COMPETING VISIONS OF LIBERALISM: THEORETICAL UNDERPINNINGS OF THE BILL OF RIGHTS DEBATE IN AUSTRALIA

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[When the bill of rights debate is evaluated in terms of the different traditions within liberal constitutionalism, it becomes evident that the debate is about more than the best means for securing civil liberties, it articulates a profound tension between differing notions of rights and competing visions of liberal constitutionalism. From this theoretical perspective, the Australian reluctance to entrench rights reveals the strength of the dominant constitutionalism characterised by a parliamentarianism influenced by Mill and Dicey. It also highlights the character of the competing traditions, especially those of natural rights and human rights elaborated by Locke and Kant. The extent to which it is possible to say that there is now a confluence of these traditions, and the political and theoretical implications of such changes, are explored in the light of the bill of rights debate in Australia.]

CONTENTS

I INTRODUCTION

It seems unnecessary to venture once again into the debate concerning the merits of entrenching a bill of rights in the Australian Constitution. One suspects that all has been said; the battle lines drawn and a resolute war of attrition firmly in place. Those who favour a bill of rights see a number of advantages in entrenching rights. They see it as a means of ensuring fundamental rights and protecting individuals and minorities from majoritarian tyranny. They think that a bill of rights would provide a means for bringing laws up-to-date, empowering those who have little power and educating citizens generally with respect to the progressive standards agreed upon by the community of nations. On the other hand, those who oppose entrenchment see rights as contrary to the tradition of parliamentary sovereignty, as politicising the judiciary, as entrenching and

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thereby freezing the development of rights and as providing only a paper defence to the serious problems of securing civil liberties.[1]

Leaving aside for now the merits of these claims, what is perhaps most remarkable about this debate is that it is taking place at all. Why is Australia reluctant to entrench rights?[2] Why should the entrenchment of rights give rise to such debate in a liberal democracy like Australia? After all, many illiberal regimes have been quite willing to entrench the most extensive charters and bills of rights and freedoms. I would suggest that approaching the bill of rights debate from this vantage point, out of the fray, provides the necessary theoretical perspective for understanding the nature of the dispute and clarifying the presuppositions of the disputants. In doing so, it is hoped that greater clarity will advance the possibility of negotiation and compromise between the proponents and opponents of a bill of rights.

The Australian reluctance about rights is not unique. It is similar to the debates on rights that have taken place in England, and in countries like Canada and New Zealand that are characterised by an English constitutionalism based on responsible government and the common law. Australia's bill of rights debate is simply one of the last instances of a more general resistance to rights exhibited by these countries founded upon English constitutionalism.[3] If this is so, then we are confronted with a potentially larger issue. It would appear that the bill of rights debate in Australia, as well as in these other countries, reveals and articulates a problem that is more fundamental than the question of the best means for securing civil liberties — it seems that at issue is a resistance by English constitutionalism to attempts to introduce a bill of rights. Put differently, there appears to be an inherent incompatibility between English constitutionalism and the changes represented by the entrenchment of a bill of rights. The more profound question, then, is in what sense does the entrenchment of a bill of rights represent a change in Australian constitutionalism? And if the question is of competing constitutional visions, what exactly are these different perspectives?

[1] There is of course extensive scholarship on the subject. For a comprehensive review of the literature, see James Thomson, 'An Australian Bill of Rights: Glorious Promises, Concealed Dangers' (1994) 19 *Melbourne University Law Review* 1020. In particular, see Justice Michael Kirby, 'The Bill of Rights Debate' (1994) 29(12) *Australian Lawyer* 16; Murray Wilcox, *An Australian Bill of Rights?* (1993); Gareth Evans, 'An Australian Bill of Rights?' (1973) 45(1) *Australian Quarterly* 4; Peter Bailey, *Human Rights: Australia in an International Context* (1990); Sir Harry Gibbs, 'Eleventh Wilfred Fullagar Memorial Lecture: The Constitutional Protection of Human Rights' (1982) 9 *Monash University Law Review* 1.

[2] See, eg, Hilary Charlesworth, 'The Australian Reluctance About Rights' (1993) 31 *Osgoode Hall Law Journal* 195; Brian Galligan, 'Australia's Rejection of a Bill of Rights' (1990) 28 *Journal of Commonwealth and Comparative Politics* 344.

[3] Even in the case of these countries the situation is somewhat ambiguous. England has come to be influenced by rights as a consequence of its adoption of the European Convention on Human Rights and its European Union membership: see John McEldowney, *Public Law* (1994) 3–33. New Zealand's *Bill of Rights Act* 1990 (NZ) is strictly an 'interpretation' statute (see ss 4 and 6): the judiciary is to interpret legislation as consistently as possible with the Act but cannot repeal or hold invalid any legislation that is otherwise inconsistent. For a discussion of the law concerning this Act, see Mai Chen and Sir Geoffrey Palmer, *Public Law in New Zealand: Cases, Materials, Commentaries, and Questions* (1993) 463–564. Of these countries, only Canada can be said to have an entrenched bill of rights (the Canadian *Charter of Rights and Freedoms* ('*Charter*'), in the *Constitution Act* 1982 (Can)).

This paper attempts to explore these issues by firstly surveying the different theoretical sources of rights within liberal constitutionalism. It does this by noting the founders' understanding of rights and contrasting it with the natural rights tradition of Locke and Kant, and the subsequent confluence of these traditions understood in terms of human rights. It will then outline the broad contours of the orthodox constitutionalism in Australia and the attempts, especially by the Labor Party, to alter it by entrenching a bill of rights. Finally, it will note the political consequences of a shift in the theoretical foundations of rights by examining the Canadian experience with the entrenchment of rights.

II LIBERAL CONSTITUTIONALISM AT THE FOUNDING

The important starting point for understanding Australian constitutionalism is the fact that it represented a continuation and development of English constitutionalism. The English common law was adopted in Australia as a 'birthright of every English subject'.[4] Similarly, English institutions were transplanted and claimed as 'ancient rights and lawful liberties'.[5] At first, representative government, and later responsible government, were adopted in the colonies, marking their increasing legal and political independence from England. The gradual adoption of such institutions introduced into Australian constitutionalism the important unwritten or 'conventional' dimension of English constitutionalism.[6]

This conventional dimension of the Constitution allows us to understand better the apparently unlimited and unconstrained powers given to the colonial legislatures. Subject to the rule against repugnancy and territorial limits, the colonial governments had plenary power to enact legislation,[7] and though subordinate to Imperial Parliament, were not delegates of it.[8] Moreover, there were no 'rights' based limitations on the exercise of this power. Except for the sections in the Tasmanian Constitution dealing with religious freedom, the colonial constitutions had no entrenched bill of rights or general civil liberties limitations.[9] In any case,

[4] William Blackstone, *Commentaries on the Laws of England* (first published 1765, 1982 ed) vol 1, 107. See also Alex Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1, 4–5.

[5] Sir Victor Windeyer, '"A Birthright and Inheritance": The Establishment of the Rule of Law in Australia' (1962) 1 *Tasmanian University Law Review* 635, 636.

[6] See generally Richard Lumb, *Australian Constitutionalism* (1983) 44–7; Sir John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (first published 1901, 1976 ed). Thus constitutionalism as a concept has a broader reach than the specific provisions of a constitution, and gains its meaning from the political, legal and social principles that animate the polity.

[7] For example, the colonial legislatures had the power to make laws 'for the peace, welfare and good government of the colony': *Constitution Act* 1902 (NSW) s 5; *Constitution Act* 1867 (Qld) s 2; to make laws 'in Victoria in all cases whatsoever': *Constitution Act* 1975 (Vic) s 16; and in Western Australia to make laws 'for the peace order and good Government of the Colony': *Constitution Act* 1889 (WA) s 2. See also R Lumb, *The Constitutions of the Australian States* (1991) 84.

[8] *R v Burah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117; *Powell v Apollo Candle Co* (1885) 10 App Cas 282.

[9] Section 46 of the *Constitution Act* 1934 (Tas) was enacted as a result of general consolidation of the Act and was intended to restate an Imperial Act: see Enid Campbell, 'Civil Rights and the Australian Constitutional Tradition' in Carl Beck (ed), *Law and Justice: Essays in Honor of Robert S Rankin* (1970) 295, 317. In *Building Construction Employees and Builders' Labourers*

colonial Parliaments had the power to alter their constitutions, limited only by special 'manner and form requirements'.[10]

It would be misleading, however, to conclude that the colonists were unconcerned with the protection of civil liberties. It was acknowledged that the common law would recognise and protect individual rights. It is true that such rights were subject to parliamentary control and hence could be limited for the public good. However, since only legislatures were entitled to impair a private right, this was not seen as a major threat to liberty because Parliament itself was seen as a manifestation and defence of another form of liberty: the right to be represented, and in particular, the right to participate by voting and the right to voice one's opinion. Thus these two forms of liberty were seen to be mutually reinforcing, securing liberty by constraining executive power.[11]

This understanding of rights could be seen most clearly in the course of the Australian founding. The founders were prepared to entrench a federal Constitution, a major innovation that appeared to be inconsistent with the principle of responsible government. The 'written and rigid' Constitution was also contrary to the 'elastic' English model that had given birth to rights and privileges.[12] Nevertheless, the founders declined to take this opportunity to entrench a bill of rights in the Constitution. Andrew Inglis Clark's attempts to entrench such rights were rejected as being simply too foreign and decisively unnecessary.[13] The few rights that were retained in the Constitution were seen as being either consistent with federalism or as a harmless confirmation of the status quo.[14]

Federation of New South Wales v Minister for Industrial Relations (NSW) (1986) 7 NSWLR 372, 387 suggestions were made that there may be substantive limits to sovereignty to protect against 'tyrannous excesses on the part of the legislature'. This was rejected by the High Court in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10 where it was held that the courts could not invalidate laws made by Parliament 'on the ground that they do not secure the welfare and the public interest'.

10 See, eg, *McCawley v The King* [1920] AC 691, 714 where it was accepted that '[t]he legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted'.

11 See generally Richard Risk and Robert Vipond, 'Rights Talk in Canada in the Late Nineteenth Century: "The Good Sense and Right Feeling of the People"' (1996) 14 *Law and History Review* 1, 2–3; Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (1965).

12 See generally *Official Record of the Debates of the Australasian Federal Convention* ('*Convention Debates*'), Sydney 1891, 198 (Cockburn); Bernhard Wise, *The Making of the Australian Commonwealth 1889–1900* (1913) 122–6; Alfred Deakin, *The Federal Story* (1944) 45; John La Nauze, *The Making of the Australian Constitution* (1974) 43, 139–60.

13 For example, Quick and Garran, above n 6, 957, consider such matters as privileges and immunities and the Fourteenth Amendment to the American Constitution in the context of citizenship, stressing that this term is used to express membership in a republican community and therefore is foreign to the British tradition that recognises allegiance to a personal sovereign. Harrison Moore distinguishes between the American Constitution with its Bill of Rights, and the Australian Consitution, noting that the American provisions are based on a 'spirit of distrust': Harrison Moore, *Constitution of the Commonwealth of Australia* (1902) 329. For Moore, there are very few guarantees of individual rights in the Australian Constitution because the 'great underlying principle is that the rights of individuals are sufficiently secured by ensuring as far as possible to each a share, an equal share, in political power': ibid 329.

14 See generally Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (1992) 151, 151–8; Geoffrey Kennett, 'Individual Rights, the High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581, 583; Haig Patapan, 'The Dead Hand of the Founders?

The Australian founders' rejection of entrenched rights was based on the notion of rights derived from English constitutionalism. To be sure, this inheritance encompassed a number of philosophical traditions, from the ancient Constitution of Coke, to the notion of Burkean prescriptive rights, to those elaborated by Blackstone and Bentham. Arguably, however, the dominant view was a utilitarianism that went beyond Bentham; the founders were Millian progressives rather than Benthamites.[15] This can be shown by the fact that some of the most influential thinkers during the founding — Dicey and Bryce who were colleagues — were 'brought up' on Mill, as Dicey put it.[16] Thus, while the founders entertained a notion of rights that included ancient entitlements, their ideas were dominated by a trust in the progressive will of Parliament.

For the founders, Parliament represented the primary means for addressing political problems. As far as possible it was to have unrestricted authority, untrammelled by constitutional limitations. Parliament was not a threat to liberties; on the contrary, it secured individual rights by means of responsible government. Parliamentary supremacy and the rule of law protected freedoms and made progress possible, allowing human beings to evolve and develop from barbarism and intolerance to enlightenment and civilisation. Implicit in this view was a notion of a growing and changing community that was not formed by an abstract citizenship based on contractual 'rights'. In this light, to limit Parliament by entrenching rights was to question the motives of Parliament or, more seriously, to assume progress was questionable.

The founders' understanding of rights, premised on liberalism and progressive parliamentarianism, needs to be contrasted with the notion of natural rights and human rights. The idea of entrenched rights has as its philosophical provenance a different but powerful stream of thought within the liberal tradition.[17]

Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 *Federal Law Review* 211.

15 Cf Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114 *Dædalus* 147; James Warden, 'The Fettered Republic: The Anglo-American Commonwealth and the Traditions of Australian Political Thought' (1993) 28 *Australian Journal of Political Science* 83; Brian Galligan, 'Parliamentary Responsible Government and the Protection of Rights' (1993) 4 *Public Law Review* 100.

16 A V Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century* (first published 1905, 1962 ed) 242–56. James Bryce, *The American Commonwealth* (first published 1888) was the pre-eminent authority for the founders. La Nauze describes the work in these terms: '[i]t was quoted or referred to more than any other single work; never criticised, it was regarded with the same awe, mingled with reverence, as the Bible would have been in an assembly of churchmen': La Nauze, above n 12, 273. For references to Bryce in the Convention debates, see *Convention Debates,* above n 12, Sydney 1891, 147 (Rutledge), 210–1 (Brown), 545 (Baker), 597 (Kingston); *Convention Debates,* above n 12, Sydney 1897, 56 (Deakin). A V Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, 1915 ed) was used by the founders to understand and explain the constitutional changes that were being debated. Dicey was referred to especially by the South Australian delegates: La Nauze, above n 12, 20; *Convention Debates*, above n 12, Sydney 1891, 105 (Downer), 198 (Cockburn); *Convention Debates*, above n 12, Adelaide 1897, 307 (Clarke), 911 (Barton); *Convention Debates,* above n 12, Melbourne 1898, 1686 (Wise).

17 Burke was critical of this understanding of the new 'metaphysic rights' because its mechanistic and geometrical view misunderstood human nature: Edmund Burke, *Reflections on the Revolution in France* (first published 1789, 1910 ed) 59. Bentham rejected natural rights in his famous observation, '[n]atural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts': as cited in Jeremy Bentham, 'A Critical Examination of the

III LIBERALISM AND NATURAL AND HUMAN RIGHTS

A *Natural Rights*

Though the decisive break from the scholastic tradition of natural law was effected by Thomas Hobbes, it was John Locke who founded liberalism on the basis of modern natural rights.[18] For Locke, the state of nature is a state of perfect freedom where people may 'order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man'. It is a state of equality, 'wherein all the Power and Jurisdiction is reciprocal, no one having more than another'.[19] Though in the state of nature a person has all the freedom and right of nature, 'the enjoyment of it is very uncertain, and constantly exposed to the invasion of others'. The enjoyment of property in the state of nature is 'very unsafe, very insecure'. Thus people are willing to quit the state of nature and enter into political society 'for the mutual *Preservation* of their Lives, Liberties and estates, which I call by the general Name, *Property*.'[20] Therefore government is by consent of the people, for the preservation of property understood in this wider sense: 'The great and chief end, therefore, of Men's uniting into Common-wealths, and putting themselves under government, is the Preservation of Property'.[21]

Based on the perfect freedom and equality found in the state of nature, Locke justifies a liberal constitutionalism characterised by representative government with legislative, executive and federative powers and the rule of law. Importantly, since the end of civil society is peace, safety and the public good of the people — *salus populi suprema lex esto* — where the government attempts to destroy the property of the people, or reduce them into slavery, then the people have a right to resume and exercise their original liberty; natural right and original freedom allow the people to dissolve governments.[22] Accordingly, for Locke, political power is based on, and limited by, natural rights.

Declaration of the Rights of Man' in Bhiku Parekh (ed), *Bentham's Political Thought* (1973) 257, 269. See further Jeremy Bentham, 'A Comment on the Commentaries' (first published 1776) and 'A Fragment on Government' (first published 1776) in James Burns and H L A Hart (eds), *A Comment on the Commentaries and A Fragment on Government* (1977) 17, 20, 439, 440, 483, 509.

18 In *Leviathan* (first published 1651), Thomas Hobbes appropriates the scholastic language of natural law and natural rights in order to argue that in the state of nature, rights have a priority over duties. Hobbesian natural rights therefore become the starting point for understanding the state as artificial entity, a rational and contractual handiwork of those who wish to escape the violence of the state of nature.

19 John Locke, *Second Treatise of Government* (first published 1690, 1980 ed) ch ii, [4].

20 Ibid ch ix, §123 (emphasis in original).

21 Ibid ch ix, §124.

22 Ibid ch ix, §131, ch xix, §§221–2.

B *Kantian Human Rights*

Kant's constitutionalism reveals the debt it owes to the Lockean tradition — public right is a system of laws based on pure principles of right; it is constitutional, representative and republican.[23] However, in Kant's formulation of human rights we find the natural rights tradition extended and altered in fundamental respects. Kant, influenced by Rousseau, distinguishes between two forms of causality, one according to nature and one according to freedom. Causality in the sensible world has a necessary or phenomenal character, determined by the order of nature. Causality in the noumenal sense acknowledges the idea of transcendental freedom, the possibility of human freedom and hence morality. The coexistence of radical human freedom with the reality of natural necessity has major consequences for rights.

Kant distinguishes between rights derived from *a priori* principles (natural rights) and rights that proceed from the will of the legislator (positive or statutory rights). Rights as moral capacities are also divided into innate and acquired rights. According to Kant there is only one innate right — freedom 'is the only original right belonging to every man by virtue of his humanity'.[24] The innate right includes the right to equality, the right to be one's own master and the right to communicate. As a *human* right based on freedom, it makes possible a method for settling disputes regarding acquired rights. This notion of right has important political implications: the rights of persons must be held sacred, however much sacrifice they may cost the ruling power.[25] In this way the infinite worth and dignity of the human person justifies the pursuit of morality without the recourse to calculation, the 'wisdom of serpents'.[26] Justice is to prevail though the world should perish — *Fiat iustitia, pereat mundus*.[27]

C *A Confluence of Traditions*

The Kantian formulation of rights reintroduced within rights-based liberalism the important moral dimension of autonomy and dignity. Thus the primacy of our morality, and hence our infinite value as human beings, has come to dominate the articulation of rights. Consequently, there has been an important shift in the conception of rights and therefore in the responsibilities of the state. If humanity and dignity are to be our lodestar then there is little that we do not deserve and nothing we should not get — the role and function of the state is simultaneously elevated and augmented. The state may still pose a threat to our freedom but it is also a guardian and patron of our entitlements. This view of dignity and humanity, and hence its modern formulation — the right to equal concern and respect

[23] Immanuel Kant, *Metaphysics of Morals* (first published 1797, 1991 ed) 124–9. See generally Mary Gregor, 'Kant's Approach to Constitutionalism' in Alan Rosenbaum (ed), *Constitutionalism: The Philosophical Dimension* (1988) 69.

[24] Kant, *Metaphysics of Morals*, above n 23, 63.

[25] Immanuel Kant, 'Perpetual Peace' (first published 1795) in Lewis Beck (ed), *Kant on History* (1963) 85, 128.

[26] Ibid 117.

[27] Ibid 126.

— has made it possible for rights-based liberalism to develop notions of social and economic rights,[28] rights to self-esteem,[29] as well as group rights.[30] The trend to appropriate the language of human rights to recognise a greater and more diverse range of entitlements has led, at its outer extreme, to a rejection of 'rights-talk' altogether.[31] Importantly, it has made such rights — the rights we possess due to our freedom and dignity — difficult to distinguish from positive rights, those entitlements that are enacted by Parliament. For does not Parliament also recognise and consider our dignity in enacting legislation and therefore are not all rights relative to this extent? In this case the priority of the right over the good is in practice blurred so that dignity becomes one of the justifications in the calculation of the good. These changes in rights-based liberalism have to some extent been mirrored in the formulation of positive rights. There have been attempts within utilitarianism to acknowledge the fact that there are minimal requirements of morality within positive law. Thus the recognition of the intrinsic separateness and importance of the individual, and thereby of individual dignity, has tended to make positive rights resemble those rights based on equal concern and respect.[32] In light of these developments it is possible to argue that there has been a merging, if not blurring, of the parliamentary liberal tradition and rights-based liberalism under the banner of human rights; that the confluence of these two liberal streams is taking place in the late twentieth century in the name of human rights.

If, indeed, there is this theoretical confluence in the notions of rights, to what extent has it influenced Australian constitutionalism? To address this question it is necessary to investigate the dominance of the founders' understanding of rights in the shaping of Australian constitutionalism; that is, to explore the extent to which it is appropriate to claim that there is an orthodox constitutionalism in Australia. This will require, in turn, an investigation of competing visions, especially of the Australian Labor Party.

[28] See, eg, Crawford Macpherson, *The Rise and Fall of Economic Justice and Other Papers* (1985); Maurice Cranston, *What Are Human Rights?* (1973) 65–71. See generally David Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (1994).

[29] See generally John Rawls, *A Theory of Justice* (1971) 440.

[30] See, eg, Charles Taylor, 'Shared and Divergent Values' in Roger Watts and Douglas Brown (eds), *Options for a New Canada* (1991) 53; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995) 34–48.

[31] See generally Mark Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363; Mary Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991); Michael Sandel, *Liberalism and the Limits of Justice* (1982); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (1981) 64–7; Ronald Beiner, *What's the Matter with Liberalism* (1992) 80–97.

[32] See, eg, H L A Hart, *Essays in Jurisprudence and Philosophy* (1983), particularly his essays 'Positivism, Law, and Morals' at 49 and 'Utilitarianism and Natural Rights' at 181.

IV AUSTRALIAN CONSTITUTIONALISM

A *A Powerful Orthodoxy*

The founders' liberal vision, based on parliamentarianism, the common law and traditional or prescriptive rights continues to exercise a persistent and powerful influence on Australian constitutionalism. Menzies, Australia's longest serving Prime Minister and founder of the Liberal Party, subscribed to it in the series of lectures he delivered at the University of Virginia in 1967 after he retired from office. After comparing the extensive provisions concerning citizens' rights in the American Constitution with the few in the Australian, he states:

> I must say, and I speak only for myself, that I am glad that the draftsmen of the Australian Constitution, though they gave close and learned study to the American Constitution and its amendments made little or no attempt to define individual liberties. They knew that, with legal definition, words can become more important than ideas. They knew that to define human rights is either to limit them — for in the long run words must be given some meaning — or to express them so broadly that the discipline which is inherent in all government and ordered society becomes impossible.[33]

In accounting for the Australian alternative he quotes at length Sir Owen Dixon's well known speech delivered to the American Bar Association in 1942. In essence, Dixon argues that in turning to the American model Australians were not prepared to abandon the principle of responsible government:

> Deeply as they respected your institutions, they found themselves unable to accept the principle by which the executive government is made independent of the legislature. Responsible government, that is, the system by which the executive is responsible to the legislature, was therefore introduced with all its necessary consequences.[34]

Furthermore, the 'framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power.' The reason for this is, as Dixon elaborates:

> that in Australia one view held was that these checks on legislative action were undemocratic, because to adopt them argued a want of confidence in the will of the people. Why, asked the Australian democrats, should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people sitting either in the federal Parliament or in the State Parliaments all legislative power, substantially without fetter or restriction?[35]

Menzies summarises the argument in these terms:

[33] Sir Robert Menzies, *Central Power in the Australian Commonwealth* (1967) 52.
[34] Dixon, above n 11, 101. See also Menzies,above n 33, 52–3.
[35] Dixon, above n 11, 102. See also Menzies, above n 33, 53.

> In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of Common Law, we have not felt the need for formality and definition.[36]

The extent to which these views represented an all-party consensus in Australia can be seen in the deliberations of the 1959 Parliamentary Joint Committee on Constitutional Review.[37] The Committee's agenda and the extent and nature of its recommendations indicate that its primary concern was Commonwealth and State relations, in particular the relationship between the Senate and the House of Representatives. The predominance and importance of federalism as a matter for constitutional concern highlights the comparative silence regarding the protection of civil liberties. According to Richardson, who was the legal secretary to the Committee, the Committee concentrated on the institutions of Parliament rather than civil liberties.[38] In particular, the discussions concerning the legislative powers of Parliament concentrated on the need for greater industrial and economic power as well as greater concurrent powers.[39] Why did the Committee (and by implication the major political parties) not regard the constitutional protection of individual rights and freedoms as sufficiently important to warrant extended discussion, let alone specific recommendations?

In fact, the Committee did address some of these issues in a section headed 'Desirability of a Constitutional Safeguard', where it recommended an amendment to the Constitution to ensure that each electoral division had near uniformity in the number of enrolled voters.[40] The Committee observed that the 'Common-

[36] Menzies, above n 33, 54. The reasoning is as follows: '[s]hould 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, as it normally would, leads to a new General Election, the people will express their judgment at the polling booths': Menzies, above n 33, 54.

[37] See generally Galligan, above n 2, 350–2; The Parliamentary Joint Committee on Constitutional Review was established in 1956 by the Menzies government with the power to review the working of the Constitution and make recommendations for amendment. It was a joint, all-party committee with a very strong membership from both the Conservatives and Labor. According to Richardson, 'Labor, as the official Opposition, fielded its strongest team consisting of Senators Kennelly and McKenna and Messrs Calwell, Pollard, Ward and Whitlam — a formidable debating force': J Richardson, 'The Parliamentary Joint Committee on Constitutional Review' (1986) 13 *Canberra Bulletin of Public Administration* 154, 154. The Government representatives included the Attorney-General Senator Spicer, the Liberal Senators Wright, Downer and Joske and from the Country Party, Drummond and Hamilton.

[38] Richardson, above n 37, 154. This meant an extensive review of the relative sizes of the two Houses, the terms of Senators as well as of the questions of electoral distribution and the means for resolving deadlocks between the two Houses.

[39] The Committee recommended express powers over navigation, shipping, aviation, corporations, scientific and industrial research, telecommunications, restrictive trade practices, marketing of primary products, industrial relations and the economy, confirming the increased national importance of these matters for Australia as a whole. The *Report from the Joint Committee on Constitutional Review* (1959) [399]–[1135] deals with these concurrent legislative powers. As Richardson observes, the Committee's recommendations 'were superseded by progressive judicial interpretation of the Constitution over the following 25 years': Richardson, above n 37, 154–5.

[40] The Committee stressed that it had 'been concerned to preserve or increase the flexibility of the Constitution wherever practicable' but for a number of reasons, including the adoption of compulsory voting and changes since Federation, this new 'safeguard' should be written into the Constitution: *Report on Constitutional Review*, above n 39, [317]–[330].

wealth Constitution does not provide many guarantees of individual rights' and that

> it remains true, in keeping with the British system of parliamentary government, inherited from the Parliament of Westminster, that there is no charter of individual rights or liberties in the Commonwealth Constitution so commonly found in the written constitution of other countries, including many of the new instruments of government which have come into existence since the end of World War II.[41]

According to the Committee, the major armed conflicts of this century have 'revolved around the liberties of the individual', and the 'Charter of the United Nations and the Universal Declaration of Human Rights are further signs of international interest in human rights'.[42] However, it was not prepared to recommend the incorporation in the Constitution of basic rights:

> The Committee concluded that the absence of constitutional guarantees in the Commonwealth Constitution had not prevented the rule of law from characterizing the Australian way of life. The Committee believes that as long as governments are democratically elected and there is full parliamentary responsibility to the electors, the protection of personal rights will in practice, be secure in Australia. The Committee has not chosen, therefore, to recommend the writing into the Constitution of a charter of individual liberties. Instead, the Committee considers it appropriate, at this stage of Federal history and having regard to recent and contemporary world events, to recommend a constitutional amendment to protect the position of the elector and the democratic process essential to proper functioning of the Federal Parliament.[43]

Here we find the dominant themes of the orthodox constitutionalism — an emphasis on democracy and therefore concern with democratic processes; faith in Parliament and responsible government; a reliance on the rule of law and, by implication, the common law and the judiciary. And not surprisingly, these are, in general, the arguments that have been relied upon to reject the entrenchment of a bill of rights.

The continuing presence of this orthodoxy can be seen in the consistent rejection of the various attempts that have been made to entrench rights in the Australian Constitution.[44] Perhaps the most remarkable instance is the rejection in the 1988 referendum of the modest attempt to alter the Constitution to impose limits on the States that already bind the Commonwealth.[45] The proposal suffered

[41] Ibid [325].

[42] Ibid [326].

[43] Ibid [328]. The Institute of Public Affairs (New South Wales) had urged the incorporation of such rights because in the future Australia would have 'a much more mixed population' and modern governments would be much more complex. The *Report on Constitutional Review* continues: '[t]hus, the Committee concluded that it should recommend the inclusion in the Constitution of provisions ensuring the regular review of the electoral division of each State and also accord near uniformity to the value accorded to the votes of the electors for each of the States': ibid [329].

[44] See generally Galligan, above n 2; Bailey, *Human Rights*, above n 1, 56–8.

[45] Under the Constitution, the Commonwealth is required to provide a jury where the trial is by indictment (s 80), pay just compensation for the acquisition of property (s 51(xxxi)), and ensure that it does not favour one religion over another by setting up a 'State' religion (s 116). The other

the worst defeat of any referendum proposal, winning less than 31 per cent support. Admittedly a number of factors contributed to the failure of the referendum.[46] Nevertheless, the rejection of even such a modest proposal indicates the extent to which the dominant constitutionalism exercises a powerful influence in Australia.

B *Labor and Rights*

In noting the relative strength of the orthodox constitutionalism, especially in the context of the various attempts that have been made to entrench rights, it has become obvious that there are in fact competing visions of constitutionalism within Australia. In order to understand the character of these competing visions it is necessary to consider the role of the Australian Labor Party as an advocate of entrenched rights, and thus as a major challenger of the orthodox constitutionalism that continued to dominate the other parties.

The all-party consensus regarding the adequacy of Parliament and the rule of law for the protection of civil liberties began to change in the 1960s. And perhaps surprisingly, it was Labor that changed its platform so that by 1969 it supported the entrenchment of fundamental civil rights and liberties, the enactment of anti-discrimination provisions and the implementation of international covenants on human rights.[47] This change was prepared and supported by new reformist leaders such as Dunstan, Murphy and Whitlam, who looked to the 'fulfilment of every person' rather than to changes to economic structure, and who feared the increasing concentration of power, especially in bureaucracies.[48]

However, Labor's newfound concern with individual rights did not translate into a wholehearted support for entrenchment of a bill of rights. Galligan has noted that 'Labor's new commitment to individual liberties sat awkwardly with its traditional collective concerns and statist strategy.'[49] Indeed it is arguable that an enduring aspect of Labor's constitutionalism has been a commitment to parliamentary democracy and therefore a preference for the orthodox constitutionalism.

Labor has favoured the orthodox constitutionalism because the principles of parliamentarianism and responsible government were sufficiently flexible to coexist with and even accommodate its commitment to 'New Liberalism' as outlined by Herbert Evatt.[50] Evatt's early *Liberalism in Australia* indicates the broad contours of this position. Evatt argued that the old laissez-faire liberalism of Dicey and Spencer needed to be replaced with new theories that acknowledged

three referendum proposals taken to the people were four year maximum terms for both Houses of Parliament; fair and democratic elections throughout Australia; and the recognition of local government.

46 See generally Brian Galligan and J Nethercote (eds), *The Constitutional Commission and the 1988 Referendums* (1989) 105–46.

47 See generally Bailey, *Human Rights*, above n 1, 79–213.

48 See generally Galligan, above n 2, 354–5.

49 Ibid 356.

50 See generally Herbert Evatt, *Liberalism in Australia: A Historical Sketch of Australian Politics Down to the Year 1915* (1918) 72–7.

the need for real equality and hence 'multiplication of the collective functions of society'.[51] The New Liberalism favoured collectivism though it was not identical to socialism. It looked to *positive* freedom since individual rights against government were no longer warranted. On the contrary, equality of opportunity and freedom presupposed an extension of state functions. Thus it was not government but unbridled individual liberty that posed the greatest threat to freedom.[52] This view has been an important theme in Labor's constitutionalism and has influenced the perspective of subsequent leaders.

For example, Whitlam regarded his refashioning of the Party to be fundamentally consistent with Labor's commitment to 'positive equality'.[53] According to Whitlam, the substantial rewriting of the Labor platform in the 1967, 1969 and 1971 federal conferences gave rise to a new framework which could be seen in his 1972 policy speech.[54] However, what is remarkable is the extent to which civil liberties did not appear to be a major issue in that policy speech. Though there is a reference to the 'practical program to ensure our basic civil rights and freedoms', the actual measure suggested — the appointment of an Ombudsman — is not as far-reaching as the entrenchment of a bill of rights. In fact, Whitlam's concerns appeared to be no different from those agreed upon by the 1956 Convention — democratic equality, especially in terms of representation and voting.[55] This is confirmed by the referenda proposed by the Whitlam government, which dealt with processes and institutions of democracy such as electoral laws and the Senate rather than with a bill of rights.[56] Similarly, Keating, who had a 'big picture' approach to politics with his concern for indigenous rights and the

[51] Ibid 73.

[52] This can be seen most clearly in Evatt's attempt to entrench rights in the 1944 referendum. Thus the Bill to entrench the 'four freedoms' was accompanied by an unprecedented expansion in the powers of central government. The extent to which the increase in powers of the Commonwealth took priority over the freedoms can be discerned from the fact that the 1944 Bill did not have such guarantees, and that they were included at the insistence of Spender. See generally Herbert Evatt, *Post-War Reconstruction: A Case for Greater Commonwealth Powers* (1942); Geoffrey Sawer, *Australian Federal Politics and Law 1929–1949* (1963) 171–3.

[53] As an illustration of the shift in Labor's thinking regarding the Constitution, compare Whitlam's 'The Constitution Versus Labor' (1957) and his 'Socialism Within the Australian Constitution' (1961) with its emphasis on 'living with' the Constitution. These speeches can be found in E G Whitlam, *On Australia's Constitution* (1977) 15, 47. See also Gough Whitlam, *The Whitlam Government* (1985).

[54] E G Whitlam, 'Chifley Memorial Lecture, 1975' in Whitlam, *On Australia's Constitution*, above n 53, 195.

[55] For this reason he states that a Freedom of Information Act will be enacted by his government: E G Whitlam, '1972 Labor Party Policy Speech' in Whitlam, *On Australia's Constitution*, above n 53, 265, 298. He also raises major concerns about the plight of the Aborigines: Whitlam, *On Australia's Constitution*, above n 53, 299–300. Recall that Whitlam was one of the Labor members present at the 1956 Convention.

[56] The unsuccessful 1973 referendum sought to give the federal government control over prices and incomes. The four unsuccessful proposals in the 1974 referendum dealt with simultaneous elections for the Senate and the House of Representatives, equality of electoral divisions (one person, one vote), changes to the amendment procedure of the Constitution and the constitutional recognition of local government. See generally Richardson, above n 37, 156. Note also that Whitlam refers to human rights not in the context of domestic civil liberties but in terms of international affairs, viewing treaties and conventions as international instruments that are 'constructing a world framework of law, order and justice': Whitlam, *The Whitlam Government*, above n 53, 174.

republican cause, did not place a bill of rights on his reform agenda. One reason for this may have been his faith in Parliament:

> These Acts [the Racial Discrimination Act and Sex Discrimination Act] — and Acts and institutions like the Human Rights and Equal Opportunity Commission, the Native Title Act and, say, Medicare — in some ways constitute our Bill of Rights. It is a more pragmatic, less rhetorical, legislative approach. But, after twenty years, I am a bit inclined to think it works as well.[57]

This view, which relies on Parliament to secure positive freedom, needs to be contrasted with the perspective of Lionel Murphy and others who supported the notion of entrenched rights. Their commitment to entrenched rights paralleled an international trend towards the formal adoption of human rights. However, they were unsuccessful in their attempts to entrench a bill of rights. Murphy's 1973 *Human Rights Bill* attracted significant controversy and ultimately lapsed with the prorogation of Parliament in early 1974. Gareth Evans' 1984 *Bill of Rights Bill*, which was weaker than the Murphy Bill, was never introduced into Parliament due to the controversy it attracted when a draft form was circulated. Finally, Lionel Bowen introduced a Bill in 1985 which was even more limited than the Evans Bill. But it too caused controversy in its passage through Parliament and was eventually allowed to lapse in 1986.[58]

Even within this tradition, however, there was ambiguity as to the nature of the rights entrenched. It is possible to see this most clearly in the human rights jurisprudence of Murphy J on the High Court.[59] For example, though Murphy J referred to rights in Kantian terms, he also emphasised the primacy of Parliament and the requirement of democratic governance.[60] It is therefore arguable that for Murphy J and other supporters of entrenched rights there was no tension in these different notions of rights and liberal traditions. For them, human rights represented a confluence of rights as noted above, seen, however, as an unproblematic merging of the natural rights and human rights traditions with that of parliamentary or positive rights.

It would seem, therefore, that Labor's rights agenda was fundamentally ambiguous. On the one hand there was an enduring suspicion of entrenched rights as limitations on Parliament. On the other, where there was a preference for entrenchment, the rights were seen in their broadest signification as limits on government as well as entitlements assured by it.

[57] Paul Keating, speech delivered in Melbourne, 9 June 1995 on the occasion of the twentieth anniversary of the *Racial Discrimination Act*, in Mark Ryan (ed), *Advancing Australia: The Speeches of Paul Keating, Prime Minister* (1995) 272, 274.

[58] See generally Evans, above n 1; Bailey, *Human Rights*, above n 1, 52–6; Charlesworth, above n 2.

[59] See generally Jean Ely and Richard Ely, *Lionel Murphy: The Rule of Law* (1986); Jocelynne Scutt (ed), *Lionel Murphy: A Radical Judge* (1987); Jenny Hocking, *Lionel Murphy: A Political Biography* (1997) 245; John Williams, 'Revitalising the Republic: Lionel Murphy and the Protection of Individual Rights' (1997) 8 *Public Law Review* 27.

[60] Compare Murphy's comments in 'Responsibility of Judges' in Gareth Evans (ed), *Law, Politics and the Labor Movement* (1980) 2 with his decisions in *SGIC v Trigwell* (1979) 142 CLR 617, 649–52; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581–2.

This ambiguity can be seen most clearly in the nature of the human rights legislation enacted by the Labor Party. Almost all the measures enacted have been predominantly egalitarian, concentrating on equality of opportunity, and in doing so, indicating Labor's commitment to positive freedom.[61] Moreover, in the administration of these provisions the emphasis generally has been on conciliation rather than judicial intervention.[62] Consequently, it would seem that Labor has seen rights as economic and social 'goods' for individuals and groups, provided and distributed by governments that do not pose a threat to individual freedoms. To this extent, the orthodox notion of rights as entitlements has dominated, displacing the idea of innate or fundamental principles that should not, at least in theory, be negotiable, and hence require protection from governmental interference.

V CHANGING LIBERALISM

The notable lack of success of those who have advocated an entrenched bill of rights tends to mask the extent to which there has been significant transformation in the treatment of rights in Australia. The range and scope of human rights legislation that has been enacted, as noted above, indicates one important dimension of such changes. Other commentators, looking at the greater number of international human rights conventions and treaties entered into by Australia, have argued that Australia already has a bill of rights.[63] The other major area where change has taken place is the High Court, especially in terms of its contentious implied rights jurisprudence.[64] Therefore it is evident that the bill of rights debate in Australia has become more complicated, taking place in different contexts, and thereby articulating and emphasising a range of distinct concerns. These complexities do not take away, however, from the important underlying question of a transformation in the nature of liberalism and constitutionalism. Why then has there been so little discussion of what appears to be such an important dimension to the bill of rights debate?

One reason, clearly, has been the complexity of the theoretical positions. It is difficult in speaking of two major streams or traditions within liberalism to bring out the subtleties within each tradition. As we have seen, there are many different

61 See, eg, *Racial Discrimination Act* 1975 (Cth); *Sex Discrimination Act* 1984 (Cth); *Affirmative Action (Equal Employment Opportunity for Women) Act* 1986 (Cth); and especially *Human Rights and Equal Opportunity Commission Act* 1986 (Cth). Compare these with *Privacy Act* 1988 (Cth); *Human Rights (Sexual Conduct) Act* 1994 (Cth).

62 This approach was adopted because of its successes in the area of industrial conciliation and arbitration. This has caused difficulties in the enforcement of decisions: see, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

63 See generally Gibbs, above n 1, 13; Bailey, *Human Rights*, above n 1, 106–49; Peter Bailey, 'Righting the Constitution without a Bill of Rights' (1995) 23 *Federal Law Review* 1. See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 285–6 (Mason CJ and Deane J), 298–303 (Toohey J).

64 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96; *Levy v Victoria* (1997) 146 ALR 248. See also 'Symposium: Constitutional Rights in Australia?' (1994) 16 *Sydney Law Review* 145, 145–305.

strands within each tradition, extending and in some instances constraining the dominant view of rights and constitutionalism. As well, the problem has been exacerbated by a confluence and confusion in the traditions. As noted above, in the late twentieth century these streams have come to resemble each other to such an extent that it is possible to argue that in many respects the proliferation and expansion in the number and scope of rights may be accounted for in terms of a confluence of these traditions.

This is not to deny the fact that there are important philosophical differences within these traditions. In broad terms, each tradition has a different conception of the core liberal concepts of rights, citizenship, authority, legitimacy and progress, to name a few. For example, rights-based liberalism conceives of citizenship as an entitlement based on reason or humanity. As a result, it will tend to favour a more inclusive and therefore more expansive foundation for citizenship and sovereignty. In contrast, citizenship within the parliamentary tradition draws upon historical circumstances, which may include obligations to the Crown, evolving conceptions of nationality, as well as decisions of Parliament itself. Consequently, a shift from one tradition will have significant philosophical and political implications which may account for the apparently disparate arguments marshalled in the bill of rights debates. Indeed, to the extent that these political arguments represent the most immediate public expression of the fundamental changes in constitutionalism, it is not surprising that the more theoretical aspect of the debate has not received sufficient attention. Though it may not be possible in this context to explore adequately these philosophical differences, it is possible to examine the political dimension of the debate to gain an appreciation of the distance that separates them. What, then, are the political consequences of entrenching a bill of rights?

In answering this question it is helpful to turn to the Canadian experience with the *Charter of Rights and Freedoms* because in many significant respects Canadian constitutionalism is similar to Australia's. Canada entrenched the *Charter* in 1982. The process that led to the drafting and entrenchment has been much criticised, highlighting the legal and political difficulties in entrenching a bill of rights.[65] Since its entrenchment, the *Charter* has had a profound influence on Canadian politics. This is not accidental since the major supporter of the *Charter*, Pierre Trudeau, saw it as more than a civil liberties measure — it was also a means for nation-building and an important counter to the centrifugal forces that threatened Canadian unity.[66]

[65] See generally Edward McWhinney, 'The Canadian Charter of Rights and Freedoms: The Lessons of Comparative Jurisprudence' (1983) 61 *Canadian Bar Review* 55; Penney Kome, *The Taking of Twenty Eight: Women Challenge the Constitution* (1983); Robert Sheppard and Michael Valpy, *The National Deal: The Fight for a Canadian Constitution* (1982).

[66] See generally Pierre Trudeau, *Federalism and the French Canadians* (1968) 44–5, 55–6; Peter Russell, 'The Political Purposes of the Canadian Charter of Rights and Freedoms' (1983) 61 *Canadian Bar Review* 30; Rainer Knopff and F Morton, 'Nation-Building and the Canadian Charter of Rights and Freedoms' in Alan Cairns and Cynthia Williams (eds), *Constitutionalism, Citizenship and Society* (1985) 133, 144–50.

Entrenchment has supplemented the previously dominant federal structure with a new notion of citizenship, based on *Charter* rights and freedoms.[67] The most noticeable aspect of the transformation in citizenship has been the increasing dominance of 'rights' discourse and the notion of individuals as rights-bearing citizens. The prevalence of 'rights-talk' as the language for politics has been made possible by the greater authority of the courts as interpreters and adjudicators of the *Charter* and hence of the status and character of the rights entrenched in the Constitution. Thus the so-called 'judicialisation' of politics has raised a number of questions concerning the legitimacy of judicial review.[68] It has also made possible a new politics of interest groups that have been prepared to use the courts as a supplementary and perhaps more accessible forum for achieving political change.[69]

Therefore, in a number of significant ways, the *Charter* has altered the contours of politics — reformulating the nature of citizenship, shifting authority from Parliament to the courts, introducing a new forum for interest group politics, and perhaps most importantly, elevating political and social issues to matters of constitutional adjudication. Given the gravity and far-reaching nature of these changes, it is inevitable that they have come to dominate the debate regarding the merits of a bill of rights. In so doing they have tended to obscure the fundamental theoretical re-orientation that has given rise to them: a reformulation in the nature of liberalism where 'equal concern and respect' and the 'infinite dignity and worth of the human person' have come to influence political and legal debate.

VI CONCLUSION

It is remarkable the extent to which these observations regarding the Canadian experience with the *Charter* seem so familiar to us. They seem familiar precisely because they remind us of the bill of rights debate in Australia. On one level this reveals and confirms the international dimension of the debate. More importantly, it returns us to the starting point of our discussion, the Australian reluctance to entrench rights. However, we are now better placed to appreciate the limitations of a debate articulated solely in terms of the political and institutional consequences of entrenchment.

What I have argued in this paper is that, in so far as the bill of rights debate in Australia has been framed in terms of how best to secure civil liberties, it has paid insufficient attention to an important dimension: the theoretical concern with the transformation in the liberal foundations of rights and the changing nature of constitutionalism. What is needed, then, is a more profound dialogue that will encompass both theoretical and political dimensions of these changes. Such a

[67] See generally Alan Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (1992).

[68] See, eg, Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1989); Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (1993); Allan Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (1995).

[69] See generally Knopff and Morton, above n 66; Katherine Swinton and Carol Rogerson (eds), *Competing Constitutional Visions: The Meech Lake Accord* (1988).

discourse would have the merit of allowing a greater understanding of the problems, and hence clarifying the actual distance that separates the position of those who favour and oppose the entrenchment of a bill of rights. Though a search for common ground may not assure consensus, it will certainly further its possibility.