

apparent to any informed observer that a vast chasm of constitutional values and pre-conceptions yawned between what tended to be termed the 'radical' and 'conservative' wings of the Convention.² This chasm, which in reality reflects the fault-line between the new and old constitutionalisms shortly to be described, was so intense that observers in the chamber must sometimes have wondered if delegates really did all share an essentially common constitutional experience on such matters as the functioning of responsible government, human rights and constitutional interpretation. What, then, are these 'old' and 'new' constitutionalisms that so enlivened the Convention?

At heart, the old constitutionalism is the constitutionalism of British parliamentary democracy, as mediated by Australian experience and — crucially — as refracted through the prism of Australian federalism. It has certain readily evident features, both as a matter of substance and of interpretative style. It is intensely positivist, rule-oriented, and textual in its constitutional focus. It is deeply suspicious both of abstract constitutional values, and of any process for the identification and formulation of such values. Similarly, it generally is hostile to broad constitutional concepts from which it is claimed that detailed, subsidiary constitutional rules may be deduced, preferring rather to found its rules directly (and as plausibly as possible) upon some definite piece of constitutional text. True, the old constitutionalism has had resort to such amorphous concepts as federalism in the interpretation of the Constitution, but only in a very limited way.

Fundamentally, the old constitutionalism is unemotional. This is an odd, but nevertheless accurate description of one of the central features of the old constitutionalism, in that it is relatively uninterested in the magic of constitutional symbols, or indeed in the Constitution itself as a symbol, but rather is preoccupied with the substantial legal operations of that document's terms. Correspondingly, with its wariness towards notions of the constitutionally sacred, the old constitutionalism is less interested in the direct protection of individual human rights as such, than in their institutional safe-guarding through the operation of varied constitutional checks and balances.

Perhaps most critically, and certainly underlining its limited sympathy towards abstract human rights, Australia's traditional constitutionalism is profoundly committed to majoritarian parliamentary democracy — within a federal paradigm — both as the highest practical expression of democratic government, and as the most democratically appropriate means of adjusting the claims of conflicting rights and aspirations within the Australian polity. Predictably, the old constitutionalism approaches the entire question of constitutional change cautiously, and as an essentially evolutionary process, in which risks are assiduously to be avoided and constitutional certainty to be maximised. Finally, and in summary, the old constitutionalism is a constitutional philosophy focused as a matter of style upon effectiveness, rather than excitement: it privileges as constitutional goals the production of workable solutions and the achievement of practical outcomes, rather than the creation of a constitutional construct which engages the aspirations of participants and populace.

Thus, the old constitutionalism is the constitutionalism of Sir Samuel Griffith; of Sir Owen Dixon; and indeed, of the majority of delegates at the recent Constitutional Convention, monarchists and moderate republicans alike. More anciently, it was the constitutionalism of Edmund Burke, and its pragmatic caution comprises the heart of conservative constitutional thought in Australia.

The new constitutionalism is very different. It has been prominently on display in the teaching of a variety of law schools for some time, but also has emerged in a number of decisions of the High Court — especially those concerning implied rights — and most

² Broadly, the 'radical' wing of the Convention favoured some form of popular election of a head of state, while more 'conservative' delegates ranged from moderate republicans (such as the members of the Australian Republican Movement), through McGarviests (extremely minimal republicans) to out-and-out monarchists.

recently has fuelled (as was noted) much of the performance of more radical republicans at the Constitutional Convention. To begin, the new constitutionalism is not wedded to the British constitutional tradition: if anything, it is contemptuous of that tradition as anachronistic, imperialist, and alien. Rather, the new constitutionalism derives comfort from more recent and often more radical constitutional and quasi-constitutional paradigms, such as those drawn from the United States, post-war Europe and the United Nations.

Unlike the old constitutionalism it is neither positivist nor rule-based, but rather is vastly more interested in constitutional values and theories of constitutional government than in propositions of constitutional law and practice. In the most pervasive way, it is obsessed with the notion of constitutional symbols, and tends to view the Constitution itself more as a profound cultural artefact than as a legislative blueprint for government. In this sense, the new constitutionalism represents a highly 'emotional' response to the Constitution, tending to understand it as being (or having the potential to be) a vast repository of semi-mystic propositions concerning the nature of the Australian polity, which may be drawn upon at will to resolve any current issue of politics or culture.

Crucially, the new constitutionalism is deeply suspicious of majoritarian parliamentary government, particularly as a means of safeguarding human rights, in which context it is condemned roundly as a comprehensive failure. Correspondingly, the new constitutionalism is impatient with arguments proposing the protection of individual rights through institutional checks and balances, preferring to focus upon more radical means by which such rights may be protected directly and immediately. Out of this preference flows a willingness to flirt with notions of 'democratic' government which in fact are highly oligarchic, so long as they operate to protect favoured rights. The most notable example of this willingness is comprised in the prevalent support of new constitutionalists for extreme notions of judicial supremacy, whereby the judges are accorded a general competence to re-write the Constitution in accordance with some broad vision of human rights. This obsession with rights, and a concomitant determination that the sole relevant function of constitutional structures is to secure their protection, is unsurprising. It is the clamorous and unceasing discourse of rights that is viewed by the new constitutionalists as the primary means of securing the constitutional re-organisation of the state in their own image, a matter which will be returned to presently. Finally, and very obviously, the new constitutionalism cheerfully contemplates rapid and dramatic constitutional change with none of the trepidation of its conservative rival. In short, it is the constitutionalism of the more languid judgments of Sir William Deane;³ of the most florid moments of Mr Justice Kirby;⁴ and of the radical republican minority of the Constitutional Convention.

Accordingly, were one to summarise the constitutionalisms presently contending within Australian constitutional debate, one would be tempted to regard the old constitutionalism as a construct of rules, institutions, blueprints and realities; while the new constitutionalism comprises a paradigm of values, symbols, poetry and hope. As stated above, the latter was very much on parade among radical republicans at the Constitutional Convention, and was perhaps best typified in the private comment by one such delegate to the effect that it really did not matter that a republican model which centred upon a popularly elected President was doomed both to failure at the polls, and practical inutility: what really was of significance was the inherent worthiness of the attempt.

III. Republicanism

By including republicanism among the issues still to be facing Australia in the twenty-first century, one is by definition suggesting that the referendum consequent upon the meeting

3 For example, in *Leeth v. Commonwealth* (1992) 174 CLR 455 at 480.

4 See for example, *Kartinyeri v. Commonwealth* (1998) 152 ALR 540 at 573.

of the Constitutional Convention, which is to be held some time in 1999, will fail. Regrettably or not, this is the most probable result, for the simple reason that the model endorsed by the Convention suffers from sufficient basic flaws as to rend it a vulnerable target within the inevitable politics of referendum.

To take merely the most obvious and easily demonstrated technical problem in the so-called 'bi-partisan model',⁵ that model requires the agreement of the Prime Minister and the Leader of the Opposition before a nomination for the appointment of a President may be taken before a joint sitting of the Federal Parliament, and consent of two-thirds of the members of such a sitting before a President may actually be appointed.⁶ Clearly, each of these requirements assume that the agreement of both major parties will indeed be forthcoming in connection with the appointment of any Australian President. The simple question in this context is why anyone remotely experienced in Australian politics could be so touchingly confident of such an apolitical coalescence for the appointment of a Head of State? It is virtually self evident that sooner or later — and almost inevitably sooner — an opposition party will find it to be in its own political advantage to oppose the progress of a Government's nomination to the Presidency. Where this occurs, the Convention model as expressed in the communique provides no means of breaking the ensuing deadlock, although leading members of the Australian Republican Movement occasionally endorsed the decidedly stop-gap measure of allowing the senior State Governor to serve (open-endedly) as acting-President. The result is that it is perfectly possible under the model as it stands for our constitutional system to prove itself incapable in any given instance of producing a President, and for that state of affairs to continue indefinitely. Not only could such an eventuality produce serious constitutional instability, but even accepting the workability of the most frequently suggested provision for an acting president, the potentially long-term occupation of the presidential office by a *faute de mieux* State Governor would undercut most of the strong arguments for an Australian President, based as they are upon the need for a Head of State possessed of the full confidence of the Australian people, and enjoying a corresponding national and international dignity.

There are, of course, other difficulties with the Convention model. The two-thirds parliamentary appointment mechanism almost certainly lends itself to character assassination of candidates under parliamentary privilege, another ancillary result of the fact that Australian politics is, in both a negative and a positive sense, truly bi-partisan. Again, one might reasonably fear that this potential would persuade many distinguished Australians against allowing their names to go forward as possible president candidates, at a point in their lives when reputation admittedly was their most valuable possession. Finally, the positioning of an ill-defined, politically and socially reflective 'Nominations Committee' at the generating end of the process virtually ensures both that this process will be politicised, and that it will leak like a sieve from the very beginning.⁷ The consequence of all this must be that the bi-partisan appointment model possesses more than enough objective flaws to ground a solid negative campaign at referendum. Indeed, limited experiments to date with audiences of the general public suggests that it is a painfully simple matter to turn even previously supportive voters against the model.

There are, however, many other reasons why the Convention model probably will fail at referendum. The first, is that it does not fall into either of the two categories of republican models likely to succeed at referendum: that is, it is neither so technically perfect that it can repel all rational argument, nor so wildly sales-worthy that it is immune to such sallies.

5 See Australian Constitutional Convention, *Report of the Constitutional Convention, Old Parliament House, Canberra, 2-13 February 1998*, vol. 1, Barton, Department of the Prime Minister and Cabinet, c1998 ('Communique').

6 Note 5 at 44-5.

7 Note 5 at 44-5.

Thus, it comprises neither the unutterably boring but profoundly practical McGarvie model, nor the hopelessly flawed but immensely attractive popular election gambit. Secondly, the model will face concerted opposition by a large array of Australian conservative opinion — most probably including the present Prime Minister — and certainly including all monarchists. Thirdly, the Convention model presumably will meet with intense opposition from a number of conservative State Governments. Finally, and perhaps crucially, the model will be attacked on all sides by dissenting republicans, whether these dissenters be McGarviests who believe that it goes too far, or popular electionists to whom it presents merely the prospect of a sham republic.

Oddly, the existence of serious defects in the model does not necessarily mean that those alarmed by these defects should oppose it at referendum, and this particularly is the case with conservative republicans of the McGarviest ilk who — rightly in my opinion — view the Convention model as one which was compromised in a misguided attempt to gain the sympathies of popular electionists. This is because in deciding one's attitude to the looming referendum, it is crucial that one ask not the question of whether the Convention model is absolutely right, but rather what would be the long term outcome of opposing it. It is in assessing this question that the divergence between the interests of old and new constitutionalists becomes vital. Thus, in contemplating the Convention model, an old constitutionalist of any wisdom would have to inquire of him or herself as to the likely course of events were that model to be defeated at referendum, quite regardless of any distaste that might be felt concerning this or that feature of the proposal. The answer to at least one aspect of this inquiry must be pellucidly clear: merely because the Convention model goes down to ruin at the referendum, it does not follow that the monarchy will reassert its grasp upon the constitutional imagination of Australians. On the contrary, rightly or wrongly, that institution has been fatally destabilised by the republican movement and its own excesses, and quite literally has no prospect of long term survival. The real issue, therefore, in contemplating the likely failure of the 1999 referendum is as to what form of republic ultimately will come to fill the void left by the destruction of the Convention model?

The critical matter here for the old constitutionalist is whether the failure of the moderate (if technically flawed) republicanism represented by the Convention model would not open the way for far more radical republicans — favouring the popular election of a relatively powerful Australian President — to capture the national imagination by proposing the comprehensive resolution of the republican debate once and for all by a thorough-going republicanisation of the Constitution. These republicans, who represent the emanation of the new constitutionalism on the issue of Australia's head of state, might well be swept to referendum success on a wave of popular resentment at what was perceived to be the bungling of the republican agenda by its more traditional proponents. If so, they not only certainly would seek to implement an Australian republic based upon the direct popular election of a head of state, but also undoubtedly would use the occasion to try to promote the implementation of other key aspects of the new constitutional agenda, most notably the institution of pervasive guarantees of judicially enforceable human rights. While the constitutional future is as difficult to predict as any other, the prospect of such a radical constitutional agenda being swept to success by the current of a long overdue republic should give constitutional traditionalists much food for thought in contemplating their attitude to the forthcoming referendum.

For this reason, if for no other, it would be highly desirable that the Howard government sanitise the Convention model through the removal of its more crucial deficiencies before that model is submitted to referendum.⁸ This would mean, at the very least, providing

8 See Winterton G, 'The 1998 Convention: A Reprise of 1898' (1998) 4(2) *University of New South Wales Law Journal Forum* 4, 7.

some means of appointing a president if the government and opposition cannot agree upon a nomination, either before or during the joint sitting. For example, it would be possible to imagine an arrangement whereby, were a two-thirds majority to prove unobtainable, a fifty per cent majority of a joint sitting would suffice. Secondly, some effort should be made to refine and make more precise the exact role of the nominating committee. Finally, a degree of self-indulgence at the Convention saw a number of quite sweeping propositions marked for inclusion in the preamble to the Constitution.⁹ Any one of these (and certainly all together) could found a problematic fear campaign during a referendum, and all should be examined carefully. It may be that the best course forward for the Government concerning all these issues would be to convene a committee composed of leading members of the Convention (or at least those drawn from the various republican perspectives) with a view to arriving at proposals which improved, but were consistent with the Convention's model.

IV. Parliament and the Executive

One of the most prominent features of the last two decades of public affairs in Australia has been the catastrophic collapse of public confidence in Parliament as the centrepiece of our system of government. This failure of confidence has turned not merely upon the effectiveness of responsible government — that is, the accountability of the executive to Parliament — but also upon the notion of Parliament itself as a representative institution, and upon the concept of parliamentary government as a genuinely democratic paradigm.¹⁰

This is a significantly different position from that which has pertained in the past where, however profound may have been the historic fear of the executive, and however prevalent the dislike of 'politicians', there always existed a basic confidence in Parliament as such. Thus, no matter how much we despised the ministry and the politicians of the day, we always accepted that Parliament as a concept was sublime.¹¹ The whole phenomenon was a little like that involved in the standard medieval rebellion against royal authority, the rhetoric of which invariably was that the King had fallen under the sway of evil counsellors, but that he himself was benign and in need of rescue.

What is now emerging, however, is a strong disdain for Parliament itself, and this disdain is one of the chief features of the new constitutionalism. It is displayed prominently by lawyers, academics, and even some judges.¹² The charges against Parliament are many and varied. It is not truly representative of the richness of the community. It is incapable of protecting human rights, and even positively antipathetic to such rights. Its members are low, venal, and unimaginative. Most critically of all, these deficiencies are institutional and irredeemable, and Parliament — hitherto the embodiment of democracy — is thus best regarded itself as an essentially anti-democratic force. It was these types of charges that prompted the more radical republicans at the Constitutional Convention to call stridently for an elected President, not on the basis that the existence of such an official would not compromise parliamentary government, but precisely on the grounds that just such an effect would be achieved. Thus, what actually was being argued was that the

9 For example, recognition of 'respect for . . . the environment'. Note 5 at 46.

10 See, for example, the curious speech of Delegate Schubert in Australian Constitutional Convention, *Report of the Constitutional Convention, Old Parliament House, Canberra, 2–13 February 1998*, vol. 3, Barton, Department of the Prime Minister and Cabinet, c1998, 37–40. For a 'pop' expression of this entire psychology see Rayner M, *Rooting Democracy: Growing the Society We Want*, Allen & Unwin, Sydney, 1997.

11 See Craven G, 'Conservative Republicanism, The Convention and the Referendum' (1998) 4(2) *University of New South Wales Law Journal Forum* 18.

12 The essence of the decisions of the High Court in such cases as *Nationwide News v. Wills* (1992) 177 CLR 1; *Theophanous v. Herald and Weekly Times Limited* (1994) 182 CLR 104; and *McGinty v. Western Australia* (1996) 186 CLR 140 lay in the Court's rejection of Parliament as the embodiment of democracy, in favour of itself, as arbiter of judicially derived democratic principles.

existence of a popularly elected President would pose a check upon the functioning of a system of government that was seen as generally unsatisfactory. To this extent, most of the radical republicans at the Constitutional Convention (new constitutionalists all) are best understood as falling outside the spectrum of parliamentary democrats. Democrats they may be, but their allegiance is not to Parliament.

The reasons for the wide-spread loss of confidence in Parliament being addressed here are many and varied. Some are more obvious than others. Thus, the incessant media criticism of Parliament, some of it fair and some grossly unfair, undoubtedly has fed a public perception of Parliament as an organisation that is institutionally corrupt. Likewise, it is pointless to pretend that executive domination of Parliament, demonstrated particularly during such public events as question time, has done anything other than to produce a largely accurate impression that Parliament is not master of its own house. Yet the much avowed debasement of Parliament hardly comprises the whole story of the popularly perceived decline of Parliament as the bastion of the people. Rhetoric notwithstanding, the case that Parliament has been more supine over the past four decades than at any other point in its long and varied history has yet to be demonstrated in any intellectually adequate way, while the huge volume of human rights legislation which has emanated from Australian Parliaments over the last thirty years seems to argue against a simplistic picture of Parliament as a decadent creature of the executive. Put simply, the golden age of Parliament, like that of football, cricket or any other sport, probably never occurred, or at least not with quite the glory that we prefer to imagine.

An alternative thesis is that the true reason for today's prevalent intellectual rejection of Parliament has little or nothing to do with democracy. The real and unforgivable charge against Parliament is that it has failed adequately to deliver upon the social and human right's agenda of the legal and political elites who collectively subscribe to the new constitutionalism. Ironically, the chief reason for this probably is that both governments and parliaments are far more interested in the mundane economic and social measures which most directly contribute (or seek to contribute) to the material comfort of society, and which consequently appeal to the electorate as a whole, rather in the essentially moral agenda of the new constitutionalists: thus, they are far more focused on taxation policy and roads than on bills of rights and the separation of powers. On this basis, the true problem that the new constitutionalists perceive in Parliament is not that it is undemocratic, but rather that it is too democratic: that is, that it more or less reflects the priorities of the electorate at large, rather than the preoccupations of prevalent intellectual elites.

The direct outcome of this failure of Parliament to respond to the social and intellectual elites that collectively support the new constitutionalism has been the strong support of these groups for non-parliamentary means of determining social priorities and directing social objectives. The clearest example of such thinking has been prevalent support for the notion of a right-thinking judiciary orchestrating social change by reference to pervasive human rights, either inserted or — if necessary — extracted from the Constitution. In the final analysis, of course, such a notion is no mere refinement of parliamentary democracy, but its substantial rejection.

None of this is even remotely likely to change as Australia moves into the next century. On the contrary, as we approach the millennium the chorus of dissatisfaction with representative parliamentary democracy has reached unparalleled heights, as illustrated in its contemptuous dismissal by many sections of the Constitutional Convention. The same frustration with parliamentary government as a means of delivering the social and constitutional objectives of the new constitutionalists undoubtedly will ensure that it is subjected to further and even more intense attack as we progress, majestically or otherwise, past the centenary of Federation.

V. The High Court

It is, perhaps, a truism that the High Court has been passing through one of the most activist phases in its history. In the context of common law, it has comprehensively rewritten such areas as equity and torts. In a quasi-constitutional context, it has created an Australian doctrine of native title, turning conventional notions of property law on their head.¹³ Crucially, in a specifically constitutional connection, the Court has blazed trails undreamt of by the likes of Sir Owen Dixon and Sir Samuel Griffith, most notably through its extraction from the visibly shrinking flesh of the Constitution of the so-called implied freedom of political communication.¹⁴

In this context, the Court has engaged in an extended flirtation with the new constitutionalism. In cases like *Theophanous*, *Stephens* and *Leeth*, the Court was determined to discern rights and freedoms that it knew to be historically and textually absent from the Constitution. Consequently, it was forced to rely upon an interpretative method that was, by any accepted Australian legal standard, loose, value-based, obsessed with both the concept and the efficacy of rights, heavily symbolic, and dismissive of Parliamentary democracy:¹⁵ in short, an interpretative methodology bearing the clear psychological signature of the new constitutionalism.

The reason for this flirtation on the part of the Court with the new constitutionalism closely parallels, in a specifically constitutional context, the broad rejection of majoritarian parliamentary democracy by the generality of new constitutionalists. Just as Parliament has failed to deliver the rights-based societal settlement desired by the new constitutionalists, so the Constitution itself had failed to provide both the Court and its legal admirers with a similarly rights-derived constitutional culture. The only way in which the Court could resolve this highly unsatisfactory situation was for it to re-interpret the Constitution so that the desired results flowed, not from its genesis, language or logic, but from an atmospheric conception of the role of the Constitution as such.¹⁶

Indeed, at certain points in this re-interpretative process and the extended argumentative build-up that preceded it, the Court or its members have hinted that their dissatisfaction was not limited to the operation of parliamentary democracy, but extended to majoritarian constitutional democracy itself. Thus, some members of the Court appear to have hinted that one of the compelling considerations justifying their effective amendment of the Constitution was that the people themselves had failed to discharge their duties honourably at referendum.¹⁷ This takes the new constitutionalism one step beyond a mere rejection of parliamentary democracy, and towards the notion that there is some objectively valid constitutional order, revealed to particular legal and intellectual elites, and from which not even the people themselves will be permitted to stray.

In fact, the recent dramatic constitutional activism of the High Court now generally is regarded as being on the wane, a diagnosis which this author cautiously endorses. If so, the question must be why the Court has turned from what appears to be so intellectually satisfying a course? A number of answers present themselves. The most simple concerns changes in the composition of the Bench. Thus, for example, neither Sir Anthony Mason nor Sir William Deane any longer sit as members of the Court, and their absence

13 *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1

14 See cases at n 12 and see also *Australian Capital Television Pty. Ltd. v. Commonwealth* (1992) 177 CLR 106; *Leeth v. Commonwealth* (1992) 174 CLR 455.

15 See for example the judgment of Sir William Deane and Justice Toohey in *Leeth v. Commonwealth* (1992) 174 CLR 455 at 482–5, and of Sir William Deane in *Cunliffe v. Commonwealth* (1994) 182 CLR 273 at 336–9.

16 See generally, Craven G, 'The High Court of Australia: A Study in the Abuse of Power' *Alfred Deakin Lecture*, 1997.

17 See for example Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation' (1986) 16 *Federal Law Review* 1 at 22–3.

undoubtedly is felt by proponents of the new constitutionalism. However, the retreat by the Court from the new constitutionalist position embodied in implied rights certainly is a little more complex than this.

One factor seems to be a general recognition on the part of a number of the judges of the Court that, hopeful predictions to the contrary, judicial creativity has not proved to be the automatic solution to complex social problems. Thus, those judges who were tempted to believe that the High Court had only to wave the wand of native title and the enormously complex political problems besetting land rights automatically would disappear must be bitterly and justifiably disappointed. The elation of *Mabo* turned quickly to the misery of *Wik*,¹⁸ and seems to have left some of the justices sadder but wiser.¹⁹ Similarly, it would seem evident that some of the more cautious justices have realised that once one starts down the slippery slope of implied rights, there is no logical reason why one must halt with an implied freedom of political communication. On the contrary, one imagined right is neither more nor less implausible than another, with the result that there is no obvious effective restraint upon the inventive capacity of an appropriately minded judge. Thus, the enthusiasm with which Sir William Deane and Justice Toohey were prepared to wield the club of implied freedoms in such directions as the creation of a broad right of equality²⁰ would have given more cautious judges considerable food for thought.

To much the same effect would have been the dawning and painful realisation that constitutional activism of the sort addressed here inevitably has embroiled the High Court in intense political controversy, and that parliaments and executives — far from responding to judicial incursions favourably — could be relied upon to repel them with maximum force. Finally, there is little doubt that the Court has been surprised by the intense political, legal and academic criticism that has met its forays into the new constitutionalism. Used as it is to polite applause from legal and academic courtiers, the Court seems to have been quite unprepared for the barrage of criticism that was levelled at it over such matters as its implication of rights. All of these factors clearly have played some role in restraining the activism of the Court.

Nevertheless, it would be a foolish commentator who was prepared to discern in this recent reticence any permanent change in the institutional disposition of the Court. On the contrary, the High Court will continue to be urged by academic and legal commentators, and by the personal inclinations of many present and future Justices,²¹ towards a role of creative re-interpretation of the Constitution in line with the imperatives of the new Constitutionalism. On this basis, there is every reason to suppose that the role of the Court will be one of the key fields of conflict within Australian constitutionalism into the next century.

VI. Human Rights

It hardly is a controversial statement that Australian constitutional law, and indeed Australian law generally, has become increasingly obsessed with notions of human rights. One significant factor underlying this obsession is that it reflects the concentration of the new constitutionalism upon individuals and their relationships, rather than upon inanimate institutions, as the chief objects of constitutional law.

Perhaps the most fundamental point to be made here is that the language of rights

18 *Wik Peoples v. Queensland* (1996) 187 CLR 1.

19 I have in mind particularly such judges as the former Chief Justice, Sir Gerard Brennan, whose majority judgement in *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1 is markedly different in tone from his dissenting opinion in *Wik Peoples v. Queensland* (1996) 187 CLR 1.

20 *Leeth v. Commonwealth* (1992) 174 CLR 455, especially at 482–5.

21 See for example the pregnant comments of Justices Hayne and Gummow in *Kartinyeri v. Commonwealth* (1998) 152 ALR 540 at 560.

employed by new constitutionalists within their legal discourse typically is highly disingenuous. What is meant by this is that such language allows what are in reality merely subjective political or policy positions to be cloaked rhetorically in the irrefutable language of objective human rights. The intended, and often successful outcome of this tactic, is that anyone disputing the utility of such positions instantly is committed not simply to opposing this or that policy option, but to advocating the despoilment of sacrosanct and inviolable human freedoms. Just one example of this argumentative technique would be the articulation of the subjective policy position that abortion on demand is a desirable societal good, as the suggested absolute right for the control of one's own fertility. Innumerable further illustrations might be given.

Indeed, in this sense, contemporary Australian rights discourse may quite properly be seen as the exact equivalent of the literalism which reigned during the post-Engineers era. Just as literalism allowed the High Court to disguise essentially policy choices concerning the desirability of the centralisation of power as comprising the objective and inevitable outcomes of a 'literal' reading of the Constitution, so recourse to concepts of human rights allows judges to present intrinsically political reasoning as involving merely the unavoidable consequence of a due respect for 'rights'. Just as literalism was the 'legal correctness' of the twenties, so rights discourse is the equivalent of the nineties.

The chief difficulty here is that there is no policy position — good or bad — which cannot be formulated as a human right, given only the will and basic linguistic dexterity of its proponent. The result is that the various struggles of the new constitutionalism tend to be carried on not as a legitimate political dialogue concerning the limits inter se of privacy and free speech, or civic security and freedom from arrest, but rather as an entirely artificial discourse where inviolable rights are elevated in contradistinction to mere political imperatives. The final outcome of this type of constitutional *leger de main* is intensely intellectually demeaning, as is exemplified in the wider operation of the Canadian Charter of Rights and Freedoms.²² Thus, under the Charter, legal discourse quickly becomes confused with moral and political discourse, while moral and political discussion tends to degenerate into the articulation of legal opinion as to the meaning of the most plausibly relevant provision of the Charter: so that when asked for a moral opinion on such an issue as abortion or euthanasia, a Canadian is just as likely to quote the text of the Charter, whereas when pressed for a legal assessment as to the operation of the Charter in the same context, will be inclined to resort to the language of Aquinas or Sartre, according to taste.

Perhaps the most significant point to grasp in this context is that this use of the language of rights has paid a crucial part in the new constitutionalism's undermining of majoritarian democracy. The reason for this is that so long as a social demand represents merely its sponsor's preferred policy position, it is extremely difficult to characterise its rejection as falling beyond the competence of the democratic process as represented by the functioning of the elected Parliament. However, if that position may be re-packaged as the application of a fundamental right, then it will be comparatively easy to argue that its implementation should be beyond frustration even by people's elected representatives, and should fall for vindication by the courts.

Naturally enough, the rights discourse of the new constitutionalists is closely related to the recent rights activism of the High Court, which was adverted to in the previous section of this article. Understood in this way, and stripped of its legal trappings, this rights activism has represented little more than the adoption by the Court of a particular cultural and political agenda. This agenda has been sponsored by a relatively narrow legal and academic elite that has turned to the Court as the most convenient means of implementing

22 For a recent critical perspective on the Charter see Watson B, 'The Language of Rights and the Crisis of the Liberal Imagination' in Peacock A (ed) *Rethinking the Constitution*, Oxford University Press, New York, 1996.

its programme independently of the democratic process, and in the absence of the popular support requisite for constitutional amendment.

In any event there is little doubt that this wider obsession with rights within Australian law will continue into the twenty-first century, both on the part of the courts and new constitutionalists generally. In many ways, it represents the central agenda of the new constitutionalism, and as such will receive constant intellectual reinforcement from its academic and judicial supporters in North America; will be taught rapturously in the law schools; and doubtless will find many receptive ears among a legal profession increasingly susceptible to the flattering tidings that it is composed of civic heroes rather than legal functionaries. Moreover, the new constitutionalists hardly can afford to ignore the High Court as the ideal vehicle by which to implement their constitutional priorities, given that these priorities hitherto have possessed an almost total lack of appeal to the only alternative vehicles for constitutional alteration, governments, parliaments and the electorate as a whole.²³ Of course, the grave danger of the continuance or the re-emergence of strong rights-based judicial activism is that it inevitably would lead the Australian judiciary into a severe conflict with the elected executive and legislative branches, which equally inevitably, the courts would lose, with disastrous consequences both for themselves and Australia's constitutional system. Lose they must, for the simple reason that the intellectual preoccupations of a legal elite inevitably must fall before the political priorities of society as a whole.

VII. Federalism

It hardly is worth observing that Australian Federalism has shared with man and woman the sorry fate of declining steadily towards the grave from the moment of its birth.²⁴ In recent years, there has been a new dimension to this decline. Not only has Australian federalism continued to wither as a constitutional and political fact, but it also has declined as the primary focus of Australian constitutional thought. The reason for this is obvious: as the constitutional activism of the High Court, particularly in relation to implied rights, has become the most troubling issue for constitutional conservatives, so their attention has been drawn steadily away from their traditional preoccupation, the protection of federalism. The inevitable result has been that those who tend to defend the existing dispositions of the Australian Constitution have had their fire drawn away from the maintenance of strongly co-ordinate federalism, and turned towards the vagaries of implied rights. Consequently, the ramparts of federalism have been left relatively undefended.

Today, from the point of view of an Australian constitutional lawyer, it must reluctantly be conceded that the chief defence of federalism is political, not legal.²⁵ Thus, the High Court undeniably has been institutionally biased against federalism for at least the last three-quarters of a century, and there is little point in pretending that it has a strong ideological commitment to the defence of that concept. The real guarantee of Australian federalism is, as Brian Galligan consistently has argued,²⁶ that Australia is federal as a matter of basic political and social fact. In functional terms, constitutional federalism is, at best, secondary to this fundamental social federalism.

In terms of Australia's constitutional future, the real question is whether a determined central government could reduce the present 'co-operative' federalism between the Commonwealth and the States still further to what effectively would be administrative

23 Thus, proposals for the insertion (or extension) of human rights in the Australian Constitution were crushingly rejected at the 1988 referendum.

24 See Craven G, 'The States' in G. Craven (ed.) *Australian Federation Towards the Second Century*, Melbourne University Press, Carlton, 1992.

25 See for example Galligan, B and C Walsh, 'Australian Federalism: Yes or No?' in Craven G (ed), n 24.

26 Note 25.

federalism, naturally assuming that appropriately propitious political conditions and sufficient political will were to exist. This always has been a potent fantasy in Australian political circles,²⁷ both of the left, and of those portions of the right who consider themselves most likely to control the Government benches in Canberra. Their argument typically has been that Australia's social and economic problems largely could be solved if only the Australian people could be persuaded to concentrate a sufficient portion of their power within the central government. It goes almost without saying that there is virtually no persuasive evidence, empirical or otherwise, that suggests any such thing, and Australian history reveals no correlation between the centralisation of power and the maximisation of policy goods. In reality, this almost mystical faith in the centralisation of power probably has less to do with good economics, or even good politics, than with an unappreciated addiction to Diceyan imperial centralism, according to which constitutional history reached its end point of perfection when all governmental power within the British Isles had been concentrated in Westminster. Indeed, it is fascinating to see how the Australian left, in particular, has found so imperial a siren song so very seductive.

One reasonably might speculate as to how federalism will interact with the new constitutionalism. Theoretically, there should be at least some instinctive sympathy between the two, in that federalism by definition is restrictive of the majoritarian impulse that the new constitutionalists so fear. In fact, however, the new constitutionalism almost invariably is hostile to federalism, as its adherents seek to impose their constitutional solutions nationally through what they regard as more readily manipulable central institutions, such as the High Court.²⁸ In this process, the States are more likely to be seen as recalcitrant communities of constitutional troglodytes, than as potential restraints upon majoritarian tyranny. Of course, it may be that the new constitutionalism will re-assess its disdain for federalism in the future: theoretically, as a limit upon majoritarian power; and practically, because it may prove a simpler matter for a constitutional elite to take command of the constitutional agenda of a single state, than of the Commonwealth as a whole.

VIII. Conclusion

In summary, the constitutional history of the early twenty-first century almost certainly will comprise the battle between the new and the old constitutionalisms, most obviously in the areas outlined in this article. Perhaps the final issue to be addressed is to enquire why the new constitutionalism is so popular among Australia's constitutional elites, and especially among lawyers. This is a wide issue, which may not be dealt with in detail here, and which in any event has been examined extensively on other occasions.²⁹ Probably the simplest explanation is the most plausible. The new constitutionalism confers power and prestige on lawyers, by elevating them — particularly in their incarnation as High Court judges — to the position of social arbiters and constitutional heroes. This cannot fail to be, and undoubtedly will continue to be, most attractive to a large proportion of lawyers. One further matter is clear. No matter how popular the new constitutionalism may be within law schools and upon the benches of the courts, it undoubtedly will continue to excite controversy throughout all levels of society, and will rigorously be contested on all the battlefields identified here.

27 For a good example see Greenwood G, *The Future of Australian Federalism*, Melbourne University Press, Carlton, 1946.

28 For example, the attempts of more radical republican delegates at the Convention to afford the Court ample opportunity to invent new constitutional doctrine through the insertion of promisingly vague statements of values in the preamble.

29 For example, see n 18.