the officially favoured minimalist strategy, thereby expunging all references to the Queen from the text of the *Commonwealth of Australia Constitution Act* (1900), we will probably be left with a lingering sense of constitutional déjà vu. After all it will still be possible for both diehard loyalists and strict legalists to derive the formal legal authority of the *Constitution Act* from the sovereign will of the imperial Crown-in-Parliament. Even the abolition of the monarchy will require royal assent to become constitutionally effective. The Australian people, like the present Queen, seem fated to reign in a state of impotent splendour while others rule on their behalf.

3. *False Premises*

That predictably persistent doctrinal confusion over the sources of legitimate constitutional authority in Australia is already amply reflected in the political advertising case. Mason CJ acknowledges Dixon's flat declaration that "the Constitution was not a supreme law proceeding from the people's inherent authority to constitute a government".[16] But he immediately counters with the claim that "the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people".[17] In one sense there is nothing remarkable in such an observation. Over one hundred years ago the eminent English jurist Albert Venn Dicey insisted that while legal sovereignty was vested in the Crown-in-Parliament, a sort of political sovereignty had been lodged in the electorate. But because the "political sovereignty" of the electorate was the informal product of constitutional convention, Dicey admitted that the courts "know nothing about any will of the people except insofar as that will is expressed by an Act of Parliament".[18]

Mason CJ seems to concede the orthodox view that legal sovereignty is vested in parliament and not in the people when he writes "that the sovereign power that resides in the people is exercised on their behalf by their representatives".[19] However, he moves well beyond Diceyan orthodoxy when he implies that elected representatives are bound in a relationship of trust to "the people on whose behalf they act".[20] The Chief Justice invokes the "very concept of representative government"[21] to support the suggestion that elected officials are merely servants of the sovereign people who are bound to observe

16 Id at 703.
17 Ibid.
18 Dicey, A V, *Introduction to the Study of the Law of the Constitution* (9th edn,1948) at 74.
19 Above n3 at 703.
20 Ibid.
21 Ibid.

the vague terms of a constitutional constructive trust raised by the High Court. Dicey rejected such claims out of hand: "Nothing is more certain than that no English judge ever conceded, or under the present constitution, can concede, that Parliament is in any legal sense trustee for the electors. Of such a feigned 'trust' the courts know nothing".[22]

Other members of the court have appealed variously to sections 7, 24 and 128 of the *Constitution Act* to support the contention that the principle of popular sovereignty enjoys a constitutional status in Australia denied to it in the United Kingdom. In *Nationwide News*, for example, Deane and Toohey JJ declare that the provisions requiring popular elections for members of the Australian Parliament, together with section 128, guarantee "to the people of the nation the ultimate power of governmental control".[23] Any lingering doubts on that score should, according to Mason CJ, have been extinguished by the passage of the *Australia Act* 1986 (UK) which "marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people".[24]

These assertions should be greeted with a healthy measure of scepticism. It is true that section 128 requires popular approval of alterations to the Constitution proposed by the Commonwealth Parliament. Nevertheless the power to initiate and draft proposed alterations remains firmly in the hands of the Commonwealth government, not the people. Section 128 establishes a procedural condition precedent to the exercise of the constituent power vested in the Commonwealth Crown-in-Parliament, not an alternative locus of sovereign authority.

If sovereignty is indeed "the ultimate power of governmental control", we should remember Carl Schmitt's dictum: "sovereign is he who decides on the exception".[25] For Schmitt, the decisionistic essence of sovereignty lies in the power to declare the existence of an exceptional situation in which the ordinary law of the land may be suspended in order to preserve the existence of the state. In the normal course of events in Australia, governments have found it both necessary and convenient to refer proposed constitutional amendments to the people for approval or rejection. Given exceptional circumstances, governments may now decide to pursue another course of action. Far from establishing "the ultimate sovereignty of the people" section 15 of the *Australia Act* 1986 (UK) actually made it possible for the Commonwealth and state parliaments acting together to bypass section 128, enacting constitutional amendments without receiving the approval of a majority of the people in a majority of the states. Indeed one legal scholar has pointed to the possibility that section 15 might also permit the Commonwealth Parliament, acting alone, to amend the Constitution.[26] On that reading of the *Australia Act* the "ultimate"

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22 Above n18 at 75.

23 Above n4 at 679.

24 Above n3 at 703.

25 Schmitt, C, *Political Theology: Four Chapters on the Concept of Sovereignty* (Schwab, G, transl, 1985) at 5.

26 Lindell, G,"Why is Australia's Constitution Binding? The Reasons in 1900 and Now and the Effects of Independence" (1986) 16 *Fed LR* 29; see also O'Brien, B, "The Australia Acts" in Ellinghaus, M P et al (eds), *The Emergence of Australian Law* (1989).

sovereign power to decide on the exception in matters of constitutional law and politics has been vested in government, not in the people. This is the dirty little secret of Australian constitutional law that the High Court is not yet prepared to divulge.

4. *Faulty Logic*

The Chief Justice derives the implied constitutional right to freedom of communication from "the very concept of representative government".[27] He suggests that a similar view was taken by the Supreme Court of Canada in *Re Alberta Legislation*[28], decided over fifty years ago. That case dealt with provincial legislation aimed at controlling the content of press reports concerning government policy. In striking down this undeniably oppressive law, the court declared "that the practice of this right of free public discussion of public affairs ... is the breath of life for parliamentary institutions".[29] The court concluded that it would be incompetent for any provincial legislature "to abrogate this right of public debate".[30] But it does not necessarily follow that the court would have recognised such a right against the sovereign will of the federal Parliament.

In fact, the decision in *Re Alberta Legislation* was reached on federalism grounds. It has more in common with the *Australian Communist Party* case[31] than with the political advertising case. The federalist foundation for the decision was made clear by Cannon J when he observed that "[t]he Federal Parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press and the equal rights in that respect of all citizens throughout the Dominion".[32] Similarly Sir Lyman Duffy CJ concluded that it was the Parliament of Canada, not the provincial parliaments, that possessed "authority to legislate for the protection of this right".[33] Federal jurisdiction rested "upon the principle that powers requisite for the protection of the constitution itself arise by necessary implication from the BNA Act as a whole".[34] In effect the court was saying that the conventions of free public discussion are so essential to the workings of the parliamentary institutions established by the *British North America Act* 1867 (UK) that only the national government possessed constitutional authority either to protect or to tamper with them. The form of the argument is similar to the High Court decision in the *Australian Communist Party* case. There it was held that only the states possessed legislative competence in relation to voluntary associations. Lacking jurisdiction over voluntary associations, the Commonwealth Parliament could not validly legislate to dissolve the Communist Party. In both cases civil liberties were constitutionally protected, not by an implied bill of rights imposing

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27 Above n3 at 703.
28 *Re Alberta Legislation* [1938] 2 DLR 81.
29 Id at 107, per Sir Lyman Duff CJC.
30 Id at 108.
31 *The Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.
32 Above n28 at 119–20.
33 Id at 107.
34 Ibid.

limits on the sovereignty of parliament, but through the creative application of the federal principle.

The present High Court has gone well beyond either of those earlier decisions in holding that the political conventions favouring freedom of communication, along with freedom of association and perhaps even freedom of movement, have somehow crystallised into a binding constitutional law. In the past British jurists have sought to maintain a clear, bright-line distinction between law and convention. Dicey maintained that the difference between legal rules and conventional rules was simply that the latter could never be enforced in a court.[35]

The Supreme Court of Canada upheld the orthodox view in the *Patriation Reference*[36] when it denied that a convention of unanimous provincial consent to all constitutional amendments affecting the federal balance was judicially cognisable. Conventions were seen as informal political norms shaping the operating constitution, not as legally binding rules enforceable in the courts. On this orthodox view no court could declare that what had hitherto been accepted as a convention, not subject to legal enforcement, would henceforth be construed as a legally binding obligation. By its very nature, a constitutional convention can only be understood "as political in inception and as depending on a consistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time".[37] The legal enforcement of such a political rule of conduct would be inconsistent with the absolutist logic of parliamentary sovereignty. In apparent defiance of that logic, the High Court has determined that the representative character of parliament, in and of itself, necessarily implies limits on its legally sovereign will.

5. *False Promises*

But, before we either heap scorn upon that faulty logic or rush to embrace the tantalising prospect of "a free society" enjoying the "freedom of movement, freedom of association" and, perhaps, freedom of speech generally[38] bestowed on us by the High Court, we should remember that flawless logic has never been a hallmark of Westminster constitutionalism. On the contrary, constitutional discourse throughout the British dominions has been shot through with persistent antinomies. The inescapable tension between legal forms and the conventional norms rooted in the political realities of the operating constitution is only the most obvious source of contradiction. Constitutional discourse also oscillates between the polarities of what I have described elsewhere as genetic and telic (from the Greek *telos*, meaning goal or purpose) legitimacy.[39]

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35 Above n18 at 439.
36 *Reference re Amendment of the Constitution of Canada* (1982) 125 DLR (3d) 1.
37 Id at 22.
38 Above n3 at 735, per Gaudron J.
39 Fraser, A, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (1990).

Constitutional discourse has to do with the conflict and interplay between competing rhetorical strategies, each designed to lend legitimacy to certain forms of governmental, corporate or individual action (or inaction). Those constitutional jurists who appeal to the genetic legitimacy of a given norm may emphasise its origins either in a free society of rights-bearing individuals or in some imperative constitutional text. Others may invoke telic norms flowing from the systemic requirements and collective welfare goals of a complex interdependent society based on the ideal of perpetual growth. Depending upon which rhetorical strategy is employed in a particular case, the constitution can be portrayed either as a set of limits on governmental authority or as a device to enhance the power of the state to pursue its own preferred political, social or economic goals.

But these rhetorical strategies are not always set in a state of permanent opposition. Constitutional limits may actually work to increase the powers of the state. One of the central paradoxes of modern constitutional discourse is "that the effective quantity of political power [varies] directly with the imposition of controls to channel and direct it".[40] This puzzling truth lies at the heart of the "logical muddle"[41] that several scholars have perceived in the *Engineers* case.[42]

That decision upheld the extension of Commonwealth arbitral jurisdiction into the industrial relations between states and their employees. That result was justified by reference to the "two cardinal features of our political system",[43] namely the indivisibility of the Crown and the principle of responsible government. So long as the absolute will of the Commonwealth Crown-in-Parliament was confined to the literal scope of the powers set out in the Constitution and so long as it also remained bound by the constitutional conventions of responsible government, the exercise of those powers could not "be further limited by the fear of abuse".[44] Should the Commonwealth Parliament ever choose to abuse its legislative powers, it would be up to "the people themselves to resent and reverse what may be done".[45]

Isaacs J's faith in the informal limits imposed upon the Crown-in-Parliament by the conventions of responsible government enabled him to sign over to the Commonwealth government what amounted to a constitutional blank cheque. His judgment in the *Engineers* case fused the otherwise divergent logics of genetic and telic legitimacy. On the one hand, Isaacs J understood that the principle of responsible government "is part of the fabric on which the written words of the Constitution are superimposed".[46] On the other hand, he simply took it for granted that the expansion of Commonwealth arbitral powers to create a national system of industrial relations could be justified by an appeal to the developmental needs of the nation. If judges were to treat the

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40 Krieger, L, *An Essay on the Theory of Enlightened Despotism* (1975) at 39.

41 Galligan, B, *Politics of the High Court: A Study of the Judicial Branch of Government* (1987) at 99.

42 *The Amalgamated Society of Engineers v The Adelaide Steamship Co* (1920) 28 CLR 129.

43 Id at 146.

44 Id at 151.

45 Id at 152.

46 *The Commonwealth v Kreglinger & Fernau Ltd and Beardsley* (1926) 37 CLR 393 at 413.

Constitution solely as a means of imposing limits on the scope of Commonwealth powers, the judiciary would "separate itself from the progressive life of the community and act as a clog upon the legislative and executive departments rather than as an interpreter".[47]

The *Engineers* case provides an almost perfect illustration of the oxymoronic schema of enlightened despotism that has presented itself as a recurrent temptation to Western statesmen and jurists ever since the eighteenth century. The "much-mooted self-contradictoriness" of both the general schema and this particular case forms a large part of their persistent appeal. As Leonard Krieger remarks, under modern conditions "despotism must be enlightened or not be at all".[48] That dictum helps us to understand why the political advertising case represents the paradoxical flip side of the *Engineers* case.

If the expansion of Commonwealth powers is to be confined within politically legitimate channels by the conventions of responsible government, it follows that the national government cannot dissolve those conventional constraints without, at the same time, undermining the genetic foundation of its own expanded powers. Conversely a constitution based on popular consent offers governments "a way of organising and generating power for the pursuit of great national objectives".[49] At the foundation of the American republic Alexander Hamilton knew that the Constitution could assure a continuous generation of power if it were genetically rooted in popular consent. Even in the British dominions statesmen and legislators have long understood that a valid electoral act of popular consent replenishes the political reservoir of governmental authority. Electoral rituals release streams of power to flow from the people to their governors. Sheldon Wolin points out that through the alchemy of legal authority "power is transmitted: it is embodied in public agents (for example, bureaucratic and military personnel) and public policies and decisions".[50] Free, fair and open elections have long been an informal or conventional prerequisite for the constitutional presumption that the people have consented to every legally valid exercise of governmental authority.

The High Court sees the freedom of communication as essential element in a properly conducted electoral process. For that reason Deane and Toohey JJ insist that:

> Freedom of communication extends not only to communications by representatives and potential representatives to the people whom they represent. It extends also to communications from the represented to the representatives and between the represented.[51]

The High Court portrays Australia as an open society of rights-bearing individuals who, apart from the effects of the Commonwealth legislation under challenge, are now able to communicate freely with each other and their governors. Having prohibited legislative interference with free communication, the court can now simply presume the political enlightenment of every responsible

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47 *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 438–9.

48 Above n40 at 39.

49 Wolin, S S, *The Presence of the Past: Essays on the State and the Constitution* (1989) at 11.

50 Id at 12.

51 Above n3 at 718.

and representative government. Once our governors have outfitted themselves with a valid electoral mandate they must be left free to adopt whatever legal means they deem appropriate, necessary and convenient to realise their political goals. Freedom of communication is not an end in itself. It is conceived by the Chief Justice as a means of "making representative government efficacious".[52]

By linking an implied right to freedom of communication to the efficacy of representative government the court effectively endows our governors with an incremental power to act, despotically if need be, to carry out their electoral mandate as the presumptively enlightened representatives of the nation. From the citizens' perspective freedom of communication becomes a double-edged sword so long as the High Court takes it for granted that the present parliamentary regime can be described unproblematically as democratic. An implied constitutional right to freedom of public discussion both limits the power of the state and simultaneously enhances its power over us. Our compulsory participation in a judicially sanctified electoral ritual underwrites the sovereign authority of state and Commonwealth governments to do with us as they will. The court's promise that our right to communicate freely will contribute to the presumptive enlightenment of our rulers now provides the essential constitutional warrant for our continued subordination to an "elective dictatorship".[53]

6. *False Impressions*

Defenders of the court will be quick to insist that governments must not only seek a freely and fairly won electoral mandate; they must also continue to act within the letter of the law. But there is a price that must be paid on that account as well. The High Court is now free to declare that the previously unenforceable political conventions of responsible (or, more broadly still, representative) government have crystallised into a body of constitutional common law. That doctrinal move can only be accomplished by hollowing out the historical legitimacy and severing the British roots of the Constitution. By denying normative significance to the formal legal genesis of the constitution in an Act of the imperial Crown-in-Parliament, the High Court has weakened our historic links to the orthodox canons of British legalism. Those who insist that the "real" genesis of the Constitution lies in its acceptance by the Australian people have further eroded the already shaky boundary between law and politics. Some years ago Deane J signalled that if the gulf between orthodox legal theory and everyday political realities became too wide, he would simply abandon that legal theory. Whatever "the theoretical explanation" might be for the legal genesis of the Constitution, he was firmly convinced that "ultimate authority in this country lies with the Australian people".[54] Now a clear majority on the High Court is prepared to assert the

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52 Id at 706.

53 Lord Hailsham, The Dimbleby Lecture 1977, expanded in *The Dilemma of Democracy* (1978); quoted in *Law, Legitimacy and the Constitution: Essays Marking the Centenary of Dicey's 'Law of the Constitution'* (McAuslan, P and McEldowney, S (eds), 1985) at 13–14.

54 *Kirmani v Captain Cook Cruises* (1985) 159 CLR 351 at 442.

same freedom to endow the conventional norms of modern political life with the full force of law.

In proclaiming a newly-discovered right to freedom of communication, the court purports to be acting in the name of the people. To appreciate the significance of that claim, one should recall that as late as 1981 a conservative judge could publicly take pride in the circumstance that "Australia ... does not have to pretend that power comes from the people".[55] According to Hutley J constitutional authority in Australia was firmly rooted in the historical legitimacy of the ancient British constitution. While that Tory tradition of fidelity to the British origins of the Constitution still has its judicial defenders, it has been drained of real authority. All that remains is the increasingly hollow and terribly old-fashioned institutional façade of the British Crown. Out of sheer ideological desperation, our political, bureaucratic and judicial masters are now compelled to pretend that governmental power belongs to the people.

In fact several of the judgments in the political advertising case and *Nationwide News* reflect a disintegration of the traditional English concept of representation that first occurred following the eighteenth century American revolution against the British Crown. In the ancient English constitution the people were virtually represented in the structure of the Parliament itself. Government embodied the assertedly natural division of society into orders. While the voice of the people could be heard in the House of Commons, no one would have imagined that the King or members of the House of Lords, much less the judiciary, were in any sense representatives of the people. In the United States all that changed when presidents, governors, senators, representatives and even judges, all began to derive their authority from the people.[56]

In *Nationwide News* Deane and Toohey JJ embrace that American theory of popular sovereignty. They too assert that all government officials, including those once proud to be known as Her Majesty's judges, are now representatives of the people at large. In their view, the representative nature of modern government "is not concerned merely with electoral processes".[57] Every repository of governmental power holds it as a representative of the people. Because "the powers of government belong to, and are derived from the governed, that is to say the people of the Commonwealth",[58] even judicial authority is rooted in the democratic principle of popular sovereignty.

This doctrinal shift might be seen as a major event in the history of British, as well as narrowly Australian constitutional law. After all, leading Australian jurists once shared the disdain of most other British lawyers and judges for the populist excesses of "Yankee republicanism". Throughout the Empire and, later, the Commonwealth, British lawyers proudly pointed to the Crown as the fountain of law and justice.[59] Through their allegiance to the Crown such British lawyers and Isaacs, Dixon and Hutley JJ located the regal authority of

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55 Hutley J, "The Legal Traditions of Australia as Contrasted with those of the United States" (1981) 55 *ALJ* 63 at 64.

56 Wood, G S, *The Creation of the American Republic, 1776–1787* (1972) at 363–89.

57 Above n4 at 680.

58 Ibid; and see also the remarks of Sir Anthony Mason quoted in *Constitutional Centenary*, Volume 2 Number 5, December 1993 at 16.

59 Forsey, E, *Freedom and Order: Collected Essays* (1974) at 31.

law in a majestic realm transcending the narrow limits of any particular nation. As "the legal expression of the sovereignty of the state",[60] the Crown embodied a descending theory of authority, according to which the law is handed down from on high.[61] The High Court seems to have jettisoned that descending image of authority when it invokes the once-despised American theory of popular sovereignty.

And yet appearances can be deceiving. The truth seems to be that the High Court has invented a fictitious popular sovereign to endow the heavily eroded constitutional authority still legally vested in the British Crown with an aura of political legitimacy. The fictitious character of the popular sovereign invoked by the High Court is evident in the practical outcome of the decision in the political advertising case. None of the majority opinions seriously consider whether it could or should be left to the people "to resent and reverse" the ban on political advertising. Had the court possessed a genuine faith in the capacity of the people to exercise "the ultimate power of governmental control" it could have joined with Justice Brennan: allowing the legislative ban on political advertising to remain in place at the Commonwealth level, while disallowing the legislation to the extent to which it denies to the people and parliaments of each state the constitutional freedom to manage their own electoral affairs.

By framing its judgment in the language of federalism the court could have protected the autonomy of the political process in the states and localities against the threat posed by the Commonwealth ban on political advertising. At the same time the court could have recognised the distinctive political utility of the federal system as a "laboratory" of law reform. Justice Brandeis once remarked that it is one of the "happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country".[62] In this instance, the Commonwealth legislation could have been treated as an experiment in electoral reform that might well turn out to have the desirable effect on the quality of political discourse predicted by its proponents. If so, the people and parliaments of the states might then be persuaded to follow the Commonwealth lead. If not, the opponents of the ban would remain free to press for its repeal by the Commonwealth Parliament.

7. *A False Sense of Freedom*

There was the possibility that a decision along the lines suggested by Brennan J could have stimulated a widespread and continuing debate over the benefits and drawbacks of paid political advertising in the electronic media. Questions of responsibility for the quality of political discourse might have become a common focus of civic concern. It is more than a little ironic that such possibilities should have been extinguished in the name of the people. Far from enhancing the power of citizens to participate in authority, the court treats the

60 Above n2 at 593.
61 Ullman, W, *Medieval Political Thought* (1975) at 12–13.
62 *New State Ice Co v Liebmann* 285 US 262 (1932) at 311.

people of Australia as the passive beneficiaries of a legal and constitutional order handed down from on high (on this occasion, by itself). The discovery of implied rights in the Australian Constitution represents a victory for the law-making power of judges acting as the self-appointed guardians of a people deemed incapable of safeguarding for itself the steady electronic diet of paid political advertising it apparently needs to make free, informed and effective political choices.

In the exercise of its now openly asserted law-making powers, the court has shown scant interest in the civic freedom of the many to participate as equals in the struggle to shape public opinion during election campaigns. Nor has it shown much sensitivity to the linkages between civic freedom and the federal principle. The court's shallow understanding of freedom is evident in its refusal to take seriously the possibility that paid political advertising does in fact corrupt, distort and trivialise the process of political communication. Not all of us, after all, share the same freedom to communicate as those with ready access to money and power. Mason CJ does recognise that access to the electronic news media may depend upon the goodwill of powerful media proprietors.[63] But he perceives no constitutional problems arising from the limits to access inherent in the need to pay for expensive television and radio advertising time.

Freedom of communication, as understood by the High Court, appears to mean that anyone who wants to communicate a political message should be free to do so, so long as that person has the money to pay for the privilege. The fact that many will never be in a position to make practical use of the freedom to broadcast political advertising is no reason, in itself, to limit the freedom of the few well-organised and well-financed individuals and interests who are able to pay their way. But the court shows no apparent concern over the power of such moneyed interests to drown out or distort other voices that lack the financial and organisational resources to make themselves heard.

Given the court's simplistic notion of freedom, the right of advertisers and media operators to do what they wish with their human and physical assets in the course of an election campaign is never in doubt. The court never considers whether, by protecting the communicative freedom of the wealthy few, it might diminish the civic freedoms available to the many. Civic freedom may be conceived as the power to participate as an equal in the life and governance of a political community.[64] The civic freedom of the citizen has more to do with the cultivation of the participatory virtues than with the assertion of individual rights. In the classical republican tradition rights exist not just to safeguard individual interests but also for the sake of the civic virtues displayed and recognised within a community of political peers.[65] A civic right to freedom of communication would open up the public sphere to popular participation on the basis of a presumptive equality. Recognition of a claimed right to freedom of communication might then depend upon its civic consequences. Certain forms of political communication might be prohibited to all citizens if

63 Above n3 at 706.

64 Patterson, O, *Freedom, Volume 1. Freedom in the Making of Western Culture* (1991) at 4.

65 Fraser, A, "Beyond the Charter Debate: Republicanism, Rights and Civic Virtue in the Civil Constitution of Canadian Society" (1993) 1 *R Const Studies* 27 at 39–40.

their use tended to corrupt the body politic. Restrictions on the *form* of political communication might be legitimate so long as the *content* of political speech is left free of governmental controls.

On this civic view the public sphere at all levels of government would be conceived as a body politic of natural persons each possessed of one voice and one vote. Members of that body politic would normally be expected to appear in public and to speak for themselves, rather than through paid agents or intermediaries, when discussing matters of common concern. A strong republican polity would have grounds for concern if a minority of wealthy citizens acquired on effective monopoly over the most important means of political communication. Such a monopoly would allow the wealthy few to dominate the discussion of public affairs, thereby undermining the capacity of other groups, interests and individuals to express their views and concerns in a publicly visible and effective manner. In the political advertising case the civic freedom of the citizen has clearly been overshadowed by the court's concern for the personal and sovereignal freedoms of political donors, advertising agencies and powerful media interests.

According to Orlando Patterson, freedom is a complex tripartite value deeply rooted in Western civilisation and culture.[66] Throughout Western history the idea of civic freedom has been combined with and, sometimes, set in opposition to other forms of freedom. In ancient Greece, the male citizens prized their *civic* freedom to participate in authority, while slaves and women longed for the *personal* freedom to do what they pleased without coercion or restraint. The ancient institution of slavery also provides the clearest illustration of the *sovereignal* freedom "to act as one pleases, regardless of the wishes of others". In the exercise of that sovereignal freedom, the slave owner had "the power to restrict the freedom of others or to empower others with the capacity to do as they please with others beneath them".[67] In the modern body politic, the master class is more likely to be found among the wealthy donors, political manipulators and media barons who exercise a sovereign sway over the platoons of writers, actors, technicians, publicity flacks and spin doctors hired to propagate their patrons' views.

8. *Conclusion*

It is not at all obvious how the civic quality of political discourse would have been damaged by a ban on paid political advertising during Commonwealth election campaigns. Had the High Court followed Justice Brennan's lead in the political advertising case, the people of Australia and of the various states would have had ample opportunity to compare the quality of political discourse at the state and Commonwealth level and to assess the relative benefits and drawbacks of the Commonwealth ban on paid political advertising. It is true that the ban would have imposed restrictions on the personal and sovereignal freedoms of political advertisers for a relatively short period every two or three years. But it is at least conceivable that the ban would, if not improve, at

66 Above n64 at 3.
67 Id at 3–5.

least arrest the decline in the perceived quality of political discourse at the Commonwealth level. If so, citizens might reasonably conclude that the limitations imposed upon the personal and sovereignal freedoms of the wealthy few were more than counterbalanced by the enhanced civic freedom of the many to participate as equals in the political process. Even so other citizens might still experience the ban as an unjustifiable barrier to their freedom of communication. Those people would remain at liberty to mount a sustained campaign to remove the ban, using the entire range of media outlets to promote their cause. A few years ago the infamous blackout on election news on television during the final days of an election campaign was disposed of through ordinary political processes. For some reason, the High Court appears to assume that the same people it declares to be sovereign in theory remain incapable in practice of holding their elected representatives accountable for an ill-conceived and possibly oppressive piece of legislation.

One might be forgiven for thinking that there is something ever so slightly opportunistic about a pseudo-republican discourse of popular sovereignty whose most immediate and obvious constitutional consequence is to enhance the law-making power of Her Majesty's judges. Apart from the renewed spectre of an openly imperial judiciary, strong republicans have little reason to rejoice over a decision that covertly reinforces the despotic potential inherent in our present parliamentary regime by joining in the current official pretence that governmental power belongs to the people. The High Court has yet to recognise the constitutional dangers inherent in the political reality of concentrated corporate power and the growth of global media empires. Until it does so, the court will remain oblivious to the difference between a free civic process of political communication and commercially-inspired marketing strategies deliberately aiming to transform the speaking and acting citizen into a politically passive consumer of manufactured images. The political advertising case merely confirms that the supremacy of the Crown has been replaced, not by the sovereignty of the people, but by the increasingly manipulative, mendacious and mass-mediated structures of the corporate welfare state. In the postmodern "society of the spectacle"[68] the self-governing people of a strong republican polity has no autonomous constitutional existence; its place is taken by an increasingly segmented cluster of media audiences armed only with the inalienable right to switch channels.

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68 Debord, G, *The Society of the Spectacle* (1970).