Interpretation of the Constitution by the High Court

The words of a Constitution, read in the abstract, tell us little about a polity’s constitutional practice. Stalin’s 1936 Soviet Constitution is a well-known illustration. And despite Ely’s plausible case that the US Constitution can be read as a representation-reinforcing document, the persistent invocation of “substantive due process” by both Left and Right – even though they mean very different things by it – has prevailed, confirming Cox’s conclusion that it is “unwise as well as hopeless to resist” the strength of America’s “natural law inheritance” (1976, 113; quoted in Ely 1980, 15). Two other variables determine a society’s constitutional practice. One is the direction in which judges interpret the Constitution; the other is the political culture’s hospitality to particular values.

First I discuss judicial interpretation. I will show that representation-reinforcement explains the High Court’s approach to construing the Constitution in most cases, and that, in those cases where the Court’s decisions have diverged from those that Proceduralism would suggest, the Court’s jurisprudence would be improved by bringing it into closer conformity with the theory.

Words rarely interpret themselves. Often their meanings are demarcated not by sharp lines but by fuzzy shades. Nor does the Constitution contain any clause saying how it should be interpreted. For example, the decision that the Constitutional Convention’s records are relevant (Cole v Whitfield [1988] at 385) was a choice by the High Court, not deduced mathematically from the Constitution’s words. To reject Sir Samuel Griffith’s personal interpretations as irrelevant – even though he was both a Founding Father and a Justice of the first High Court – is also a judicial policy decision. A visiting Martian reading the US Constitution might never guess from the text alone that “shall” in the Republican Guarantee clause is directory (Article IV, Section 4), while the same word is permissive in the Amendments clause (Article V) and mandatory in most other parts of the document. Likewise judges may construe particular clauses very broadly, or very narrowly, without needing to go beyond their textual limits. They must decide whether a specific example is mentioned for the purpose of excluding anything not mentioned, or merely for abundance of caution. In Fuller’s (1958, 666) famous hypothetical law that forbids “bringing a vehicle into a park”, no amount of re-checking the dictionary will tell judges whether this includes an army truck set up as a war memorial.
Thus courts can reach very different results interpreting the same text – especially one as broadly-phrased (and usually as dated) as a Constitution. To lay people, the First Amendment’s “law respecting an establishment of religion” might sound indistinguishable from s 116’s “law for establishing any religion”, but the Australian and US supreme courts have construed the two phrases in very different ways (Everson [1947]; DOGS [1981]).

In DOGS, two Justices – both conservative legalists who upheld government funding to church-run schools – disagreed over how much of Constitution s 116 should be construed deferentially. Barwick CJ (at 577) rejected an argument that “Section 116, not being a provision granting legislative power but, on the contrary, a provision denying it, ought not to be read as largely.” Even though Dixon CJ had taken this same view (Wragg [1953]), Barwick found “no reason why the words of the Constitution should not be given their full effect, whether they be expressed in a facultative or prohibitory provision.” Gibbs J (at 603) however, did support the view that certain types of constitutional clauses should be construed more narrowly than others. In addition to the facultative-prohibitory distinction that Barwick rejected, Gibbs saw a further distinction between two limbs of the same section. Not only does “the establishment clause impose[] a fetter on legislative power”, but “unlike the words which… [guarantee] free exercise of… religion, [it] does not do so for the purpose of protecting a fundamental human right; indeed, the purpose for which it was inserted in the Constitution remains obscure.” Gibbs therefore saw “no reason to give such a provision a liberal interpretation.9

But the language of “fundamental human right[s]” is subjective. And it seems incongruous for a conservative jurist like Gibbs, who is famously skeptical of rights talk,10 to hint at the existence (but not the contents) of a list of “fundamental human right[s]” able to widen or narrow the scope of the Constitution’s words. And even if free exercise of religion is a “fundamental right” (which few would dispute), it must still be subject to limits.

One might assume that judges tend to be narrow or broad constructionists11 by temperament, but in fact such consistency is rare. In the USA, it is common that judges (and

9 This is different from saying that the meaning of a provision is obscure. A constitutional clause disqualifying people born on 31 January in odd-numbered years from being Senators would be obscure in its purpose but entirely clear in its meaning.

10 “If society is tolerant and rational, it does not need a bill of rights. If it is not, no bill of rights will preserve it” (Sir Harry Gibbs, Sydney Morning Herald, 12 December 1984).

11 The term “strict constructionist”, popular in the USA in the 1970s, is ambiguous – it was intended to mean a judge who restricted the Bill of Rights to a narrow scope, but could misleadingly imply that a judge is strict in scrutinising legislative restrictions.
academics) who interpret the Sixth and Eighth Amendments’ criminal-process rights expansively will also advocate a narrow reading of the Second Amendment’s right to bear arms, and *vice versa*; while many Australian judges who proclaimed their deference to legislative sovereignty also fortified s 92 into a strong individual immunity against regulation.

This of course provides ammunition for critics to accuse them of inconsistency, but the *tu quoque* objection applies all around because few jurists are consistent in this area. Everyone wants to construe some constitutional clauses broadly and others narrowly. If a judge were to construe all clauses of the Constitution (whether of Australia, the USA, or most other polities) as widely as possible, government would become unworkable. As Komesar (2001, 232) notes in relation to the USA’s Equal Protection Clause, all legislation discriminates, yet the judiciary cannot practicably review more than a tiny percentage of it. Likewise, in Australia, although the courts have construed the judicial power (s 71) and acquisitions (s 51(xxi)) clauses very strictly in relation to all interests covered by them (*Brandy* [1995]; *Dalziel* [1944]), they have also held that certain interests are not so covered – for example, social security benefits may be cancelled at the government’s discretion, without either a judicial hearing or “just terms”, if they were originally granted subject to such a condition (*Allpike* [1948]). Although some take the political view that unindexed taxation rates amount to nationalisation of income by stealth because of inflation (Walker 1988, 347, 349), that the High Court would entertain a “just terms” challenge to the income-tax laws is unthinkable.

But if, on the other hand, judges applied the same ultra-minimal scrutiny to all alleged violations of the Constitution as they do when, say, Australia’s “peace, order and good government” formula or the USA’s “republican form of government” clause is invoked, the Constitution would be a dead letter. It would make promises that the courts would refuse to keep. Although there are arguments for excluding certain clauses – or even the entire Constitution – from the courts’ jurisdiction, there seems little point in going through the motions of judicial review if the deck is stacked in the legislature’s favour. Worse, the Court’s imprimatur would give blatantly unconstitutional legislation a veneer of legitimacy (Rosenberg 2001). Even to apply intermediate scrutiny to every alleged constitutional

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12 The referendum proposal rejected in November 1999 would have inserted a new Constitutional preamble, plus a new s 125A declaring that such preamble “has no legal force and shall not be considered in interpreting this Constitution or the law...”


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violation would consume much judicial time and attention. What is most likely to occur in practice is a general policy of deference, apart from a few areas in which the judiciary applies strict scrutiny to legislation. Therefore jurists have endeavoured to suggest a principled basis for distinguishing those cases where the judges should be suspicious of legislative claims, make up their own minds, and construe the Constitution liberally and expansively, from other cases where the courts should rightly defer to the legislature’s judgment.

Traditionally, Australian judges believed they had such a principled basis: “strict and complete legalism.” When interpreting the Constitution they would give paramount, almost sole, attention to the words used and to such few implications as were inescapable, but they would ignore political and social consequences as irrelevant. If this meant popular legislative programs were invalidated, so be it; and if it failed to protect individuals against governmental actions many considered deeply unjust, that was the necessary price of keeping judges out of politics. This philosophy was famously enunciated by Australian Chief Justices from the 1920s, through the 1950s, until the early 1980s:

[T]he extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts (Engineers [1920] per Isaacs J, Knox CJ, Rich, and Starke JJ at 151-52).

... [C]lose adherence to legal reasoning is the only way to maintain the confidence of all parties to federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safer guide to judicial decisions in great conflict than a strict and complete legalism (Dixon 1952, xiii-xiv).

The problem which is thus presented to the Court is a matter of legal construction of the Constitution of Australia; itself a legal document... The problem is not to be solved by resort to slogans or to political catch-cries or to vague and imprecise expressions of political philosophy (McKinlay [1975] per Barwick CJ at 17).

As noted, the Framers chose to rely on federalism as their main constitutional safeguard; and for decades legalism seemed the jurisprudential philosophy most consistent with federalism. A legalist court focuses on the apparently technical question of whether a particular statute relates to a matter within a legislature’s jurisdiction, and excludes complex questions about its utility, necessity or justice (eg, Murphyores [1976]). The very fact that federalism limits power by reference not to rights or justice, but to morally arbitrary lists of topics,14 helps

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14 In the USA, both divorce and criminal law are State matters; in Australia, they are respectively federal and State matters; in Canada, both are federal matters. But no one would claim this reflects any substantial
judges to remain politically impartial; likewise, legalism does not ask judges to take sides on disputed moral questions, only to decide whether a law is one “with respect to” immigration or quarantine.

From Federation until circa 1980 the High Court delivered many constitutional judgments, with far-reaching political ramifications, yet by successfully invoking the philosophy of legalism it largely escaped criticism on political grounds (Galligan 1987, 6, 249-50, 260). Political actors accepted that whatever inconveniences (often considerable) the Court might impose were not directly intended by the Justices; they were merely by-products of the Court interpreting the Constitution like any other statute.

But in recent decades dissatisfaction has grown with Australia’s constitutional settlement, particularly with the balance it strikes between Commonwealth and States, courts and legislatures, and individual and majorities. Since the early 1980s, four factors have converged which have made legalism less palatable.

First, under Chief Justice Barwick the High Court’s highly literalist interpretation of the taxation laws, which was seen as encouraging “bottom of the harbour” schemes to flourish, attracted criticism from the political and academic Left. Eventually the feared loss of revenue was so great that even conservative politicians were goaded to act. Ironically, the constitutionally conservative Treasurer, John Howard, took the highly un-conservative step of using retrospective legislation. In 1981, the Commonwealth Parliament amended the Acts Interpretation Act 1901, pointedly reminding judges to prefer purposive interpretations of legislation, and to look at extrinsic materials (particularly Hansard) to find a statute’s purpose (ss 15AA, 15AB). Although it is unresolved whether Parliament can tell the courts how to interpret legislation (a fortiori the Constitution, or even future constitutional alterations), some judges have since suggested that even without the legislative changes the common law itself has evolved towards a more purposive approach – eg, to fix obvious oversights by the legislators (Newcastle City Council [1997] per McHugh J at 111-13; Pepper v Hart [1993]). Parliamentarians themselves recognised that legalism, despite its lip-service to democracy, could in fact operate to undermine democracy. They responded by directing judges to pay regard to the spirit and not only the letter of their enactments. But if ordinary statutes should be interpreted so as to “promote the[ir] objects”, why not also the Constitution itself?

difference in how Americans, Australians and Canadians view the morality of crime or divorce.
Secondly, the Barwick Court’s literalist approach to Constitutional interpretation attracted an equal measure of criticism from political and academic conservatives. For refusing to find implied limits that might protect the “reserved powers” of the States, or prevent the Commonwealth using its powers for “ulterior” purposes unconnected with the original intention of the power (*Murphyores* [1976]), the High Court was attacked as undermining federalism and creating a centralised Commonwealth. Yet, as Greg Craven and other conservatives have pointed out, the High Court was doing no more than continuing the tradition of legalist interpretation laid down by the *Engineers* Case in 1920 – and that in itself had been justified as a continuation of the highly literalist, non-activist jurisprudence of Victorian-era England (Craven 1992; Blackshield 1977; MacAdam and Pyke 1998). A High Court that confines itself to reading the black letters of the Constitution will find nothing that tells it to protect States’ Rights, or how to do this in ways consistent with the judicial role.

Despite claims like Dixon CJ’s that legalism would “maintain the confidence of all parties to federal conflicts”, its benefit to federalism was doubtful. Legalism did preclude the Commonwealth from arguing, on grounds of practical necessity or convenience, for expanded federal powers beyond those listed in the text. It also reassured conservatives and federalists (who were usually, in that era, the same people) that State Parliaments would not be restricted by federal judges discovering implied rights (or giving new teeth to express rights) in the federal Constitution – as had happened in the USA (eg, *Griswold* [1965] and *Brown* [1954]). To that extent legalism could be seen as safeguarding “States’ Rights.”

At the same time, however, by confining grounds of invalidation to the literal words and undeniable implications of the Constitution, legalism also precluded the High Court from reviewing facially-valid Commonwealth statutes on the ground that their motive (*First Uniform Tax Case* [1942]; *Fairfax* [1965]; contrast *R v Barger* [1908]) or their effect (*Federal Roads Case* [1926]; *WR Moran* [1939]) was to coerce the States on matters outside the Commonwealth’s authority. Some conclude that, in hindsight, legalism was probably more a hindrance than a help to State autonomy (Craven 1992). It is no coincidence that, when legalism was first expounded in the 1920 *Engineers* judgment, its effect was to deny the States any implied immunity from Commonwealth laws. And Barwick CJ, a famous exponent of legalism, was also unsympathetic to the claims of the States (Marr 1992, xvi, 229-33, 249-50). However, because federalists were also political and legal conservatives and admirers of the British view that judges applied existing law without question, they did not criticise legalism at the time.
Thirdly, earlier decisions that disappointed the conservatives politically (such as the invalidation of the *Communist Party Dissolution Act*) were tolerated for the sake of limiting Commonwealth power, but once the High Court began to uphold the Commonwealth’s far-reaching use of its External Affairs Power in 1982-83, open attacks began in earnest. Galligan (1987, 242-45) chronicles the shift in conservative rhetoric from deference to the courts to attacks on “unelected judges making law.” Yet to enforce any meaningful limitations to the Commonwealth’s use of the External Affairs Power, the High Court would have to start imaginatively re-writing the Constitution. All of the limitations mooted — whether by the Justices\(^\text{15}\) or by authors of proposed constitutional alterations\(^\text{16}\) — would draw the High Court into making highly political judgments.

Criticism of the High Court only began in earnest after 1982, when it upheld a very wide view of the Commonwealth’s power to legislate for the implementation of treaties under the External Affairs Power (*Koowarta* [1982]; *Tasmanian Dams* [1983]). Its former conservative supporters, who had applauded the Court’s invalidation of bank nationalisation and tolerated its invalidation of the Communist Party ban, now began to attack the majority Justices for “rewriting” the Constitution (Finnis 1985: Walker 1987, 159).

To some extent these criticisms were unfair. The Court had not radically changed its interpretation of the External Affairs Power, and results like *Dams* had been foreshadowed as early as the 1930s (*R v Burgess* [1936] per Evatt and McTiernan JJ at 798; Coper 1987). Instead, the practical result — greater centralisation — was due to Commonwealth governments’ greater willingness to use this constitutional power actively. Much of the critics’ rhetoric was copied from the USA, where conservatives and federalists had been “running against the [Supreme] Court” since the 1950s, criticising the Justices for restricting States’ power in the name of individuals’ constitutional rights. Yet the crucial difference was that, in Australia, unlike the USA, the restrictions on State power were a result not of too little respect for legislative supremacy, but of too much. What the States found constricting was not a constitutional Bill of Rights but federal legislation.

And to restore the “federal balance” as conservatives demanded would have required the Court to be *more* activist, rather than more deferential. Under Constitution s 109, valid

\(^{15}\) For example, if there is some reason to think the treaty was entered into merely as a colourable attempt to expand the Commonwealth’s legislative power: *Tasmanian Dams* [1983] per Brennan J at 218-19.

\(^{16}\) See suggestions by Finnis (1985) and Senator Peter Durack (in Constitutional Commission 1988). Other proposed remedies, eg, requiring treaties to be ratified by the Senate and/or the States, would limit the External Affairs Power politically but not legally (Winterton 1995).
Commonwealth legislation prevails over State laws. Finding that a Commonwealth law contravenes a broadly-worded Constitutional provision drafted a century ago requires greater judicial creativity than finding that a State law contravenes a detailed Commonwealth statute drafted only a year or a decade before. When one statute conflicts with another – each backed by a government that wants to enforce its own legislation – the courts cannot refuse to resolve the conflict. But it is easier for judges to find one of several interpretations of the Constitution which, however textually or historically unlikely, avoids the need for them to confront a legislature over the validity of its enactments.

Thus, for the US Supreme Court to restore “State’s Rights” would have been a judicially manageable (if politically unpalatable) matter of refusing to (re-)enter such “political thickets” as electoral reapportionment, school segregation, religious freedom and criminal procedure – of simply dismissing any appeals concerning these matters. But for the Australian High Court to protect “States’ Rights” after Koowarta and Tasmanian Dams would have required it to scrutinise and possibly criticise the motives and/or broad social effect of statutes enacted by legislators elected by the entire nation. The Court might, for example, have to declare that the Commonwealth had signed a treaty only as a “sham” or “cloak” to expand its own legislative powers. Or it might have to ask whether signing a treaty with (say) Kyrgyzstan and Kuwait was sufficient evidence of “international concern” to make a matter an “external affair.” Making such highly politicised decisions would be distasteful to judges steeped in the British tradition. It is significant that critics of the Court’s approach soon abandoned attempts to frame either judicial doctrines or Constitutional alterations that would “restore the federal balance” to their liking, and instead sought political safeguards to hinder the signing of treaties with unduly centralist impact. The aftermath of the External Affairs decisions disillusioned those who had formerly supported legalism in the hope it would preserve the Australian tradition of States’ Rights.

The four developments outlined here represent the culmination of a trend in Australian legal and constitutional theory: the rejection of text alone, divorced from values or purposes, as an acceptable guide for judicial decision-making. The critique is that either the text is unclear beneath its veneer of clarity (leading to the smuggling-in of unacknowledged values: Coper 1983, 305-06; Mason 1991, 175-77; Zines 1986, 100-02) – or, if it is clear, dictates unacceptable results (eg, the unseating of elected MPs, the disruption of convenient produce-

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17 Such as the Joint Standing Committee on Treaties (JSCOT) and the Treaties Council (an adjunct to the Council of Australian Governments)
marketing or cross-vesting arrangements). Either way, legalism merely maintains either the *de jure* rule of the Framers, or the *de facto* rule of the judges, over present-day legislators. For this and other reasons, when the crunch came, Australian constitutional decision-makers preferred to back away from full-blown legalism and have more recently been tentatively, or even enthusiastically, embracing the prospect of judicial decision-making based on fundamental societal values, extrinsic to the Constitution’s text and structure (in particular, individual rights and the separation of powers, at least in relation to the judiciary).

There have been calls for a new constitutional theory. Numerous sitting and retired High Court Justices have openly espoused more purposive constitutional doctrines which, they assert, would serve the interests of the Australian community better than legalism did (Brennan 1991; 1996; Kirby 1994; Mason 1989; 1993; 1995; 1996; McHugh 1988; Toohey 1993). Even conservative jurists have disowned pure legalism. Craven (1992, 28-31) advocates a hybrid doctrine he labels “contextualism”, while Goldsworthy (1997) argues for “moderate originalism” as an antidote both to legalism and to “extreme versions of originalism and non-originalism.” Walker (1988, 322-23, 463) espouses an ambitious form of social contractarian or even natural law jurisprudence, claiming that courts have “respectable legal grounds” to invalidate retrospective legislation because it does not “fall within any accepted definition of ‘law’.”

Once the spell of legalism is broken, it seems, it cannot be cast again. Once judicial decisions begin to be assessed by their results, a return to legalism – which says results should be ignored as irrelevant – will no longer persuade. The spell has been broken, and the best option remaining is to ensure that the results are palatable ones.

Five to ten years after it expanded the External Affairs Power, the High Court took an unexpected turn in a different direction, which also drew public criticism. For the first time in its history, the Court began to invalidate laws and/or declare novel rights for the purpose of protecting individuals and minority groups, not States. Again the Justices were accused of “judicial activism” and of “making law”, and this time these criticisms were more accurate, because the Court did indeed overturn legislation (or, in the native title cases, retrospectively imputed to former Parliaments intentions they never consciously held) on grounds other than the conventional (and unavoidable) federalist function of resolving conflicts between national and State legislation.

The harbinger was *Davis v Commonwealth* [1986], the first non-s 92 case in which the High Court overruled the Commonwealth Parliament – not “merely” a Commonwealth
Minister, a State Parliament or a local council – in the name of individual freedom (specifically, freedom to satirise the Bicentennial), albeit by invoking a semi-federalist rationale by construing the Constitution to exempt so important a liberty from the Commonwealth’s “matters incidental” power (s 51(3xxxix)). Three years later (Street, 1989) the Court revived the long-moribund s 117 by scrutinising the substance, not just the form, of discrimination against out-of-State residents. (In the Corporations Case [1990], the Court also struck down the Corporations Law on federalism grounds.)

The 1992-1995 triennium was the high-water mark of this activism, heralded by the Court first announcing implied constitutional rights of political communication (Nationwide News [1992]; ACTV [1992]) and access to the courts (Lim [1992]; Dietrich [1992]), as well as extending human rights and anti-discrimination jurisprudence to the non-constitutional law of Aboriginal native title (Mabo [1992]). Next the Court held that majority jury verdicts for federal offences were unconstitutional (Cheatle [1993]) and that the implied freedom of political communication covered advice by migration agents (Cunliffe [1994]) and common-law defamation suits (Theophanus [1994]; Stephens [1994]). In 1995 the Court invalidated, on separation-of-powers grounds, Commonwealth laws that effectively gave judicial power to the Human Rights and Equal Opportunity Commission (HREOC) (Brandy). The Court also widened the administrative-law ground of “legitimate expectation” to include international conventions signed by the executive, even if not yet ratified by Parliament (Teoh [1995]). However, rarely did the Court strike down State laws for conflict with implied constitutional rights.18 It had still not reached the degree of “anti-federalist” activism of its US counterpart.

The Court’s decade of rights-based activism, which coincided with Sir Anthony Mason’s term as Chief Justice (1987-95), attracted unprecedented public criticism. Though political conservatives were the most vocal critics (Barwick 1995; Craven 1997; Goldsworthy 1995; McGuinness 1992; Morgan 1992; Santamaria 1993; Walker 1993), disaffection with the Court was bipartisan. Labor politicians liked the substantive outcomes of some judgments, particularly Mabo, but were suspicious of the thought of unelected lawyers from privileged backgrounds claiming power to overrule elected parliaments. Alongside its civil-libertarian ethos the ALP has a long tradition of legislative supremacism, as shown in its century-old support for a unitary, sovereign national Parliament. Thus Justice Lionel Murphy, a former

18 Stephens [1994] and arguably Kable [1991] being the exceptions. The South Australian law challenged in Cheatle [1993] was invalid only insofar as it allowed majority jury verdicts for federal offences.
federal Labor Attorney-General, espoused deference to Parliament’s intentions in some judgements (Westraders [1980] at 80; Gazzo [1981] at 254-61) but in others, justified his creative statutory and Constitutional interpretations by arguing that some rights were so deeply rooted in Australian society that not even the Constitution, let alone Parliament, could override them (Ex parte Henry [1975]; Buck v Bavone [1976]; Ex rel Ansett Transport [1976]; McGraw-Hinds [1979]; Sillery (1981); Miller v TCN [1986]; see generally Blackshield 1986).

Labor parliamentarians’ reactions to the ACTV decision were similarly ambivalent. On the one hand they disliked the result (the Court declaring Labor’s own political advertising ban a violation of free speech), although not intensely enough to bother responding to it with new legislation. But on the other hand, they praised the fact that the Court had protected civil liberties of the kind Labor governments themselves had often attempted – unsuccessfully – to enact through legislation and Constitutional changes. Senator Nick Bolkus, sponsor of the legislation the Court had invalidated, praised the judgment as a “first step towards entrenching in our legal system respect for rights” (Senate Hansard, 6 October 1992, p 1181) and noted that “[t]he only person in the High Court who, some five or six years ago, even contemplated such a principle was… Lionel Murphy” (p 1138). And the response to Teoh by some Ministers – “a plainly bad decision” (Gareth Evans, quoted in Virtue 1995, 24) – was incongruously hostile for a Labor government that often cited the urgency of bringing Australia’s laws and economy into harmony with international standards.19

With both major parties alarmed by the High Court’s activism, a political counter-reaction was likely. Two judicial vacancies occurred after much-publicised calls to find more conservative judges, or even to reduce the Court’s independence by such radical reforms as an elective judiciary (eg, Queensland Premier Borbidge, quoted in Patapan 2000, 166: Santamaria 1993: Walker 1987, 158-62; 1988, 196-97, 359). In 1996 the series of activist judgments seemed to end abruptly, Wik [1996] being its coda. The Court refused to extend proportionality review to Commonwealth laws generally (Leask [1996]), to extend implied rights to require equal State electorates (McGinty [1996]), to extend the implied freedom of speech to private defamation lawsuits (Lange [1997]), or to protect public advocacy of a lawful but irregular method of marking ballot-papers (Langer [1996]).

19 The year before Teoh, the Keating Government invoked a UN Committee report to support Commonwealth legislation nullifying Tasmania’s ban on homosexual intercourse: Human Rights (Sexual Conduct) Act 1994 (Cth); Croome v Tasmania [1996]. Of course, implementing Teoh would have required costly governmental effort, not just non-prosecution of gays.
The restoration of judicial caution, however, was short-lived. The Court soon delivered other judgments that were claimed to be based on the constitutional text alone, but which were no less disruptive in their practical ramifications than the implied rights judgments had been. To declare that the United Kingdom had become a “foreign power” since 1901, for example (Sue v Hill [1999]), would have been considered almost treasonous in Menzies’ era. And the decision invalidating the Commonwealth-State cross-vesting scheme (Re Wakim [1999]) created widespread disruption, despite the fact that all parties to the federal compact – Commonwealth and States – consented to the arrangement.

Australia’s constitutional history since 1992 has parallels to the USA’s since 1954. In both cases, the highest court (under Chief Justices Warren and Mason respectively) was strongly criticised for its small-l liberal activism, which yielded novel and egalitarian judgments in the areas of political speech, racial discrimination and criminal procedure. Remedies that involved radically changing the court’s composition or powers – constitutional amendments reversing particular judgments; impeachment or election of judges – were mooted but did not eventuate. Then, after crucial “swing Justices” left office, governments appointed replacements who were publicly praised at the time as “strict constructionists” or “capital-C conservative” justices. But this did not halt the process of activism, only its direction: these appointments produced a bench that, although notionally more conservative, in practice proved even less deferential to governments (Wik [1996]: Wakim [1999]). Under their successors as Chief Justice (Burger and Rehnquist and Brennan and Gleeson respectively), both supreme courts continued to invalidate laws, but without a consistent direction of favouring individual rights or protecting minority groups. So it was the Burger Court, which Blasi (1983) labels “The Counter-Revolution That Wasn’t”, which authored Roe and Buckley, two of the most activist judgments in recent US history (Ely 1980, 248; Klarman 1991, 820; Rosen 2000).20 “We have become so used to a left-liberal Court that any move toward the centre is immediately proclaimed a right-wing threat” (Bork 1990, 126). Likewise, despite the purported legalist restoration, the High Court under Chief Justices Brennan and Gleeson has expanded native title; found that Britain is now a “foreign power”, read down Parliament’s traditional power to judge its own Members’ qualifications in light of implied representation-reinforcing concerns (Sue v Hill [1999]); invalidated a cross-vesting scheme agreed by all governments (Wakim [1999]); and extended the

20 29 years after Roe and 26 years after Buckley, abortion and campaign finance remain two of the most controversial issues in US politics.
Commonwealth Parliament’s power to direct as well as establish industrial-relations tribunals (CFMEU Case [2000]). Whatever controversy and disruption Mabo caused, it did not require a referendum (or even uniform Commonwealth-State legislation) to overturn – unlike the cross-vesting decisions, which have seen current and former Attorneys-General call for an “urgent” constitutional amendment (Wade 2000, 31). Reports of legalism’s death have been exaggerated – so far; but its days are numbered. It is time to start looking for a successor.

Finally, since the end of World War II and the Cold War, many democracies old and new have adopted charters of rights and/or judicial review where previously they lacked either or both. The US Supreme Court’s invalidation of racial segregation, controversial in the 1950s and 1960s, was by the 1980s praised by all major political actors (Bork 1990; Carter 1994, 61; Klarman 1991, 789). Thus, judicial activism was seen as delivering policy outcomes morally superior to those produced by legislative supremacy. In France (Harrison 1990; Walker 1988, 380, 460) and Ireland (Kelly 1984; Sturgess and Chubb 1988), during the 1960s and 1970s, constitutional rights previously thought to be only hortatory were found to bind the legislature.

Australia has become increasingly isolated in lacking a rights charter that citizens can invoke before the courts against their governments. At the same time, the US Supreme Court’s activism after Brown v Board of Education is much less palatable to Australian observers, whether of the Left (eg, in relation to affirmative action programs and election spending controls) or of the Right (eg, abortion restrictions and criminal procedure). Like other democracies, Australia wants to copy the good from the US Bill of Rights while avoiding the bad. Many countries – even former British colonies with Westminster-style systems – adopted a Bill of Rights, but usually one with significant differences from the USA’s: eg, Canada (1982), New Zealand (1990) and Britain itself (1998) all reserve an override power for the legislature.

However, even non-legalist constitutional interpretation can go only so far with a text that, like Australia’s, was drafted by men determined to avoid binding Parliaments to respect enforceable constitutional rights. Most of the Constitution’s rights guarantees (as Deane J noted in Street, at 521, immediately after listing them) have been construed narrowly by the High Court. Sometimes the Court did this by taking the words literally (eg, requiring s 80 jury trials only where Parliament classified an offence as indictable: Zarb [1968]); at other times the Court did this by implying common-law distinctions that limited the scope of the
literal words (eg, construing s 117 to prohibit only “residence”, not “domicile”, as a ground of discrimination: Davies and Jones [1904]; Henry v Boehm [1973], and exempting courts-martial from s 80: R v Bevan [1942]).

This tradition of narrow interpretation has been criticised by jurists and even by some dissenting Justices, although none has copied Murphy J in his isolated willingness to give constitutional provisions (and even the very “nature of Australian society”: Miller v TCN [1986]) an extremely wide reach. Even working within the limits of the text, some argue, for example, that mandatory sentencing laws violate the Constitution’s separation of judicial power (Manderson and Sharp 2000). The objection that these interpretations do not accord with the authoritative legal texts and precedents is often met with the counter-objection that novel developments – particularly advances in technology (Benkler and Lessig 1998; Kirby 1987; c/f Tribe 1991), and increased domination of Parliament by the executive (Finn 1994b; 1994c; 1995a; 1995b; Howard 1980; Toohey 1993; Walker 1988; c/f Hailsham 1978) – require innovative judicial responses.

But others oppose such responses and maintain the traditional stance. Chief Justice Murray Gleeson of the High Court recently told the American Bar Association that “[t]he quality which sustains judicial legitimacy is not bravery, or creativity, but fidelity” to legal texts and methods. Judges are valued solely for their expertise as lawyers, and “[t]he Australian community would be properly concerned if [judges] decided to base their decisions upon the exercise of other supposed talents.” Gleeson rejected judicial activism because “[j]udges whose authority comes from the will of the people, and who exercise authority upon trust that they will administer justice according to law, have no right to subvert the law because they disagree with a particular rule” (Lane 2000, 3). Similarly, NSW Justice James Wood argued that because “[j]udges are sworn to do right... after the laws and usages of the State”, therefore “they must apply the law”: in extreme cases, if “they feel unable to do so, their only course is to resign” (Sydney Morning Herald, 14 March 2000).

One common way around these objections is to adopt a Bill of Rights so that judges can do both at once – upholding justice while applying the law. Hence frequent calls in the past three decades for explicit declarations of minority or individual rights to be guaranteed – whether entrenched in the Constitution, enacted by statute, or (particularly for Indigenous rights) set out in a treaty (Evans 1982; Howard 1976; Keon-Cohen 2000; Murphy 1974;
Thompson 1977). In the past five years, those in favour include two former Prime Ministers (Fraser 2000; Whitlam 1997) and a number of prominent academics and officials (Brennan 1998; Burdekin 1998; Churches 1995; Finn 1994a; 1994b; 1994c; 1995a; 1995b; G Williams 2000).

However, other opinion leaders have responded by restating the reasons for Australia’s traditional rejection of Bills of Rights. Prime Minister Howard disagreed with his Liberal predecessor, telling Melbourne radio that a Bill would “open up a whole new opportunity for court cases” and that “strong, robust and virile democracy” was a better protector of freedoms (Saunders 2000). Although Labor’s federal legal affairs spokesperson, Robert McClelland, did support a Bill because common law did not adequately protect rights, NSW Labor Premier Bob Carr disagreed strongly, warning that Bills of Rights would only transfer decision-making from politicians to judges (Harris and Videnieks 2001):

It is not possible to draft a bill of rights which gives clear answers to every case.... If a bill of rights had been included in the Commonwealth Constitution in 1901 it would most likely have enshrined the “White Australia policy”... A bill of rights will further engender a litigation culture (Carr 2001).

In this recent debate, the strongest argument raised for a Bill of Rights focused on the lack of protection that majoritarian democracy offers to isolated minorities. Thus, Charlesworth and Mathew (2000) argue that

[w]hile the democratic political card game should usually be run along majoritarian lines, a civilised society needs to protect particular rights of minorities.... [A] majority of Australians may profess Christianity, but it would go against our ideas of tolerance if an Australian government attempted to ban all other faiths. While non-democratic governments by definition are in breach of their citizens’ human rights, they are not alone. Democratically elected governments also regularly violate human rights...

Similarly, former Democrat Senator Sid Spindler (2000) agrees that “minorities are easily ignored in a system of government by the majority.” For example,

Indigenous Australians had to wait until 1962 to get the right to vote and until 1992 to get judicial recognition as prior owners... Asylum-seekers are such a friendless minority that the major parties combined in parliament to severely limit their right to compensation for illegal detention.

Not all those advocating such reforms support judicial activism as well. Kirby (1997), G Williams (2000), and Winterton (1986; 1996; 1998) generally oppose judicial implication of constitutional rights, but do not reject explicit constitutional or statutory reforms to the same effect.

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No one is disputing that parliamentary democracy in Australia has served 95% of the population well. That is the point of majority rule. But injustice to the other 5% is serious enough to require consideration.

On the other hand, of the two strongest arguments against Bills of Rights, one is to concede that Parliaments may do badly but deny that courts will perform any better. Like Komesar (1994, 202-03), these opponents note that if a society’s hostility toward a particular group is so strong that it distorts the judgment of the legislature, the judges are not likely to be immune either. The cases Spindler cites, of discrimination against Aborigines, were terminated respectively by Parliaments (1962) and by courts developing the common law (1992) – and others, by referendum (1967). Compared to these three examples, attempts to have the courts uphold Indigenous interests by invoking the Constitution (Kartinyeri [1998]) – or other “foundational” laws challenging Parliament’s sovereignty (Coe [1979]) – have been unsuccessful. We can only speculate whether Aborigines would have been more successful in the courts if Inglis Clark’s equal protection clause had made it into the Constitution.

The other of the two strongest anti-Bill of Rights arguments is that Parliaments actually perform better than courts at the task most central to rights jurisprudence: balancing of interests when “rights collide.” Despite the naïve hopes of some earlier jurists, to find that a particular action falls within the ambit of “speech”, “religion”, or some similar term is only the beginning of the courts’ task. The real problem with constitutionalised rights is deciding which limitations are legitimate – in particular, which goals are compelling enough to justify encroaching on a right and which alternative limitations, if any exist, could achieve the same goal with less encroachment. These are not tasks in which the judiciary has traditionally claimed particular institutional expertise. To assume that judges will “find” one’s preferred answer by the same deductive process as they “find” the law amidst other statutes and precedents is, perhaps, to betray over-confidence in how contestable one’s own policy judgments really are. As Premier Carr argued:

No right is absolute. Rights conflict.... [F]reedom of speech will conflict with... equality (for example, racial vilification) and... equality will in turn conflict with the right to freely exercise one's religion (for example, the right to exclude women from the priesthood).... A bill of rights can only be interpreted by the courts by balancing rights and interests.... This is clearly a policy decision, not a judicial issue. If a bill of rights were enacted, it would then be up to a court to decide whether freedom of speech should be limited in relation to pornography, tobacco advertising and solicitation for prostitution. These are issues which should be decided by an elected parliament – not by judges (Carr 2001).
Unlike most other matters of common law, statutory, and even constitutional interpretation, adjudicating a Bill of Rights asks courts to answer questions that cannot be resolved by any amount of poring over *Hansard* or the *Oxford Dictionary*. There is no “legislative intention” that can be elucidated and then applied as law, regardless of its moral unpalatability, because the very point of adopting a Bill of Rights is that legislators are giving judges a mandate to applying only such laws as the judges themselves find morally palatable.

So there seems to be an impasse. The pro-Bill of Rights side makes the undeniable argument that minorities (especially voteless minorities) are often treated unfairly under majoritarian democracy. But Bill of Rights opponents make the equally strong argument that legislatures are better than judges – both in competency and in democratic legitimacy – at deciding which values the law should enshrine, and in prioritising these values.

Representation-reinforcement as a constitutional theory might prove a acceptable compromise. It aims to prevent unfair treatment of minorities, not by laying down a list of rights which everyone must be guaranteed equally (which list could be arbitrary and contentious) but by insisting that whatever rights a legislative majority grants to itself should be extended equally to minorities. Judges would not need to tell Parliament whether, say, the right to own land, or the right to strike, or the right to marry and found a family are “fundamental” enough to be constitutionalised and, even if so, which limits seem reasonable compromises in the judges’ eyes. Instead, simply insisting that all statute or common law regulating these matters, whatever its content, must apply equally to everyone in Australia, could have armed the judiciary with grounds to remedy Aboriginal dispossession decades before *Mabo*, to assist the striking Gurindji workers in 1966, and to prevent the mass removals of the “Stolen Generation.”

**High Court judgements that are consistent with representation-reinforcement**

But, as history records, the courts did not do these things and the judges, then and now, have not seen themselves as having the authority to invoke such a constitutional doctrine. How far does this refute the claims of representation-reinforcement? If no support can be found for it in existing constitutional jurisprudence, then it cannot be adopted without an explicit amendment, via referendum – and any political movement with the clout needed to carry
such a change would probably not be content until it had amended the Constitution to spell out particular values its members favoured.

Surprisingly, however, a more limited form of representation-reinforcement does have a respectable pedigree in Australian constitutional law. A brief survey of the past century shows that in a number of judgments, the High Court reached conclusions that only “policing the political process” can explain satisfactorily. True, the Court did not act against the abuses mentioned above – but it did act in other ways where the text did not compel that result and where interpretive theories other than representation-reinforcement, eg legalism or Fundamental Values theory, would have favoured a different result. The Court’s recent decision on the power to judge disputed elections of Commonwealth Parliamentarians (s 47) seems to stretch the text but is justified according to the “majority rule” ground of political process-policing, while its interpretations of trial by jury (s 80), religious freedom (s 116), acquisition of property (s 51(xxxi)) and freedom of inter-State trade (s 92) are consistent with the “equality for minorities” ground. (It is noteworthy that the constitutional clauses involved all have some counterpart in the US Constitution.)

**Australian Capital Television v Commonwealth (1992)**

Exhibit A of any claimed representation-reinforcing reading of the Australian Constitution must be *Australian Capital Television v Commonwealth (1992) (ACTV).*

In *ACTV*, the High Court struck down Part IIID of the *Broadcasting Act 1942* (Cth), inserted by the *Political Broadcasts and Political Disclosures Act 1991* (Cth). Under this legislative scheme, paid political broadcasts were prohibited during an election period: in return, the Australian Broadcasting Tribunal was to allocate free television and radio time to candidates and parties, who could use it only to run non-dramatised “talking head” advertisements. Ninety per cent of this air-time was to be divided among political parties (and independent Senators) holding seats in Parliament before the election, in proportion to their first-preference votes at the previous election. The other 10% was to be divided among other parties and candidates at the Tribunal’s discretion, subject to regulations to be made later. Individuals and groups not contesting the election as candidates or parties could not broadcast electoral advertisements at all.

Immediately after the *ACTV* judgement was rendered, political and legal commentators saw the decision as heralding a long-awaited era in which the High Court would at last begin to directly uphold the fundamental rights that recalcitrant parliamentarians had for so long
denied to the Australian people. Detmold (1994, 229) perceived this “New Constitutional Law” to provide a “simple” justification for an “implied right of equality as a control on our equally-held power”, while conservative journalist PP McGuinness envisaged the Court discovering an implied constitutional freedom of occupation which would invalidate the rugby league draft. Senator Nick Bolkus, seeking to recover from the political embarrassment of having steered through Parliament the first Australian bill ever to be judicially invalidated as a violation of free speech, warned his parliamentary opponents to take care the High Court did not similarly strike down their planned industrial relations laws (*Senate Hansard*, 6 October 1992, p 1174).

But both hopes and fears were misplaced. It was often overlooked was that the Court had not announced an American-style “freedom of speech” that was wide in scope. Instead, the freedom the Court identified was both narrow in scope (directed to political debate and communication) and subject to reasonable limits.\(^{22}\) Thus it was aimed at reinforcing parliamentary representation rather than undermining it.

First, the majority Justices acknowledged the often-repeated objection that the Framers had consciously decided to omit individual rights guarantees from the Constitution.\(^{23}\) But they went on to distinguish the implied freedom protected in *ACTV* because, unlike a Bill of Rights on the American model, its purpose was not to diminish but (in the words of Sir Edmund Barton at the 1897 Convention) “to enlarge the powers of self-government of the people of Australia” (quoted by McHugh J at 228). The constitutional freedom of communication was not aimed at reducing the range of matters that could be democratically regulated but, rather, to ensure that any legislative regulation of those matters was genuinely democratic.

Admittedly, this does involve a paradox: unelected judges telling an elected legislature that its enactments are not democratic enough. Yet the High Court was conscious of this apparent inconsistency and took care to minimise the risk of “government by judiciary.” The majority Justices explicitly acknowledged that, in different circumstances, moves to regulate such advertising might be upheld. For example, Parliament could enact advertising

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\(^{22}\) For example, because this freedom of political discourse is “concerned with the free flow of information and ideas”, it does not include any “right to disseminate false or misleading material” (Gaudron J).

\(^{23}\) See Mason CJ (noting “the prevailing sentiment of the Framers that there was no need to incorporate a comprehensive Bill of Rights”); Brennan J (unlike “a Bill of Rights in [sic] the American model”, the *ACTV* freedom “cannot be understood as a personal right”); and McHugh J (Australian Framers “rejected the United States example of a Bill of Rights to protect the people… against the abuse of governmental power”).

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restrictions that did not discriminate so heavily in favour of the established political parties:24 and even the draconian system struck down in ACTV might have survived had the Commonwealth shown evidence that electoral bribery was an immediate and pressing problem.25 Although the political effect of that High Court’s judgment was to kill off attempts to restrict electoral advertising, this result was not constitutionally mandated. But the legislative majority showed no further interest in exploring these avenues and preferred to drop the matter, which had become politically embarrassing. The Labor Government’s support for regulation of political advertising had been a temporary political tactic, not an intense, long-term ideological commitment (although it is true that, given its interventionist ideology, Labor was more willing to support such measures than its “free enterprise” rivals were). Indeed the ALP had itself used television advertising effectively in election campaigns before (1972, 1983) and after (1993) the ACTV judgment. So while legitimate criticisms can be made of the unregulated status quo ante which the ACTV judgment restored (eg, Adams 1996; 1998; Fraser 1994; Tucker 1994; Williams and Rosenberg 1997), ACTV itself would not preclude a genuinely determined future government from legislating to similar effect while avoiding the constitutional pitfalls the High Court had identified.26 “If parliament had chosen to re-enact the Act with a fair distribution of free time it would have been perfectly valid, but the government had in fact changed its mind about restricting advertising by the time of the decision” (MacAdam and Pyke 1998, 368).

In fact, the particular reasons the Court invoked to invalidate the Political Advertising Ban were a combination of Carolene Paragraphs Two and Three. The restrictions were

24. “If the electoral process... is likely to be... corrupted by the cost of television and radio advertising, means less drastic than... Part IIIID are available” (McHugh J) – for example, “control of spending on, or... regulation of the use of, political communication” such as “a total blackout of political advertisements... on election day” (Deane and Toohey JJ). But contra Brennan J: “A more direct way of... reducing the untoward advantage of wealth... is to limit the expenditure which an individual or an organisation is permitted to make on political advertising.” However, in 1980 Parliament had repealed similar spending limits as “unworkable.”

25. See McHugh J: “[T]he potential for or even the existence of corruption... does not amount to compelling justification for... infringements of... constitutional rights... [I]t would need to be demonstrated,... and not merely asserted, that, by reason of their practical control of the electronic media, some individuals and groups so dominate public discussion... that it threatens the ability of the electors to make reasoned and informed choices.”

26. Allocating air-time units among candidates equally (or, if the number of candidates is large, by lot), and allowing candidates to pool their units (eg, all Labor or Liberal candidates might assign their air-time to their party leader), would not advantage larger or established parties as much. It would still favour such parties, which normally stand more candidates and lose fewer deposits. But independents and small or new parties still have a reasonable chance to get their message across. If they expect to poll well, they can stand many candidates, thus qualifying for more air time; this in turn will help them to win more votes (if their message has electoral appeal) and keep their deposits.
unduly harsh both on rival political parties and on discrete and insular minorities. As Mason CJ observed (at 132):

The provisions of Part IIID manifestly favour the status quo… [F]reedom of… expression on electronic media in relation to… the political process is severely restricted by a regulatory regime which evidently favours the established political parties and their candidates without securing compensating advantages or benefits for others...27

And it was the very selectivity of the restriction that rendered it constitutionally suspect, even though a more general restriction or prohibition might have been upheld. “It was submitted… that no valid objection could be taken to a prohibition of political advertisements on television and radio since a general prohibition of all advertisements on television and radio would be within Commonwealth legislative power.” Even if so, however, that no more settles the constitutionality of Part IIID –

than would an assumption that a State Parliament had legislative power to ban all newspaper advertising within the State […] settle] the question whether a specific and protectionist ban on any newspaper advertising by out-of-State traders was consistent with Section 92… The ban on political communication… must be assessed in the context in which it operates, namely, a context where advertising in general is permitted on commercial radio and television stations (Deane and Toohey JJ at 170).

Although these two representation-reinforcing paragraphs can often be elided under the omnibus description of “protecting minorities against majorities”, in fact they refer to two very different, almost mutually exclusive types of minorities. The Paragraph Two ground protects temporary minorities – specifically, opposition parties and candidates28 – against harsh treatment motivated by fear that otherwise they might become a majority. On the other hand, Carolene’s Paragraph Three protects permanent (or at least long-term) minorities against harsh treatment motivated by confidence that they are never going to become a majority, and therefore cannot retaliate electorally.

This distinction is important because the two are often conflated. While the ACTV majority spoke of protecting the majority’s right to govern itself, statutes restricting

27 Accord McHugh J. Ironically, it was the major Opposition parties who most strongly opposed the advertising ban, while the Australian Democrats – the most prominent minor party represented in Parliament – voted in its favour.

28 Not just the second-highest-polling political party as a challenger to the highest-polling party (i.e., that which controls the legislature and/or executive), but also third, fourth (etc) parties and independents as challengers to both. The term “parties” can be construed widely to cover other types of organised political opposition groups – e.g., a coalition formed to campaign in a referendum, or even dissidents and protestors who repudiate electoral politics.
particular political viewpoints from being presented to the electorate may, in fact, be quite popular with the majority of voters. If so, a constitutional rule invalidating such restrictions will decrease the power of the average voter (who is more likely to be a member of the majority). “Each member of the present majority might prefer to accept less information for himself, and thus lower his own opportunity to change his mind, just because he does not want others… to have a similar opportunity” (Dworkin 1985, 62). It is true that enacting such a rule would foreclose future opportunities to decide otherwise. But every majority decision does this, whether to build a dam or (Dworkin’s example) to prohibit the dissemination of Marxist literature. On purely majoritarian grounds, the minority political speaker who is silenced by such a gag rule can no more demand its abolition than advertisers can demand that householders remove their “No Junk Mail” signs.

A justification for such a rule must look somewhere other than protecting the majority from itself. Two alternative rationales are available: that of protecting minorities from the majority, and of protecting the majority from minorities. The first offers a rationale for, say, protecting religious and linguistic minorities against censorship – but again, political or electoral minorities are a different case. It is all very well for courts to uphold one’s right to publish The Watchtower (c/f Roncarelli [1959]) or display English-only signs in Québec (Ford v A-G Québec [1988]). Those freedoms can be enjoyed effectively even if the majority opposes their protection. But a right to put before the majority proposals that most of the majority’s members consider repugnant has little value. If the purpose of the right is to elicit that public-policy decision which is acceptable to the largest number of citizens, then a blanket decision precluding certain proposals being put at all is functionally little different from a series of decisions rejecting such proposals each time they are put. One could justify such a freedom by locating it in the dissenter’s right to dissent rather than in the majority’s right to have the fullest possible range of information and arguments before it: but then we are back to substantive individual rights instead of a constitutionally-protected democratic process. A median position might be to frame the dissenter’s claim as a right to seek future reversals of majoritarian decisions – to have tomorrow’s majority re-visit decisions currently closed by today’s majority. But even this can be abused as a time-wasting device.

The second rationale, therefore, is stronger: freedom of political communication serves to protect the electoral majority from exploitation by a minority – not at the hands of less-powerful religious, ethnic or other minorities within society, but at the hands of the privileged and powerful minority whom they elect as their representatives. Klarman, in his
revision of representation-reinforcement, rejects the broader position, which "simply posit[s] that open political debate is a *sine qua non* of democratic government" (1991, 754), in favour of the narrower and more easily defended position that "legislators are unlikely to evaluate dispassionately the costs and benefits of speech critical of their governing performance" (pp 753-54). Judicial review of speech restrictions is justified in restraining, not the popular majority itself, but its elected servants: the rationale is analogous to recusal for conflict of interest rather than the language of fundamental rights.

Before *ACTV* can be claimed as a representation-reinforcing decision, however, two other objections must be answered. The first is that the High Court’s solicitude for independent candidates and small or new political parties was inconsistent. Other aspects of the Australian electoral system favour the established parties no less heavily than the advertising ban did, but have been upheld by the Court: eg, non-refundable deposits (*Fabre* [1972]), Senate ticket-voting (*McKenzie* [1984]), and compulsory full-preferential voting (*Langer* [1996]). Yet the Democrats, Greens, One Nation, or DLP would almost certainly prefer the *ACTV* scheme with proportional representation instead of single-member electorates with unregulated advertising.

Of course the Court is partly constrained by the constitutional text, which explicitly leaves Parliament a free choice between single-and multi-member electorates for both Houses (ss 7[b], 29[a]). But nothing in the Constitution (not even s 51(3xxix)) says Parliament has any more power to extract deposits from candidates, or to limit Senate voting tickets to registered parties and sitting Senators, than it has to regulate electoral broadcasts. If there is a principle linking *ACTV* with these contrasting judgments, then, it is that Parliament can legislate for an electoral system that prevents small parties winning *seats*, as long as it does not hinder them winning *votes*. The degree of representative democracy required is minimalist: small parties can be excluded from representation, as long as they have a fair chance to become big parties at subsequent elections.

The second obstacle to claiming *ACTV* as a representation-reinforcing judgement along the lines that Ely advocates is that the majority Justices either accepted Parliament’s good faith in enacting the advertising ban or else considered legislative motives constitutionally irrelevant. However, on closer examination the answer lies in remembering that the

29 "... I am prepared to assume that the purpose of Part III D is to safeguard the integrity of the political process" (Mason CJ)

30 Whether they considered Part III D valid ("the political motivation for legislation is... immaterial to its constitutional validity": Brennan J) or invalid ("[A] prohibition is no less... inconsistent with the freedom of
majority and the minorities grounds of representation-reinforcement, while overlapping, are distinct. The “procedural” ideal in relation to the minority non-discrimination ground is that decision-makers should reach their judgments uninfluenced by bias or conflict of interest. By contrast, the “correct procedure” in relation to the majority rule ground is that decisions should be reached by free and informed consent of a majority. While, as noted, this latter requirement is minimalist, it is much less likely to vary according to the specific circumstances and motives of different decision-makers. For example, as noted, Ely’s theory means that a law limiting the number of Jewish doctors would be suspect if enacted by a US State but not by the Israeli Knesset (1980, 171). But a law denying Jews the vote or censoring their political speech – thus excluding them from the machinery of the process, not just from its “spoils” – would be unconstitutional regardless of who enacted it or why.

Therefore, judicial scrutiny for unconscious or structural bias should be stricter when this bias might clog the machinery of democracy so as to hinder future reversals of policy:

Of course… the ins should not be permitted to inhibit expression for no reason at all. But… they [also] should not be permitted to inhibit it for some flimsy… pretext. But even this cannot be enough. Perspective is critical, and one whose continued authority depends on the silencing of other voices may well in all good faith… convince himself that a reason… is in fact compelling (Ely 1980, 106-07).

By contrast, when a decision’s alleged procedural flaw is not that it is self-entrenching but that it is tainted by the majority’s bias in its own favour, courts should be more deferential.

Three of the six majority Justices in ACTIV express expressly stated that restrictions on freedom of speech imposed by laws of general application, not aimed at political communications, had a much higher chance of passing constitutional muster. Ely’s example of the longevity of anti-polygamy laws (1996, 193) illustrates the value of traditional or common-law rules as presumptively neutral limitations on rights. If a particular restriction has been in place consistently since the days of Blackstone or King Stephen, it is less likely to have been targeted ad hoc at a particular group. On the other hand, Ely is dismissive of tradition as a

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political communication… simply because… those in government genuinely apprehend that some persons or groups may make more… effective[] use of the freedom than others” (Deane and Toohey JJ).

31 Particularly Gaudron J (“… R)epresentative parliamentary democracy… entails consequences, some of which… may be revealed by the general law, including the common law… The laws with respect to defamation, sedition, blasphemy, obscenity and offensive language, will indicate the kind of regulation that is consistent with the freedom of political discourse… [W]hat is reasonable and appropriate will… depend on whether the regulation is of a kind that has traditionally been permitted by the general law”). See also Mason CJ (“… T)he law which imposes the restrictions is not one of general application”, but is “specifically directed at… matters relating to… political discussion…” and McHugh J (the implied freedom will “extend to the use of all… methods of communication which are lawfully available for general use in the community”).

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stand-alone source of substantive constitutional values – first, because the majority’s customs are unlikely to protect unpopular minorities; second, because if a polity wanted to entrench a tradition, “the sensible course would be to write it down” (Ely 1980, 62) rather than leave it to implication. But if what renders a law invalid is a suspected intention to persistently treat a group unfavourably (treating it differently being strong but not conclusive evidence of such intention), then tradition – if it shows that a legislative majority is abiding consistently by long-standing, neutrally-framed rules – can help rebut this suspicion (c/f Dworkin 1985, 90-91). Although Ely focuses on legislative motivation and rejects appeals to tradition, while the ACTV majority Justices give greater weight to tradition while rejecting legislative motives as immaterial, both end up converging on a roughly similar test for “disproportionate restrictions”, at least so far as the majority rule ground is concerned.

Disputed elections of Commonwealth Parliamentarians (s 47)

The High Court’s ruling in June 1999 that the UK was now a “foreign power” achieved brief media notoriety (Sue v Hill [1999]), since it involved both the Republic debate and the electoral fortunes of Pauline Hanson’s One Nation Party, whose sole federal parliamentarian was disqualified from the Senate under Constitution s 44(i) because she was still a British subject. However, two Justices stopped at a prior threshold, holding that the High Court (as the Court of Disputed Returns) should not be adjudicating Heather Hill’s eligibility as a candidate in the first place. McHugh and Kirby JJ held that Constitution s 47 – read in light of the Framers’ intentions, and centuries of Westminster tradition – barred the Court from ruling on a parliamentarian’s qualifications for office unless her House referred the matter (which the Senate had not), or Parliament had “otherwise provide[d]” (which, they argued, it had not because the Commonwealth Electoral Act 1918 gave the Court jurisdiction only to adjudicate irregularities in the electoral process, not candidates’ personal eligibility: c/f Schoff 1997). However, the other Justices construed the Electoral Act as legislative warrant for the courts to hear individual petitioners’ challenges to MPs’ qualifications.

Of particular interest is a passage in Kirby J’s dissent, which anticipated a representation-reinforcement-based objection: that his deferential interpretation of the Constitution and the Electoral Act would allow a House of Parliament to flout the Constitution (by seating an

32 Callinan J agreed that Court lacked jurisdiction, but in dicta also objected that deeming Britain a “foreign
unqualified candidate, or by unseating or referring to the Court a qualified candidate) “for purely political reasons.” Kirby J’s first counter-objection – that “in matters of this kind the Federal Parliament would act... with propriety and lawfulness as the Constitution presumes” (at 567) contrasts incongruously with his dissent in Kartinyeri, a year earlier, likening the *Hindmarsh Island Bridge Act 1997*, in kind if not degree, to the racist laws of South Africa and Nazi Germany (*Kartinyeri* [1998] at 414-16). But his second counter-objection shows that Kirby’s rhetoric of respect for Parliament is more an expression of courtesy or comity among branches than of really trusting MPs with unreviewable control over their own membership. Although MPs’ qualifications remain justiciable in the last resort, the courts should wait some reasonable time to give the relevant House a chance to refer a dispute on its own initiative. But if an MP was clearly unqualified, and “the relevant House of the Parliament failed or refused to ‘determine’ [the] question”, then a private individual with *locus standi* could seek redress under Constitution s 75(v) (at 568). Kirby seeks to balance the Constitutional text against Parliamentary tradition. In a compromise analogous to the High Court’s position in *Cormack v Cope* [1974], he holds that although the courts will “uphold the law and the Constitution in relation to the Parliament”, they will also “ordinarily permit[] parliamentary procedures to be completed before they intervene” (at 568). Tradition gives Parliament the first word, but the Constitution (interpreted in a representation-reinforcing direction) gives the courts the last word.\(^{33}\)

### Jury trials for offences “on indictment” (s 80)

The Constitution’s s 80, guaranteeing trial by jury for federal offences prosecuted on indictment, is valuable from a representation-reinforcing point of view. Jury trial gives a veto over criminal punishment to a body even further removed from executive or legislative control than the judiciary is, and thereby ensures that any deprivations of liberty or property must be independently proven.\(^{34}\) At the same time, trial by jury is not a fetter on substantive policies. It is hard to think of any law that could only be applied fairly by “Diplock courts.”

\(^{33}\) None of the Justices in *Sue v Hill* mentioned the analogous US precedent, *Powell v McCormack* [1969]. Here the Supreme Court held (7-1) that the Constitution’s literal words – “each House shall be the judge of the... qualifications of its own members” (Article I, §5(1)) – did not authorise Congress to expel a member for reasons other than lack of the qualifications specified in the Constitution itself (age, citizenship, residency: Article I, §2(2)). Thus, the House of Representatives’ decision (by bipartisan two-thirds majority) to unseat flamboyant Black Congressman Adam Clayton Powell Jr, for alleged misuse of funds, was unconstitutional.

\(^{34}\) Of course judges are independent of post-appointment government control. However, the executive can still
No one disputes that Parliament may regulate the incidental aspects of jury trial. But in *Cheatle* [1993], the High Court held (unanimously) that, notwithstanding State laws permitting majority verdicts, any jury trial for a federal offence requires unanimity, because this had been understood in 1901 – and for centuries before that – as an essential element of the institution. The Justices anticipated objections that such an appeal to history and tradition was selective. At Federation, only property-owning males could serve as jurors, yet no one today would expect the High Court to quash a trial because the jury included unemployed women. Is it consistent for the High Court to hold that one then-traditional aspect of a jury (unanimity) is preserved as “essential” while another (gender and class discrimination) may, or even must, be abolished by Parliament? By what standard do judges pick and choose?

One ground of distinction would be that discrimination is inconsistent with today’s notions of justice. But one could similarly attack the unanimity requirement – originally, centuries ago, judges could detain jurors “without meat or drinke, fire or candle” (Coke LCJ’s words) until all agreed (*Cheatle* at 560). And if “contemporary standards and perceptions” (*Cheatle* at 551) can change the Constitution’s meaning, perhaps courts should take judicial notice of rising public opposition to procedures viewed as “outmoded” and “too soft on crime.” Again, the same objection arises to appealing to “society’s values” as a constitutional constraint: if these really are our community’s values, why have our elected representatives legislated in contravention of them?

Representation-reinforcement, however, does offer a principled rationale for the distinction the High Court drew. It is legitimate for legislatures to alleviate discrimination against groups that do not form a majority of the electorate – especially when such discrimination involves the franchise, and rights linked to it, such as jury service. The same process-policing logic, however, dictates that judges should be much more skeptical toward legislative attempts to dispense with unanimity – or with jury trial itself.

The representation-reinforcing position is *not* that unanimity is non-negotiable, only that judges have legitimate grounds to second-guess the legislature’s judgement on the matter. But insisting on unanimity does have the advantage of a “bright-line” rule; and allowing majority verdicts faces a problem analogous to that of deciding whether electorates are “equal.” How much variation is permissible? To prescribe a fixed number that is deemed (or

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influence the *selection* of judges, but has much less control over selection of jurors.

35 Not only are jurors usually drawn from the electoral roll, but the jury as a body has traditionally been seen as representing “the people” (Rakove 1996, 294-302).