WHO WINS UNDER A BILL OF RIGHTS?

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INTRODUCTION

The title of this paper was prescribed by the organisers of the seminar at which this paper was first presented and I hope they will forgive my expression of unease with it. The question implies that there are categories of people who generally win if a jurisdiction has a bill of rights and there are others who will generally lose. In this sense the debate about the value of bills of rights is framed as a zero-sum game — that is, a game in which whatever is gained by one group is lost by the other. I will argue that this way of characterising the discussion is unproductive.

In this paper I focus on the Australian context. There is of course no Australian bill of rights at the national level, but there has been a lengthy debate on the topic, shadowing the controversies that have raged in countries with such an instrument. I will survey the Australian debate and argue that participants on all sides have tended to invoke broad brush and inaccurate images of the major institutions affected by bills of rights. In my view, the debate has, by and large, avoided crucial questions about the nature of Australian democracy.

WINNERS AND LOSERS IN THE PROTECTION OF RIGHTS

In many ways the question 'who wins (and who loses) under a bill of rights?' has shaped the discussion of bills of rights in Australia from Federation onwards, and it is the main reason for the repetitive and unproductive form of the debate. The identity of the winners and losers however has morphed somewhat over time: states' rights have been a major issue in the Australian debates, but there has also been a strong current of anxiety about the politicisation of the judiciary and the judicialisation of politics.

In the lead up to Federation it was argued that a bill of rights would undermine state autonomy. Inglis Clark's preliminary draft of a constitution in 1890, which influenced the first official draft produced by Queensland Premier Samuel Griffith in 1891, contained a fragmentary bill of rights. Clark's draft featured four rights from the United State Bill of Rights: the right to a jury trial, to the privileges and immunities of state citizenship, to equal protection under the law and due process and to freedom of and non-establishment of religion. The inclusion of these rights in Clark's draft constitution met with considerable resistance, and only some references survived the constitutional convention debates in a watered-down form.[1]

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[1] Eg, *Australian Constitution* sections 80 (right to a jury trial for Commonwealth offences tried on indictment), 116 (prohibition on religious restrictions in Commonwealth laws), 117 (prohibition of discrimination by a state against residents of another state).

Clark's attempts to insert into the Australian Constitution the language of equal protection of the laws and due process as part of a privileges and immunities clause, based on the United States Constitution, were a particular failure. Two themes recur in the Federation debates. The immediate charge was that the equal protection provision was couched in general and uncertain language. This was typically followed by the objection that the provision could invalidate colonial legislation, particularly that which discriminated against non-European workers. Robert Garran's *Australian Handbook of Federal Government*, published in 1897, echoed the course of the debate in the Convention. He argued that few of the United States Constitution's provisions relating to individual rights were relevant to Australia. They were either trivial or already amply secured. He described the idea of a declaration of rights as 'an interference with state rights, on behalf of popular rights: an interference undoubtedly justifiable, if necessary, but if not necessary, better dispensed with'.[2]

Sir John Forrest, Premier of Western Australia, warned the Melbourne Convention in 1898 that an equal protection clause would create particular difficulties with coloured residents of his state. Western Australian legislation prevented Asian or African aliens from obtaining mining rights or privileges without permission of the government, and imposed an absolute ban on the employment of Asians and Africans as miners. Forrest feared that if such aliens were resident in other parts of Australia and not subject to similar constraints, they would be able to invoke the clause to avoid the Western Australian restrictions. He spoke frankly:

> It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies … in regard to that class of persons. It seems to me that should the clause be passed in its present shape, if a person, whatever his nationality, his colour or his character may be, happens to live in one state, another state could not legislate in any way to prohibit his entrance into that state.[3]

Isaac Isaacs also warned of the dangers of the language of equal protection and the possibility that a clause could invalidate state factory legislation that restricted the employment of Asian workers.

The Australian rejection of Clark's proposals was based above all on a concern to preserve the autonomy of the states. Consent to Federation, it was argued, should not have implications for the way that a state dealt with anyone within its jurisdiction. This view was supported by what now appear to be contradictory arguments: the constantly expressed confidence that the states were unlikely to abridge any individual freedoms; and a consensus that the power to enact racially discriminatory legislation was part of the inherent sovereignty of the states. It is worth recalling these ideas not, as Tom Campbell has suggested,[4] to tar all opponents of Australian bills of rights with a racist brush, but rather to puncture excessive nostalgia about the wisdom of the founding fathers' constitutional design.

States' rights also dominated the opposition to Attorney-General Lionel Murphy's Human Rights Bill in 1973, the first attempt to introduce national human rights legislation.

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[2] *An Australian Handbook of Federal Government* (1897) 173.

[3] *Official Record of the Debates of the Australasian Federal Convention (Third Session): Melbourne 1898* at 1113 ('*Melbourne Debates*').

[4] See Tom Campbell, in this volume, 57.

It was based on the International Covenant on Civil and Political Rights 1966 and applied to both federal and state governments. The Bill drew a storm of protest, most particularly based on the claim that the law would diminish states' rights, and it eventually lapsed. A second legislative attempt to enact a bill of rights was made in 1983 by Attorney-General Gareth Evans: this was a less ambitious version of the Murphy law, providing for judicial interpretation to favour constructions of laws that promoted human rights. Again, a heated attack on the proposals was made on the ground that the law would diminish state legislative power and in the end the draft law was not introduced into Parliament.

In 1985, Attorney-General Lionel Bowen introduced yet another version of an Australian bill of rights into Parliament. The draft legislation was narrower still than the Evans Bill since it applied only to federal laws and excluded all state laws from its scope. Despite its modest form, the bill attracted intense controversy and opposition from politicians from all parties, on the basis that it that it would usurp parliamentary power, and it was allowed to lapse. In 1988, a bill to amend the Constitution to (among other things) extend the existing rights provisions to apply to the states as well as the Commonwealth failed miserably at a referendum.[5] States' rights were prominent in the 1988 debate, as well as the spectre of the politicisation of the judiciary. Given the consistent concern about the states as losers in any Australian bill of rights, it is intriguing now to see calls for a bill of rights made by supporters of states' rights in order to combat the strongly centralising tendencies of the current Commonwealth government.[6]

THE STRUCTURE OF THE BILL OF RIGHTS DEBATE

Two main camps have emerged in the modern bill of rights debate: on the one hand there are those who regard a bill of rights as an essential element of a modern parliamentary system because it offers some form of restraint on untrammelled legislative power; within this group, some support a bill of rights that allows judicial review and invalidation of legislation[7] while others favour a legislative bill of rights that provides fewer formal constraints on parliamentary action.[8] The other camp comprises those who view a constitutional or statutory bill of rights as a fundamentally undemocratic mechanism that will disrupt, perhaps even corrupt, the political process,[9] although some members of this group have come to tolerate a legislative bill of rights.[10] Both groups would probably see themselves at heart as committed to human rights principles as a set of signposts towards a more just society (although the second group is often uncomfortable with the international vocabulary of human rights) and the division between them is essentially founded on the mechanics of expressing those principles.

The two camps just described are not associated with the major left/right faultlines in Australian politics: within the left (broadly defined) particularly there is considerable disagreement on the bill of rights issue, with a spectrum of positions from warm embrace to outright rejection represented. In general, those associated with the political right have been more consistent in their opposition to any form of bill of rights.

The debates over bills of rights in Australia have not just been rather uncreative, remaining in set furrows; they have also been marked by a personal zeal and passion

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[5] *Constitution Alteration (Rights and Freedoms) Bill* 1988 (Cth).

[6] See 'Federalism on notice', *The Weekend Australian*, 20-21 May 2006, 27.

[7] Eg, Julie Debeljak, 'The *Human Rights Act 2004* (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights' (2004) 15 *Public Law Review* 169.

[8] Eg, Frank Brennan, *Legislating Liberty: A Bill of Rights for Australia* (1998).

[9] Eg, James Allan, 'A Defence of the Status Quo' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 175.

[10] Eg, Conor Gearty, *Principles of Human Rights Adjudication* (2004).

uncharacteristic of other legal controversies in Australia. Each camp is remarkably suspicious of the other: proponents of bills of rights despair at the callousness, or perhaps just the misguided faith, of the sceptics in the face of evidence of failures of the parliamentary process to protect rights; while the mantle of virtue assumed by the human rights set and their apparent disregard for democratic processes irritates the Australian bill of rights sceptics. Perhaps the journalist Janet Albrechtsen most colourfully expresses this exasperation with her regular references to jet-setting human rights gurus.[11] It is indeed quite rare that the two camps ever seriously engage with each other, each preferring the intellectual company of their own members. Discussions between the two camps often become dialogues of the deaf, and so this present symposium is unusual and important.

Within the rather starkly polarised debate I have sketched here, the question 'who wins under a bill of rights?' would be answered typically by members of the pro-bill of rights camp as 'society generally'. Social benefit arises, it would be contended, by virtue of the capacity of non-majoritarian values expressed in a bill of rights to restrain the legislature from actions in the heat of the moment.[12] The beneficiaries of a bill of rights would be identified by the second camp as 'judges and lawyers' (who will use the concepts of human rights as a power-grabbing technology)[13] and also as 'criminals and other manipulative or anti-social groups' (who will exploit particular rights to make otherwise unfounded claims).

A DIFFERENT QUESTION

I want to take a different tack to the one I have attributed to the camp with which I am associated and suggest that the benefits and detriments of bills of rights are hard to predict in advance: they depend on local cultures and contexts and *a priori* sweeping acceptances or rejections of such instruments are not useful. In this sense, the categories of 'winners' and 'losers' from bills of rights are not fixed. But I want to move away from the sporting metaphor implied in the question as it does not get us very far. In my view, we should analyse the effect of bills of rights not in terms of win/loss but rather in terms of the contribution they can make to public discussion and dialogue about the values and form of democracy we want to promote in our society.

Traditional legal analysis assumes that the proper forum for debate about social and political values is the legislature. The democratic process allows citizens to participate indirectly in this discussion through elections and this 'civil society' is involved in the values debate to the extent that it can mobilise pressure to exert on politicians. The judiciary is not regarded as a legitimate interlocutor about values. These assumptions have made the most durable theme in the bill of rights debate the objection that bills of rights are antithetical both to Australian democracy and to the proper judicial role because they provide limits on legislative power and effectively transfer power from an elected legislature to an unelected judiciary. This transfer is of course most obvious in the case of a constitutional bill of rights, where legislation can be struck down if interpreted to be inconsistent with protected rights, but it is also increasingly feared in the case of legislative bills of rights, such as in New Zealand or the United Kingdom.

The idea is that parliamentary sovereignty and the tradition of responsible government in Australia — the convention that the executive branch of government is kept in check by being answerable to the elected legislature — are adequate to protect individual rights. This argument has been made by both politicians and judges. Sir Owen Dixon read the

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[11] Eg, 'Let the peoples' representatives make the hard decisions', *The Australian*, 25 January 2006.
[12] See, eg, Laurence Tribe, *American Constitutional Law* (1978) 10.
[13] James Allan and Mirko Bagaric, 'Bill of rights benefits judges, lawyers most', *Australian Financial Review*, 7 February 2006.

Federation debates about rights in this light. He explained to an American audience in 1942 that a study of the United States Constitution 'fired no [Australian constitutional drafter] with enthusiasm for the principle [of guarantees of rights]'. The reason for this lack of enthusiasm was confidence in the legislative process:

> Why, asked the Australian democrats, should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people … all legislative power, substantially without fetter or restriction?[14]

Sir Robert Menzies later offered another American audience a more detailed account of the protection of individual rights in the Australian political process.

> Should a Minister do something which is thought to violate fundamental human freedom he can be promptly brought to account in Parliament. If his Government supports him, the Government may be attacked, and, if necessary defeated. And if that … leads to a new General Election, the people will express their judgment at the polling booths. In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. [15]

These sentiments are similar to those of many contemporary Australian politicians whose confidence in the parliamentary process to protect rights extends across the political spectrum. For example in 2001 former New South Wales Labor Premier Bob Carr strongly attacked proposals for a bill of rights. He said:

> Parliaments are elected to make laws. In doing so, they make judgments about how the rights and interests of the public should be balanced. Views will differ in any given case about whether the judgment is correct. However, if the decision is unacceptable, the community can make its views known at regular elections. This is our political tradition. A bill of rights would pose a fundamental shift in that tradition, with the Parliament abdicating its important policy-making functions to the judiciary. ... A bill of rights is an admission of the failure of parliaments, governments and the people to behave in a reasonable, responsible and respectful manner. I do not believe we have failed.[16]

So too Commonwealth Attorney-General Daryl Williams launched National Law Week in 2001 by criticising proponents of bills of rights. He argued that:

> We have a system of representative and responsible government, certain important constitutional guarantees, explicit protections in legislation including specialised human rights legislation, and protections in the common law. Our democratic institutions hold governments accountable. They limit potential abuses of power. They support a democratic civil culture. … Parliaments make laws in this country. In doing so, they make decisions about how competing rights and freedoms, including those of the community at large, are to be balanced.[17]

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[14] Owen Dixon, 'Two Constitutions Compared' in J Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1965) 100, 102.
[15] Robert Menzies, *Central Power in the Australian Commonwealth* (1967) 54.
[16] Bob Carr, 'Only people -- not bills -- protect rights', *The Australian*, 9 January 2001, 17.
[17] Attorney-General (Press Release, 13 May 2001).

Academics have also developed this 'anti-democratic' criticism, sometimes in even stronger terms than the politicians.[18] James Allan, for example, identifies himself as a 'majoritarian democrat who prefers important social disputes – including disputes about rights—to be decided on the widest practical basis, one in which each has some sort of say and everyone's say counts about the same.'[19] He argues that the legislature should be left with decisions about rights because they represent the majority's voice.

The idea that parliaments are the proper forums for the protection of rights and that, if judges were let loose with rights, they might get carried away and impose their own political, moral and ethical views on the interpretation of the law, thus undermining the democratic process, has powerful rhetorical appeal. The criticism typically emphasises the fact that judges are unelected, implying that the process of standing for election provides proper accountability for action. I want to argue that this popular critique of the notion of an Australian bill of rights deserves close scrutiny for three reasons.

a. Evidence-free optimism about the legislative human rights record

First, we need to consider how well elected governments, like our own, do in fact protect human rights. Are, in James Allan's words, disputes about rights in Australia in fact 'decoded on the widest practical basis, one in which each has some sort of say and everyone's say counts about the same'? And, in any event, should the definition of rights be decided by the majority? Is it *obvious* that contemporary disputes about Aboriginal land rights and the rights of refugees, for example, are adequately discussed by our elected government? Jeremy Waldron has described some of the features of a democratic legislature in the following way:

> [It would be] a large deliberative body, accustomed to dealing with difficult issues, including important issues of justice and social policy. The legislators deliberate and vote on public issues, and the procedures for lawmaking are elaborate and responsible, and incorporate various safeguards, such as bicameralism, robust committee scrutiny, and multiple levels of consideration, debate, and voting. … I assume … that there are political parties, and that legislators' party affiliations are key to their taking a view that ranges more broadly than the interests and opinions of their immediate constituents.[20]

How well does the Australian Parliament measure up against this blueprint? In practice the human rights dimensions of political issues are not regularly discussed there and the major political parties are regularly in agreement on the groups whose freedoms need to be restricted. Parliamentary dialogue about human rights is generally limited and impoverished. Political debate is governed by party allegiance and attempts by individual politicians to pursue human rights issues are typically muzzled.[21] The claim that 'robust parliamentary debate' operates to protect rights[22] has little empirical basis in Australian

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[18] Eg, James Allan, 'All bets are off when a bill of rights comes in', *Sydney Morning Herald*, 18 April 2006.

[19] Allan, above n 9, 175.

[20] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1361.

[21] The failure of the *Migration Amendment (Designated Unauthorised Arrivals) Bill* in August 2006, because of the threat by government Senators to cross the floor of Parliament to vote against it, is a rare counter-example. The Bill would have required all asylum seekers arriving by boat to be processed outside Australia.

[22] John Howard, 'Democracy built on a fair-go ethic', *The Australian*, 10 May 2001, 11.

history: indeed the current operation of the Commonwealth Parliament indicates the sharp diminution of the role of the legislature in policy development generally.[23] This is particularly the case when, as now, both Houses of Parliament are controlled by the government. The passage of the 2005 Commonwealth Terrorism legislation is an example of major policy measures with implications for human rights being devised in secret by the executive and pushed through the legislature without serious debate.

In any event, the Commonwealth government has broad power to breach human rights. This is illustrated by the case of *Al-Kateb*,[24] decided by the High Court in 2004. Ahmed Ali Al-Kateb, born in Kuwait in 1976 to Palestinian parents, arrived by boat in Australia in December 2000 claiming refugee status and was placed in detention. He was a stateless person because Kuwait did not consider him a citizen and Palestine did not have the capacity to grant citizenship. Mr Al-Kateb applied for, but was refused, a protection visa to stay in Australia. After failed legal challenges to this decision, he wrote to the Minister for Immigration in 2002 asking to be sent back either to Kuwait or to Gaza. However, no country would accept him. The *Migration Act 1958* states that a non-citizen unlawfully in Australia who asks to be removed from Australia must be removed 'as soon as reasonably practicable'.[25] It also requires the continued detention of such a person 'until' they are removed.[26]

The High Court had to determine whether or not under the *Migration Act* the Minister for Immigration could detain an individual in Mr Al-Kateb's situation until another country was prepared to accept him. Members of the High Court conceded that the likelihood of Mr Al-Kateb's acceptance by another country was remote in current circumstances and that his detention in Australia would be indefinite, but a majority of the Court held the *Migration Act* validly allowed Mr Al-Kateb's detention. Justice McHugh acknowledged that the outcome for Mr Al-Kateb was 'tragic', but there was no reason why Parliament could not legislate for indefinite detention. Justice McHugh argued that the lack of an Australian bill of rights justified his narrow reading of the *Migration Act*.[27] He implied that an Australian bill of rights would provide authority for the judiciary to look beyond Australia's borders and to take human rights principles into account in interpreting domestic law.[28]

This case indicates some of the problems in our legal system in protecting human rights. Because there are few limits on legislative power in Australia, it is possible for our elected representatives to act to breach human rights (in this case allowing arbitrary and indefinite detention) without effective scrutiny. Minorities are most at risk of human rights breaches and, for this reason, legislatures are unlikely to be held accountable for human rights violations at the ballot box. My argument is not that parliaments are 'less suited than courts to making human rights decisions',[29] but rather that, at least in Australia, they are currently less likely to do so. I should emphasise that questioning the human rights record of the legislative branch of government does not imply that the judiciary is inevitably better placed to protect human rights. I will suggest below that the judiciary has no particular claim to monopolise decisions about human rights, but rather that it is an appropriate participant in conversations about human rights.

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[23] Ian Marsh, *Institutions on the Edge? Capacity for Governance* (2000). Paul Kelly has pointed out that Australia's values are now a matter, not just of executive governance, but of Prime Ministerial governance: 'Re-thinking Australian Governance – The Howard Legacy' (Cunningham Lecture, 2005).

[24] [2004] HCA 37.

[25] Section 198.

[26] Section 196 (1).

[27] [2004] HCA 37 [73].

[28] [2004] HCA 37 [73].

[29] Tom Campbell, this volume, 61

b. Mischaracterisation of the judicial role

A second reason why the 'anti-democratic' criticism of bills of rights is difficult to sustain is because it depends on a caricature of the judicial role. Sceptics about bills of rights often present striking and unattractive images of judges. They imply that a bill of rights will operate to seduce the judiciary into seizing more power, something like the intoxicating effect of Tolkein's 'one ring to rule them all.' For example, Sir Gerard Brennan has argued that 'the heady powers conferred by a Bill of Rights would present a welcome challenge and an opportunity to sweep aside legislative and executive action which impedes the doing of justice in the instant case'[30] and James Allan has referred to 'judicial overlords' that are created by bills of rights.[31] At the same time, paradoxically, sceptics sometimes point to the failure of the judiciary in particular periods to go against prevailing discriminatory trends by the majority. Thus Allan appears to criticise the judicial treatment of Native Americans and African Americans by American courts in the 19th century precisely for not standing out 'as some sort of specially endowed moral guardians.'[32]

The more fundamental claim being made by critics of bills of rights is that decisions on the scope of human rights will inevitably take judges out of the legal realm into a moral minefield. The argument is that judicial decisions *about human rights* are qualitatively different from any other type of judicial decision. There is an implication that judges are somehow constrained when dealing with the interpretation of laws generally, but in the area of human rights they are given *carte blanche* to go wild.

However this contention is not supported in practice. As Barry Friedman has shown in the US context, such a claim is not based on empirical evidence of the process of judicial review and fails to acknowledge the ways that courts are accountable to the public.[33] The 'democracy objection' in relation to bills of rights in Australia has the hallmarks of what Friedman describes as 'an obsession … that grips the academy even when it fails to describe reality'. It is also striking that the critics' concern with democracy is confined to a single context – the judicial scrutiny of rights. The criticism does not extend to the democratic credentials of other judicial contexts or other institutions of democratic governance.[34] In any event, we constantly call on our judiciary to make difficult calls of interpretation in all areas of the law. This may be most obvious in the area of constitutional law, but, outside this field, our statutes are full of terms such as 'reasonable', 'adequate', 'unduly', 'relevant', 'unfairly' which require significant context and judicial development as is also the case with many principles of the common law.

Tom Campbell describes the 'distinctive role' of the judiciary as 'the application not the making and rewriting of law'.[35] This formulation has an appealing semblance of clarity but masks the complexity of the judicial role. The phenomenon of judicial dissents, well known in Australian law, is evidence that there is often not one clear, easy, answer to how the law applies in particular contexts and that the distinction between 'application' and 'rewriting' of laws will not get us very far. Supporters of bills of rights do not have to subscribe to the view that 'the unelected judges who would operate a bill of rights have a more highly developed sense of moral perspicacity than elected politicians.'[36] We can accept a bill of

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[30] G Brennan 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective' in P Alston (ed), *Promoting Human Rights Through Bills of Rights* (1999) 454, 463.
[31] Allan, above n 9, 182.
[32] Ibid 181.
[33] Barry Friedman, 'The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five' (2002-2003) 112 *Yale Law Journal* 153, 158.
[34] Ibid.
[35] Tom Campbell, in this volume, 56.
[36] Allan, above n 9, 190.

rights, while still criticising the homogenous and unrepresentative character of the Australian judiciary. In this sense supporters of an Australian bill of rights could well share James Allan's concern that 'rights challenges through the courts might end up being largely captured by one political perspective.'[37] The same concern could surely be held, however, of judicial decisions on any topic.

Allan is one of the few rights sceptics who acknowledge the possible inconsistency between acceptance of constitutionalism on the one hand and objections to bills of rights on the other.[38] How then can we reconcile the fact that constitutionalism requires that 'democratic decision-making will on occasion have to lose out to the locked-in rules and values' of a constitution, such as federalism with total opposition to all forms of judicial rights adjudication? Allan's answer seems to be that it's all a matter of degree: 'one can be prepared to make some bargains at the expense of self-government [i.e. complete legislative freedom] but still say that other bargains come at too high a cost.'[39] Allan regards the Australian Constitution as a remarkably unpaternalistic one in the sense that it largely leaves the Australian people 'entrusted with their own destiny' precisely because it contains so few commitments to rights guarantees.[40] But he does not explain how we determine that the cost of some constitutional restraints is 'acceptable' and others are not; it seems to be simply in the eye of the beholder.

The sceptical literature assumes that rights, unlike other legal provisions, are empty shells that can be filled with content in an arbitrary way. Thus Allan asks 'why rights should be entrusted to unelected judges to be given specific content as cases arise'.[41] He continues: Why should *their views* of moral rights count more than anyone elses'? Why should we accept the judiciary's opinions about rights as somehow amounting to what rights 'really' require, thereby handing hefty amounts of social policy-making over to judges?[42]

But the assumption that human rights guarantees can be interpreted according to judicial whim or the roll of a dice is not based on evidence of judicial practice. Over the last fifty years, a significant body of human rights jurisprudence has emerged, from international institutions such as the European Court of Human Rights and the United Nations human rights committees to the case law of national courts, such as those of New Zealand and United Kingdom. This jurisprudence illustrates the development of principles that guide and constrain judicial interpretation of rights.

Allan argues:

> The point is that *if* Australia opts for a bill of rights, then the judges will end up deciding controversial questions of social policy over which sincere, intelligent, well-meaning people disagree….[43]

My response is that the interpretation of human rights guarantees is no different in character to the accepted judicial role in statutory interpretation or the development of the common law. Judges regularly make decisions on controversial questions of social policy – take, for example, the High Court's decisions on Indigenous land rights or on 'wrongful life' actions. These decisions cannot be usefully analysed through notions of judicial 'application' or 'rewriting' of the law. Although these decisions provoke great debate, they do not lead to calls to remove the judiciary from involvement in interpretation. Rights

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[37] Ibid 187.
[38] Ibid 191.
[39] Ibid 193.
[40] Ibid 193.
[41] Ibid 186.
[42] Ibid 186-187 (emphasis in original). Conor Gearty also assumes that rights provisions inevitably involve increased judicial power: *Principles of Human Rights Adjudication* (2004) 25.
[43] Allan, above n 9, 190.

sceptics have not explained why such decisions are *qualitatively* different to those relating to human rights provisions and why they do not make a general call for the election of judges to ensure that the judiciary is directly accountable to the people in all legal contexts.

There is some evidence that legal systems that allow an explicit consideration of human rights tend to deliver a more humane and balanced jurisprudence. The House of Lords' decision in *A (FC) v Secretary of State for the Home Department*,[44] a challenge to Part 4 of the *Terrorism Act* (UK) which allowed non-British nationals suspected of being engaged in terrorist activities to be detained indefinitely, but not terrorist suspects who were British nationals, illustrates the impact of the *Human Rights Act 1998* (UK). It contrasts with the Australian High Court's bland acceptance of the government's indefinite detention of failed asylum seekers in *Al Kateb*. In *A (FC)* Baroness Hale of Richmond said:

> It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely. Only the courts can do that and, except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of the person.[45]

Unlike some proponents of bills of rights, however, I do not think that judicial decisions on rights are inevitably superior; judges can misunderstand the scope of rights and provide unconvincing reasons for their decisions. And, in the case of statutory bills of rights, there are cases where the judiciary has undermined the possibility of human rights dialogue about rights, a concept discussed below. An example of the latter problem is the House of Lord's approach in *Ghaidan v Godin-Mendoza*.[46] At issue in the case was whether the word 'spouse' as used in a schedule to the *Rent Act* 1977 (UK) (allowing the spouse of a protected tenant to succeed to the tenancy on the tenant's death) could be read to include the same-sex partner of a deceased tenant. A majority of the House of Lords found that the *Rent Act* provision was inconsistent with the right to family life and that section 3 of the *Human Rights Act* 1998 (UK) required the word 'spouse' to be read to cover same-sex partners. Lord Nicholls said:

> [T]he mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.[47]

The House of Lords described Convention-compliant interpretation as the primary remedy under the *Human Rights Act* and regarded a declaration of incompatibility under section 4 as exceptional.

By contrast, Lord Millett's dissent in *Ghaidan* conceded that the *Rent Act's* treatment of same sex couples was incompatible with their rights under the *European Convention*, but

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[44] [2004] UKHL 56.
[45] Ibid.
[46] [2004] 3 WLR 113.
[47] Ibid [32].

argued that it was not possible to read the word 'spouse' as covering a same sex partner. Lord Millett insisted that section 3 required courts to engage in a rights-compatible reading of legislation '*by a process of interpretation alone*'.[48] This meant that courts could not 'supply words which are inconsistent with a fundamental feature of the legislative scheme; nor to repeal, delete, or contradict the language of the offending statute'.[49]

The interventionist approach to statutory interpretation supported by the House of Lords in *Ghaidan* is unlikely to promote a human rights dialogue between the judiciary, the legislature and the executive. In my view, in such a case, it would be preferable to use the declaration of incompatibility mechanism to draw attention to the human rights breaches in the legislation.[50]

Another, Australian, example of a judicial bypass of human rights dialogue under a statutory bill of rights is the ACT Supreme Court's decision in *SI bhnf CC v KS bhnf IS*.[51] The case arose from a protection order made against a child, without a hearing, under section 51A of the *Domestic Violence and Protection Orders Act* 2001 (ACT). This section provides that a respondent who was not present when an interim protection order was made must be served with an 'endorsement copy' of the order. Sub-section 51A (3) states that 'the interim order becomes a final order against the respondent… if the respondent does not return the endorsement copy to the Magistrates Court at least 7 days before' the date set for the hearing. In this case the child had not been advised of the need to return the endorsement copy, and discovered that it had become final only when he came to court on the hearing date. The effect of the legislation was, then, to allow an order to be made against a person who had not had the chance to be heard on the matter.[52]

The child against whom the order had been made sought, among other orders, a declaration that section 51A was incompatible with the right to a fair trial in the *Human Rights Act* 2004 (ACT).[53] The ACT government argued that the right to a fair trial was not breached because section 51A provided a respondent with an opportunity to object to interim orders becoming final, and that section 82 of the same Act should be construed as allowing full review by the Supreme Court. The ACT Human Rights Commissioner also intervened in the case, supporting the challenge to the legislation. She argued that section 51A breached the rights to equality before the law (section 8), the right to a fair hearing (section 21), the right of the child to protection (section 11) and possibly criminal law procedures (section 22). The Commissioner proposed that a broad approach to interpretation should be taken under section 30 of the *Human Rights Act*, but noted that in this case rectifying the human rights breaches 'would require a reconstruction of the clear words of section 51A of the DVPO Act [and thus] the court would need substantial ingenuity to achieve this result.'[54]

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[48] Ibid [66] (emphasis in original).
[49] Ibid [68].
[50] As done, for example, in *Bellinger v Bellinger* [2003] 2 AC 467.
[51] [2005] ACTSC 125 (2 December 2005). This description of the case is taken largely from Hilary Charlesworth and Gabrielle McKinnon, 'Australia's First Bill of Rigths: The Australian Capital Territory's Human Rights Act' Law and Policy Paper No 28 (2006).
[52] Section 51A had been included in an amending act introduced in 2005, after the entry into force of the *Human Rights Act*. The amendments had been subject to the internal governmental human rights scrutiny process, and had been reviewed by the ACT Human Rights Commissioner, but it appears that the potential implications of this provision were not recognised at that time. The Explanatory Statement to the amending legislation briefly asserted that it did not 'unduly interfere with the civil liberties of the individual' and was thus covered by the '"reasonable limits" exemption under section 28' of the *Human Rights Act*. This assertion was not challenged by the Legislative Assembly's scrutiny of bills committee.
[53] Section 18.
[54] Submission of the Human Rights Commissioner, 26 August 2005, para 49.

Higgins CJ refused to issue a declaration of incompatibility in the case. He interpreted the legislation in dispute as 'empower[ing] but … not mandat[ing] the making of a final order in the absence of a conforming objection'.[55] He also found that such orders do not automatically come into existence, but must be made by a Magistrate who is obliged to act judicially.[56] Curiously, the Chief Justice did not refer at all to the interpretative obligation in section 30 of the *Human Rights Act*, or consider how consistency with human rights is to be balanced against the purpose of the legislation. Instead, he placed great weight on the fact that the legislation had been certified by the Attorney-General to be consistent with human rights,[57] thus requiring reinterpretation of the provisions to be compatible with the right to a fair trial. Higgins CJ argued that his interpretation of the legislation was mandated by both the Magna Carta of 1215, which is still part of the ACT law, and by the doctrine of separation of powers, which would prevent the executive from providing for automatic orders without judicial intervention. This case is an unsatisfactory one from the perspective of the promotion of a human rights dialogue as it emphasises a judicial responsibility to reshape the clear legislative text instead of drawing the issue to the legislature's attention through a declaration of incompatibility. As I point out below, however, it is significant that in such cases the scheme of the ACT *Human Rights Act* accords the legislature the power to clarify its intentions.

c. Eliding constitutional and statutory bills of rights

A third reason why the argument that bills of rights are antithetical to democracy deserves critical scrutiny is that it has been developed in relation to constitutional bills of rights that allow the judiciary to invalidate legislation and does not readily translate to the context of statutory bills of rights. As I have noted above, I do not accept the distinction that is drawn (but rarely justified) by sceptics between judicial review on non-rights-based constitutional interpretation and judicial review under a bill of rights. But, conceding it for the sake of argument, the democracy objection to bills of rights cannot exist in the same form in the context of legislative bills of rights.

New Zealand, the United Kingdom and the ACT have all adopted statutory bills of rights that can be readily repealed, and Victoria is about to enact similar legislation. It is difficult to see how these laws can be characterised as anti-democratic, because they have been freely adopted by elected representatives of the people. Jeremy Waldron has rejected such a claim in the context of constitutional bills of rights. He argues that such a bill of rights may have been democratically adopted, but that it in fact 'vot[es] democracy out of existence, at least so far as a wide range of issues of political principle is concerned'.[58] But in my view this argument misunderstands the way that constitutional bills of rights work, and, in any event, it cannot apply to legislative bills of rights where the legislature retains the power to reject judicial accounts of rights.[59] Moreover, as Conor Gearty has pointed out in the UK context, the definition of the protected human rights is far from the language of natural rights.[60] Human rights in statutory bills of rights contemplate exceptions and balancing of rights with the needs of the community. Indeed modern bills of rights present rights 'not so much as trumps but rather as a suit expressing certain assumptions about the person, themselves heavily qualified, which can even so be "trumped" by the dictates of

[55] [2005] ACTSC 125 (2 December 2005) [98].
[56] Ibid.
[57] *Human Rights Act* section 37.
[58] 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 1, 46.
[59] See below n 70 and accompanying text.
[60] Gearty, above n 10, 13

representative democracy'.[61] In this sense, legislative bills of rights respond to Tom Campbell's objections to the standard conceptual analysis of rights as either under or over-inclusive.[62]

These modern bills of rights do not allow the judiciary to strike down legislation as invalid if it is inconsistent with human rights. Rather, they depend on what has been described as a 'dialogue' model of human rights protection, or perhaps, more prosaically, an 'institutional interaction'[63] on human rights issues. The participants in the dialogue are the three arms of government, and the community. The mechanisms for dialogue are, first of all, a requirement that all laws be interpreted to be consistent with human rights as far as possible.[64] If a human rights-consistent interpretation is not possible, the laws in the United Kingdom, the ACT and Victoria allow the judiciary to issue a formal declaration that the law is inconsistent with human rights. This does not affect the validity of the law, but requires the legislature to consider the inconsistency and make a judgment how to proceed. The human rights dialogue contemplated by the modern bills of rights is not open-ended – after debate, the legislature is assigned the final word on human rights protection. It may be that, in particular circumstances, a government will decide that it will enact a law that will result in the breach of human rights; but the statutory bills of rights referred to here require that a government should only do so when it has fully considered all the issues, and when it has had to justify publicly the human rights breach.

The purpose of statutory bills of rights is to create a durable human rights culture within government and the community, rather than a judicial monopoly on the application of human rights. The judiciary is however an important participant in the rights conversation because it has to confront specific claims of rights violations in a way that the government and the community do not.[65] The overall effect of a statutory bill of rights should be to require a government to think through the human rights implications of proposed actions. This has been the effect of a statutory bill of rights in the ACT. Over the last two years in the ACT, the major impact of the *Human Rights Act* has been on the workings of the executive government and the legislature. A variety of government policy proposals have been redesigned, or jettisoned, on human rights grounds.[66] For example, the ACT's 2006 anti-terrorism law, designed to complement the 2005 Commonwealth law, provide more legal safeguards than those of the Commonwealth or other states and territories.

Nevertheless, some rights-sceptics regard legislative bills of rights as almost equally pernicious as constitutional bills of rights, doing little to 'reduce or alleviate the power of judges'.[67] The argument seems to be that, whatever the theory, in practice judges will arrogate great interpretative power to themselves if some form of rights instrument is in sight and that the legislature will be reluctant to use its power to override judicial interpretations. But, if this is the case,[68] it is not clear why it is a *democratic* problem:

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[61] Ibid 20.

[62] Tom Campbell 'Human Rights: The Shifting Boundaries' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 17.

[63] Leighton McDonald, 'Rights, "Dialogue" and Democratic Objections to Judicial Review' (2004) 32 *Federal Law Review* 1.

[64] *Human Rights Act* (UK) s 3; *Human Rights Act* (ACT) s 30.

[65] See generally Jeremy Webber, 'A Modest (but Robust) Defence of Statutuory Bills of Rights' in Campbell, Goldworthy and Stone (eds) *Protecting Rights Without a Bill of Rights* (2006) 263

[66] See Elizabeth Kelly, 'Government in the ACT: A Human Rights Dialogue' (paper presented at the Conference on Assessing the First Year of the ACT Human Rights Act, ANU, 29 June 2005) available at <http://acthra.anu.edu.au/articles/Elizabeth_Kelly.pdf> at 1 September 2006.

[67] Allan, above n 9, 188.

[68] For information on the legislative reaction to declarations of incompatibility made in UK courts up till June 2006, see Appendix 3 of the UK Parliament's Joint Committee on Human Rights Twenty-Third Report available at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/239/23909.htm> at 1

legislative reluctance to act is as much an expression of democratic will as legislative action. Jeff Goldsworthy has noted the conceptual difference between relinquishing power to make particular types of decisions and declining to exercise such power.[69] He makes the point that 'we regard democracy as based on a *right* to participate *indirectly*, rather than a *duty* to participate *directly*, in public decision-making'.[70] On this understanding, legislative bills of rights cannot be said to reduce or undermine democracy. Other rights-sceptics have acknowledged a distinction between the 'strong' judicial review required by a constitutional bill of rights and the 'weak' judicial review available under a statutory human rights scheme. Jeremy Waldron, for example, has recognised the democratic compatibility of statutory bills of rights as 'leav[ing] the ultimate decision to the representatives of the people in Parliament, but … us[ing] courts to bring issues of rights to the attention of the community'.[71] He adds 'It may not always be easy for legislators to see what issues of rights are embedded in the legislative proposals brought before them; courts can help them see this ….' So too Jeremy Webber has argued that the most significant aspect of judicial decision-making in the field of human rights, compared to legislative action, is its focus on individual cases: 'the attempt to ensure that the application of general norms is attentive to the detail of particular circumstances; the attempt to ensure that in the practical imposition of social norms, individual people and individual circumstances are given their due.'[72]. Webber defends statutory bills of rights as 'combining adjudication's intense focus on the particular case with, at the end of the day, legislative determination of the general normative order of society.'[73]

CONCLUSION

The heart of the sceptical case against bills of rights is that they are an assault on democracy. The claim that parliament is the only proper location for human rights conversations and decisions reflects, I think, the power of the ideology of utilitarianism in Australian public life.[74] The aim of political society for a utilitarian is the achievement of the greatest happiness of the greatest number. Utilitarian philosophers typically reject the idea of individuals as bearers of rights because this implies that individual or minority interests may on occasion take precedence over those of the majority.

One problem with utilitarianism is that it rests on a judgment about the aggregate position of a community, though it is generally vague about how this might be ascertained. Parliamentary attitudes are often taken by rights sceptics as a surrogate measure of community support. Utilitarianism has little interest in identifying the interests of minority groups who may be worst off in society. For example, if we used average life expectancy of all Australians as the basis for public policy, we would miss the significantly lower rates of life expectancy of Indigenous peoples and the differences in male and female rates. Martha Nussbaum has pointed out that:

September 2006. In most cases where a declaration has survived appeal, the relevant legislation has been amended or repealed.

[69] 'Judicial Review, Legislative Override, and Democracy' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 263, 268.

[70] Ibid 269 (emphasis in original).

[71] Laurence H Tribe, Jeremy Waldron and Mark Tushnet, 'On Judicial Review' (Summer 2005) *Dissent*. See also Waldron, above n 20, 1370.

[72] Jeremy Webber, op. cit. 276

[73] Ibid 284

[74] Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (Winter 1985) *Daedalus* 147.

> [a]verage utility is an imprecise number, which does not tell us enough about different types of people and their relative social placement. This makes it an especially bad approach when we are selecting basic political principles with a commitment to treat each person as an end…. What is more, utilitarians typically aggregate not only across distinct lives but also across distinct elements of lives. Thus, within the total or average utility will lie information about liberty, about economic well-being, about health, about education. But these are all separate goods, which to some extent vary independently and … we should not give up one of them simply to achieve an especially large amount of another.[75]

Sceptics about a bill of rights in Australia however maintain faith in the crude democratic metric of parliamentary numbers and have not responded to this type of critique of utilitarianism.

The sceptical, utilitarian, 'democracy objection' to an Australian bill of rights understands democracy as essentially majority rule,[76] but a major weakness of this approach is that it is not interested in cases where 'democracy' delivers injustice, when the interests of a minority are not taken into account . Moreover the notion of democracy has a much broader context and potential. If we use, for example, Susan Mark's idea of democracy as self-rule on the basis of equality between citizens, resting on principles of popular control and political equality,[77] human rights and democracy can be seen to have a symbiotic rather than antagonistic relationship. On this analysis, it is possible to argue that '[d]emocracy depends on the protection of human rights. At the same time, the protection of human rights depends on democracy.'[78]

I have argued that, in Australia's political system, a statutory bill of rights would be likely to improve the quality of our democracy by requiring human rights standards to be taken into account in governmental actions and policy; it would not be a panacea for all rights violations, but would be likely to make the violations more obvious and subject to scrutiny. In my view, the exhausted and predictable debate about an Australian bill of rights would become more productive if it abandoned images of winners and losers, of institutional battles between the judiciary and the legislature. It should turn instead to questions about the type of democracy we should aim for in Australia and the way in which all institutions of democratic governance, not just the judiciary, can best contribute to it.

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[75] Martha Nussbaum, *Women and Human Development* (2000) 62.
[76] Eg, Allan, above n 9, 175-78 (emphasising the virtue of Australia's voting systems).
[77] Susan Marks, *The Riddle of all Constitutions* (1999).
[78] Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (2005) 66.