

Curbing Judicial Activism: the High Court, the People and a Bill of Rights*

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On 7 December, 1941, the Imperial Japanese Navy launched simultaneous attacks on American and British Empire forces in the Pacific. As a result, both Canada and the United States found themselves at war with Japan. Both countries contained large populations of naturalized and second-generation citizens of Japanese origin, living mostly along the Pacific coast and working largely as fishermen. Given the fear of coastal attacks, the White majority in both countries reacted with what one author has described as ‘near-identical racism to the perceived security threat posed by the Japanese minorities’.¹

As a result, in February 1942 these mostly patriotic Canadians and Americans were rounded up and shipped to internment camps in the interior. In their absence, their property, including fishing vessels, was in many cases seized without their consent.

Naturally, some of the internees sought legal remedies to the outrageous manner in which their rights had been violated. In Canada, which had no Bill of Rights at that time, their appeals were rejected by the courts, and the policy banning these citizens from returning to the West Coast remained in effect until 1949. In the United States, the cases eventually made their way to the Supreme Court, which ruled in 1944² that the wartime internment of American citizens without

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¹ John Thompson and Stephen Randall, *Canada and the United States: Ambivalent Allies*. Montreal/Kingston, McGill/Queen’s University Press, 1994, p. 173.

² *Korematsu v United States* (1944) 323 U.S. p. 214.

proof of anti-government activity or treasonable sentiment was a justifiable use of state power. This ruling has made some commentators conclude that in times of crisis, Bills of Rights cannot be relied upon to protect against the tyranny of the majority.

What is forgotten, in this criticism, is that the same court had also ruled, at a time when war was still raging and the Japanese Empire seemed to be years from defeat, that it was not permissible for the American government to place travel restrictions on Japanese-Americans of demonstrable loyalty, forbidding them to return to their homes on the Pacific coast. Similarly, perhaps in anticipation of unfavourable court rulings, the American authorities did not engage in compulsory sales of property. In Canada, seized property was sold for a fraction of its value without regard to the protests of the former owners, and to add insult to injury, deductions were made for sale costs and taxes. In a comparison of the treatment of the Japanese on either side of the border, historian Roger Daniels concludes that it was 'the American constitution, with its tradition of judicial review which was largely responsible' for the less uncivilized behaviour of the American authorities.³

I have related this story because I am a little concerned that the title of this talk will leave the impression that I am opposed to Bills of Rights in general, or at least to constitutionally entrenched Bills of Rights that include the power of full judicial review. In truth, the exact opposite is the case. It seems to me that even in as civilized a country as Australia, Canada, or the United States, there are a number of vital services that can be performed by a well-written, well-interpreted Bill of Rights. These are functions that cannot be performed by any other institution of which I am aware. Although there have been other, less spectacular occasions on which American citizens have been protected by their Bill of Rights against what have been called the 'momentary passions of the majority',⁴ the example of the Japanese internments alone is enough to convince me that all democratic states can benefit from having a Bill of Rights.

This being said, however, I freely confess that I am a great deal less optimistic about either the willingness or the ability of courts to always serve as absolutely neutral defenders of the law and of the public interest. If Australia adopts a Bill of Rights, whether constitutionally as in Canada and the U.S. or by means of legislation as in New Zealand, it will be placing enormous potential power in the hands of the judiciary. The manner in which the judges choose to exercise this power will be entirely their own decision; Parliament will have lost the power to rein in the High Court, should the justices choose to begin the process of striking down legislation. As Gil Remillard, a Canadian cabinet minister, warned shortly after the 1982 adoption of the *Canadian Charter of Rights and Freedoms*, 'The Charter will be whatever the Supreme Court chooses to make it, because only a constitutional amendment ... may alter a Supreme Court decision.'⁵

³ Roger Daniels, 'Japanese relocation and redress in North America: a comparative view', *Pacific Historian*, vol. XXVI, no. 1, 1982, pp. 2-13.

⁴ I have borrowed this phrase from Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Toronto, Wall and Thompson, 1989, p. 48.

⁵ Gil Remillard, 'Supreme Court of Canada', *The Canadian Encyclopedia*, Edmonton, Hurtig, 1988, p. 2098. Remillard later served as Quebec's minister of justice and of intergovernmental affairs.

This would not be problematic, if:

- (a) judges could be counted upon to always enact decisions that are entirely impartial and entirely free of arbitrary content; and
- (b) impartial judgments always promoted justice, equity and other socially important goals.

Sadly, neither of these two propositions is valid.

For this reason it would be appropriate for Australians to consider writing certain safeguards directly into the text of any Bill of Rights that the country may choose to adopt. In the course of this talk, I hope to outline some of the dangers that can result from unchecked judicial supremacy, and also to suggest some potential solutions to these dangers.

Intelligent observers have long recognized the concerns that I will be raising today. Ninety-one years ago, U.S. Chief Justice Charles Evans Hughes warned, ‘We are under a Constitution, but the Constitution is what the judges say it is.’⁶ Hughes’ contemporary, the humorist Ambrose Bierce, defined the term ‘Lawful’ in the following words in his *Devil’s Dictionary*: ‘Lawful (adj.): Compatible with the will of the judge having jurisdiction’.

What Hughes and Bierce were really doing was to state, in the form of aphorisms, the law of constitutional design that the great British jurist Albert Venn Dicey had earlier noted in his book, *The Law of the Constitution*: it is not possible to administer a constitution unless you are standing outside the control of that constitution, and whenever an administrator, enforcer or adjudicator is given power over a constitution, the individual or body so empowered ceases to be under the control of that constitution. There is no way to avoid this problem; it is *the* fundamental paradox of constitutional design.

But while you cannot avoid placing some actor or another outside the bounds of the Constitution, it is important to realize that there is a choice as to which actor should be made into the final, extra-constitutional authority. In Britain it is Parliament that holds this position. In the United States, it is the Supreme Court. In Switzerland, it is the people themselves, acting by means of nationwide referendums.

Adopting an Australian Bill of Rights slavishly constructed on the American precedent would cause a simple transfer of extra-constitutional authority from Parliament to the High Court, full stop. So it is important to recognize that this is not the only available alternative to the status quo. When Canada adopted its Charter of Rights sixteen years ago, our leaders attempted to make only a partial shift from parliamentary supremacy to judicial supremacy. I see no reason why Australians could not do the same thing—and do it a good deal more successfully than we have done in Canada. As well, I see no reason why an element of Swiss-style popular sovereignty could not also be applied.

⁶ Speech at Elmira, New York. May 3, 1907.

Before turning to such matters, however, I'd like to review some of the dysfunctions that can result from adopting a Bill of Rights on the American or Canadian model. This will give a good idea of what Australians may wish to protect against when and if they decide to adopt a Bill of Rights.

The first problem arises when the courts are presented with requests to render decisions on the basis of sections of a Bill of Rights that are poorly drafted or unclear. In the *Canadian Charter of Rights and Freedoms*, for example, there are some very precisely defined rights, such as the right not to be punished for any act that was not illegal at the time at which that act was performed, regardless of its illegality at some later date. These very precise sections of the Charter tend to correspond to subjects on which there was broad consensus among the elites that drafted and ratified the Charter in 1981. But there are other provisions which are extremely vague. A large enough proportion of the rights protected under the Charter are loosely worded to prompt one observer to make the observation that 'The Charter is mostly a collection of vague incantations of lofty but entirely abstract ideals, incapable of either restraining or guiding the judges in their application to everyday life.'⁷ But vague or not, all parts of the Charter are equally authoritative, and any part of it can be invoked with equal force to strike down laws that cannot thereafter be re-enacted without a formal constitutional amendment.

Worse yet, the truth of the matter is that the areas where the Canadian Charter and the American Bill of Rights are most likely to be vague are the areas in which there was no consensus among the authors of these texts. This is perhaps less relevant in the case of the American Bill of Rights, as two hundred years have gone by since it was drafted, and broadly held social mores on everything from slavery to homosexuality have shifted since that date. But most of the authors of the *Canadian Charter of Rights and Freedoms* are still alive, and the issues on which they could not agree, and therefore either glossed over or included in the Charter in unclear language, are still issues on which Canadian society is deeply divided. To ask a court to make an authoritative and absolutely final decision on the basis of supreme but unclear laws on precisely the matters where society is most deeply divided, is simply unfair to the judges. It's unfair to the rest of us too.

The classic Canadian example of this kind of deeply divisive constitutional provision is an amendment to the Constitution that was presented to Parliament in 1987 and then in modified form to the voters in a referendum in 1992, that would have contained (*inter alia*) the following words: 'The Constitution of Canada shall be interpreted in a manner consistent with ... the recognition that Quebec constitutes within Canada a distinct society.' Five years of heated public debate did not produce a consensus as to the meaning of this provision, which means that, as one observer put it, in entrenching this new amendment, we would simply have decided as a people to 'pass the buck to the Supreme Court'.⁸

⁷ Mandel, *op. cit.*, p. 39.

⁸ David Thomas, 'Turning a blind eye: constitutional abeyances and the Canadian experience', *International Journal of Canadian Studies*, no. 78, Spring-Fall 1993, p. 76.

Sometimes the rules contained in the Bill of Rights are reasonably clear, and judges are able to interpret them without acting in a manner that seems unreasonably arbitrary. But this does not mean that any decision that they make will necessarily be in the public interest. When a legislature enacts a law, it does so on the basis of utilitarian considerations. Will this measure benefit society as a whole, even if a few citizens may be rendered worse-off? If so, the measure goes ahead. For parliaments, the ends justify the means.

It is precisely because parliaments act in this manner—sometimes creating injustices for groups like the Japanese-Canadians as they act to protect the broader public interest—that we have a court system with an anti-utilitarian mandate. For a court armed with a Bill of Rights, it is the means that are always under scrutiny. Not only do the ends not justify the means, but if the means are found to violate the rules laid down in the Bill of Rights, then they must be rendered invalid, regardless of the consequences. As Justice Sopinka wrote in a 1990 decision of the Canadian Supreme Court that had the effect of setting free a known murderer: ‘Any price to society occasioned by the loss of such a conviction is fully justified in a free and democratic society which is governed by the rule of law.’⁹ So for the courts, it is no exaggeration to say that the means justify the ends.

There are other ways of repeating this point. If you like, you could say that legislatures are Benthamite, while courts must be Kantian. Or you could say, as Ronald Dworkin does in his book, *Law’s Empire*, that legislatures may take into account considerations of policy, but courts must look exclusively at considerations of principle.

Whichever way the matter is put, it does not take much imagination to see how things can start to go wrong in society when the institution that is vested with supreme power starts to make decisions based solely on the consideration of means, and is prohibited from looking at the end results of its actions. Sometimes the judges themselves are startled by the negative outcome of their decisions. In 1990, the Supreme Court of Canada ruled that the right to a trial without

unreasonable delay had been violated in the case of a man held for 23 months on assault charges without trial. The justices added that they thought a wait of six to eight months seemed a great deal more reasonable. Within a year, as a result of this decision, 43,640 charges were stayed in the Province of Ontario alone, including 817 charges of assault with a weapon or assault causing bodily harm, and 290 charges of sexual assault.¹⁰

⁹ *Feeney v the Queen* (1990) 2 S.C.R. 1199. My italics. The case involved a certain Mr. Feeney, who returned to his home after having killed another man. Guided by a neighbour, police entered Mr. Feeney’s premises without a warrant. As an editorial note, I should observe that I do not agree with Justice Sopinka’s conclusion that the actions of the police in entering Mr. Feeney’s premises without a warrant represented the obtaining of evidence in a manner that ‘infringed or denied any rights or freedoms’ in such a manner as to ‘bring the administration of justice into disrepute’. Therefore, I am of the view that Mr. Feeney’s bloodstained clothes, which were obtained during the search, should have been permissible as evidence. However, Justice Sopinka’s reasoning that courts should consider only means, not ends, is absolutely correct.

¹⁰ Rainer Knopff and F.L. Morton, *Charter Politics*, Scarborough, Ontario, Nelson Canada, 1992, p. 218.

Afterwards, the Justice who had authored the decision on behalf of the Court indicated that he was ‘shocked’ by the practical results of the court’s decision.¹¹ But it is difficult to see what the Court could have done, aside from disregarding the express word of the Charter of Rights, that would have avoided this outcome. It certainly was not the Court’s fault that in drafting Section 11(b) of the Charter, Canada’s leaders had chosen to say, ‘Any person charged with an offence has the right to be tried within a reasonable time’, instead of ‘Any person charged with an offence has the right to be tried within one year’—or two years, or whatever other length of time seemed to them to be more reasonable than six to eight months.

The difficulty is compounded by the fact that Supreme Courts are regularly faced with situations in which judgments in cases that are highly atypical will be applied to an entire range of situations to which they bear a merely formal similarity. Christopher Manfredi of Montreal’s McGill University warns that this may lead to constitutionally-entrenched decisions ‘that prevent the worst case, but make things worse in most situations’.¹²

This problem is summed up in the well-known saying that ‘hard cases make bad law’. A case that exemplifies this problem made its way to the Supreme Court of Canada in 1993, when a woman named Sue Rodriguez, who was dying of Lou Gehrig’s disease, petitioned for the right to an assisted suicide, which is forbidden under the Criminal Code of Canada. She maintained that this provision was a violation of her rights under section 7 of the Charter of Rights. Ms Rodriguez was absolutely unlike a typical candidate for euthanasia, in that she had entirely lost control of her body but nonetheless was alert, in complete control of all her mental faculties, supported by a strong and loving family, and in possession of an iron sense of determination. In the event, the Court refused her plea, meaning that any law permitting assisted suicide will have to originate in Parliament. But a decision to overturn the relevant part of the Criminal Code based upon her case might have permitted the euthanizing of other persons whose personal situations were utterly different from that of Ms Rodriguez.

Sometimes judges who have been empowered by a Bill of Rights are aware that their decisions may have socially harmful consequences, and they are forced (or seduced, if you like) into taking ends as well as means into account—in other words, taking notice of policy considerations—when they make their decisions. There are several ways in which this can be done. The first way

is to exercise self-restraint. A court may refuse to use the Bill of Rights to strike down a certain type of law, thereby serving notice to the legislative branch that it will have to make the relevant decisions for itself. This is what both the Canadian and the U.S. Supreme Courts did when presented with the question of euthanasia. Judicial restraint of this sort is easiest to exercise in good conscience when the judges are reasonably certain that the authors of the Bill of Rights had simply not anticipated that the question would ever arise. It is a great deal more difficult to justify in a case where the drafters were simply negligent, as Canada’s legislators were when they decided to give citizens the right to a speedy trial.

¹¹ Rory Leishman, ‘Robed Dictators’, in *The Next City*, Fall 1998, p. 40.

¹² Christopher Manfredi, *Judicial Power and the Charter*, Toronto, McClelland and Stewart, 1993, p. 176.

A second solution is for courts to weigh each law that appears to be in violation of the Bill of Rights and to decide if the social purpose being served by that law is sufficiently important to justify the violation that is taking place. If the answer is yes, then the law is permitted to stand. Laws that are challenged before the courts can also be reviewed to determine whether they achieve their socially useful goals in the least intrusive manner possible. If the answer is yes, then they are allowed to stand. If not, then they are struck down.

This method of applying utilitarian considerations in court decisions is explicitly recognized as valid under Section 1 of the *Canadian Charter of Rights and Freedoms*, which contains a derogation clause stating that all rights under the Charter are subject to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. It is interesting to note, however, that the very same solution has been invented, without a shred of constitutional authority, by the supreme courts of a number of other countries where the constitution contains a Bill of Rights, including the United States, India, Japan and Germany.¹³

In fact, the practice of using these Benthamite tests in the nominally Kantian courts is so widespread that one Canadian commentator, David Beatty of the University of Toronto, has gone so far as to argue that all courts under all Bills of Rights in all countries will in the end largely disregard the specific provisions of their country’s Bill of Rights and instead simply apply a personal test as to whether in this case or that case societal considerations justify a violation of constitutionally-entrenched rights, or are proportionate in importance to the right that is being violated. What is more, the judges can be expected to engage in this exercise of weighing ends against means with their ‘thumb on the scales’.¹⁴

Beatty does not think that this is an enormous tragedy, since judicial notions as to the definition of the terms ‘justice’ and ‘proportionality’ are probably not so very far removed from the definitions that the average citizen would hold. And Beatty is right. It is not the end of the world. Countries with courts that act in this manner remain civilized, democratic states. But this can hardly be described as the best of all possible worlds, since the basic non-utilitarian function of a Bill of Rights is largely eviscerated. Whenever courts act this way, in practice they are not sitting as judges at all, but rather as a kind of appointed third house of Parliament, a chamber of ‘sober second thought (or third thought), to which laws are submitted on a more or less *ad hoc* basis for potential approval or veto.

This criticism leads us, at last, to the matter of judicial activism. Once judges have been assigned a rule, as in Canada’s Charter, that instructs them to take utilitarian considerations into account, or have invented a doctrine that allows them to do so, as in the United States, the courts can choose ‘to be as deferential to lawmakers and their agents as they think appropriate in each case’.¹⁵ The problem is simply that each of us must, in making utilitarian considerations, apply our own beliefs and standards—our own ideologies—to each case that we consider. It becomes,

¹³ David Beatty, *Constitutional Law in Theory and Practice*, Toronto, University of Toronto Press, 1995, Chapter 4.

¹⁴ *ibid.*, p. 124.

¹⁵ *ibid.*, p. 146.

quite literally, impossible for a judge not to make decisions based on his or her own status as a libertarian or a social democrat, a social conservative or a feminist, a Christian or an agnostic. And once you have crossed the Rubicon (even if you were pushed across), there is no turning back.

But some judges seem to make the crossing with a great deal more enthusiasm than others, and actively set about trying to achieve policy goals. This is what is known as ‘judicial activism’.

One step that must be taken by a judge who seeks to actively promote an ideological agenda is to adopt some version of what American scholars refer to as the doctrine of ‘non-interpretivism’¹⁶ An ‘interpretivist’ or ‘originalist’ reading of a Bill of Rights attempts to seek out the original intentions of its authors and ratifiers. A non-interpretivist approach holds that judges must apply considerations such as contemporary social or economic conditions, or the general spirit of the entire Bill of Rights, to their reading of the individual rights contained therein. Sometimes it is argued by non-interpretivists that it is impossible to determine what the authors of the Bill of Rights meant, and that in view of the fact that it would be wrong to assume that the authors meant nothing at all, it is therefore the obligation of the judges to ‘breathe life’ into the rights by applying their own interpretations.¹⁷

Only three years after the *Canadian Charter of Rights and Freedoms* had gone into effect, the future Chief Justice, Antonio Lamer, was justifying his own non-interpretivism by stating that he could not determine what the authors of the Charter had intended:

[T]he simple fact remains that the *Charter* is not the product of a few individual public servants ... but of a multiplicity of individuals who played major roles in the negotiating, drafting, and adoption of the *Charter*. How can one say with confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants [whose words are on the official record] can be determinative.¹⁸

In Canadian and American debates, the tendency is for persons on the political right to be interpretivists and opponents of judicial activism, and for persons on the political left to be non-interpretivists and supporters of judicial activism. These positions seem to have been adopted

¹⁶ There is an exception to this rule, applicable only in the United States. As will be noted below, in the United States the large body of existing case law, based on non-interpretivist doctrines, mean that a strict originalism would actually represent a form of activism.

¹⁷ The reference is to Justice Dickson’s comment, in *Mahe v. Alberta* (1990) 1 S.C.R. 342, that the courts must ‘breathe life’ into section 23 of the *Canadian Charter of Rights and Freedoms*, possibly by applying ‘novel solutions’ to the problem of minority-language education, which is guaranteed under this section.

¹⁸ *Reference re British Columbia Motor Vehicle Act.* (1985) 2 S.C.R. 501.

based primarily on the fact that the activist Warren court of the 1950s–1970s had a generally leftist orientation.¹⁹

But it is a serious mistake to conclude that judicial activism will always push the political agenda to the left. During its previous period of activism, which lasted from the 1870s to the 1930s, the U.S. Supreme Court used the Bill of Rights to repeatedly strike down redistributionist legislation. One prominent Supreme Court justice of this period was so loose in his *laissez-faire* interpretations of the Constitution that a commentator has since written, ‘The fact that Stephen Field had been born too late to participate in the Constitutional Convention was an accident of history that he was happy to correct.’²⁰ And more recently, the court in the 1990s has become fairly consistently libertarian. Once public opinion latches onto the ideological shift in the court, I anticipate a complete rotation of personnel among supporters and critics of judicial activism.

A more useful point to be made in respect of judicial activism is pointed out by Gabriel Moens, a professor of law at the University of Queensland, who warns that ‘this judicial philosophy largely destroys the very reason as to why an entrenched Bill of Rights is adopted by its proponents, namely to protect people against arbitrariness and uncertainty.’²¹ Once the courts have made the decision to engage in activism, protection from arbitrary legislative measures will occur only in circumstances where the courts and the lawmakers have a philosophical disagreement, and for that reason, to some extent the rule of law will be compromised.

I turn now to solutions to the problems described above. I hope that it is clear from what I have said that problems start to arise only when courts are either unable, or unwilling, to exclude utilitarian considerations from their judgments, or when a provision of the Bill of Rights is vaguely drafted that the exclusion of utilitarian considerations becomes an unnecessarily great burden upon society. Therefore it is *your* job, should you ever find yourselves in the position of drafting a Bill of Rights, to ensure that included within its text are provisions that will allow judges to do their job without (perverse as this sounds when stated baldly) being forced to take the public interest into account. And as well, to include measures that will remind any willfully activist members of the court that they are paid to be judges, not legislators.

As samples of this kind of limiting clause, I have included an appendix which contains possible wordings for a set of derogations which could be attached to either a legislated or a constitutionally-entrenched Bill of Rights. In engaging in this little self-indulgence I am painfully aware that I might be accused of engaging in a little judicial activism of my own, but in my own defence I would like to observe that my contribution seems modest compared to Frank Brennan’s new book, *Legislating Liberty*, which contains the complete text of an entire Australian Bill of

¹⁹ Earl Warren was Chief Justice from 1953 to 1969, so strictly speaking the ‘Warren court’ does not extend into the 1970s. However the era of activism continued for a few more years, most notably in the case of *Roe v. Wade* (1973) 410 U.S. p. 113.

²⁰ David Friedman, review of *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (by Paul Kens), *Liberty*, vol. XII, no. 1, September 1998, p. 54.

²¹ Gabriel Moens, ‘The Wrongs of a Constitutionally-Entrenched Bill of Rights’, in M.A. Stephenson and Clive Turner, *Australia: Republic or Monarchy?* St. Lucia, Queensland: University of Queensland Press, 1994, p. 234.

Rights, and Malcolm Turnbull's *The Reluctant Republic*, which contains the full text of an entirely rewritten Commonwealth constitution.

The first measure that I would suggest is an interpretive clause stating that this Bill of Rights is to be interpreted in a manner consistent with the original intentions of its framers and ratifiers. Interpretive clauses are certainly not a new innovation. Sections 26 and 27 of the *Canadian Charter of Rights and Freedoms* give specific instructions on how the Charter is to be interpreted. Similarly, the Ninth Amendment of the American Bill of Rights advises future courts that 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

In making the suggestion that an Australian Bill of Rights should contain a clause mandating an originalist interpretation, I am not siding with those who argue that the same rule should be applied by American judges in interpreting the U.S. Bill of Rights. The fundamental difference between taking this position in Australia and taking it in the U.S. is this: in America, two centuries of interpretation have led to a large body of case law that causes the Bill of Rights to function in a very different manner than James Madison probably had in mind when he wrote it in 1789. So it is impossible to return to an original interpretation without engaging in a judicial revolution in which decades of prior decisions are cast aside.²² But under a newly-minted Australian Bill of Rights, the courts would not yet have had the opportunity to wander away from

²² A recent article gives a good sense of the revolutionary implications of an originalist interpretation of the U.S. Constitution by contrasting the conservative originalism of Justice Thomas with the precedent-based conservatism of Justice Scalia. See Dylan Carp, 'Out of Scalia's shadow', *Liberty*, vol. XII, no. 1, September 1998, pp. 27-29, 50.

the original intentions of the framers and ratifiers. So a clause mandating an originalist interpretation would *prevent* the possibility of a judicial revolution.²³

This is not to say that this proposal would not have consequences which might endear it to one ideological strand within Australian society and alienate another. In enacting such an interpretive clause, the Bill of Rights would effectively prevent the achievement of the agenda described as follows by Sir Harry Gibbs:

Many of the advocates of a Bill of Rights do not merely wish to protect rights already recognized by the law; they often seek, quite openly, to create rights which the law has hitherto denied and hope to achieve that result by securing a favourable interpretation of vague, general phrases which are not specifically directed to the matter which concerns them. In other words, they hope to achieve social change by judicial rather than legislative action.²⁴

A Bill of Rights containing a clause like the one I have described above would inevitably be interpreted as protecting only such rights as are currently the subject of society-wide consensus, such as freedom of religion, the right to a jury trial, and protection from *post facto* laws. Other more controversial rights would have to be added by formal amendment at a later date, just as citizenship rights for Black Americans had to wait until the 14th Amendment was added to the Constitution in 1868.

This may seem discouraging to some, but I encourage you to remember that when drafting a Bill of Rights, we are all sheltered by a version of what John Rawls once called ‘the veil of ignorance’ from knowing how the words we craft today will be interpreted by future High Courts populated by Justices who are today in their mothers’ wombs dealing with legal issues that have not yet been imagined on the basis of ideologies that have not yet been put to paper. The one thing we do know, from reviewing U.S. Supreme Court judgments like *Dred Scott v. Sandford*, which used the Bill of Rights to rule that slavery could not be banned from federal territories, or *Plessy v. Ferguson*, which ruled that segregated education was permissible, is that courts cannot be relied upon to be systematically more enlightened than legislators.

²³ Canada represents a midway case in terms of the impact that an interpretivist reading would have. In practice, interpretivism has not had much of a following in Canada, based largely on the traditional English rule that legislative history is not admissible as an aid to the interpretation of statutes. See Peter Hogg, *Constitutional Law of Canada*, third edition (supplemented), Toronto, Carswell, 1992 and dates of supplements, sections 57.1(c)–57.1(e). However, the logic of the rule as applied to statute law is that it improves the fixity of the law, even if at the price of a certain narrowness of judicial interpretation. (See Dicey, *The Law of the Constitution*, Indianapolis, Liberty Fund, 1982 (1914), p. 269.) When applied to Bills of Rights, the rule seems to have the opposite effect. This is due to the fact that in interpreting statute law, the practice of ignoring the legislative history prevents the law from being interpreted in an expansive manner reflecting the desire of some legislators to create a broader law than was finally implemented. In the case of Bills of Rights, the legislative history will tend to produce evidence that the framers of the Bill were divided as to its meaning or assigned only limited power to a clause that is assigned great importance after the fact of the Bill’s entrenchment.

²⁴ Harry Gibbs, ‘A Constitutional Bill of Rights?’ in K. Baker (ed.), *An Australian Bill of Rights: Pro and Contra*, Melbourne, Institute of Public Affairs, 1986, p. 40.

If we fail to take this lesson into account, then it seems to me that we run the risk warned of by Canadian commentator David Frum in the early 1990s, when he said that courts were starting to ‘read the Charter of Rights as if it contained one fun-filled clause: ‘Be creative!’²⁵

A second precautionary measure that I would suggest incorporating into a Bill of Rights would be a requirement that any court decision that has the consequence of disallowing a statute or a pre-existing common-law rule be concurred in by at least two-thirds of the justices hearing the case. Remember Gil Remillard’s observation from the beginning of this talk: any decision that strikes down a law cannot be overturned except by a constitutional amendment. Such amendments can only be enacted by extraordinary means, including a referendum victory in two-thirds of the states. These rules are designed to ensure that a consensus exists across Australian society before Parliament and the people are permitted to change Australia’s most fundamental law. It is difficult to see why a bare majority High Court justices should be granted the same power.

William Brennan, who served on the nine-member U.S. Supreme Court for thirty-four years, once observed that ‘with five votes, you can do anything around here’. Australia’s High Court has seven members, so under the rule that I am proposing here, it would take five votes to overturn a law, assuming that the full bench was sitting. This may seem like a small matter, but it is important to remember that the issues that divide society are also the issues that divide the courts, and these are precisely the issues where it is least advisable to run amok amending the constitution.

This can be illustrated by reference to an interesting calculation performed by Canadian political scientist F.L. Morton, who noted in 1993 that the Supreme Court of Canada was bringing down unanimous decisions in over 80% of cases not related to the Charter of Rights, but only in about 64% of cases relating to the Charter.²⁶ And all too often, the most controversial cases are decided by single-vote majorities. Just to cite two examples, the 1978 case in which the U.S. Supreme Court determined that affirmative action was not a violation of the Constitution was decided by a one-vote majority. The Supreme Court of Canada decision rejecting Sue Rodriguez’ plea to overturn the anti-euthanasia parts of the Criminal Code was also decided by a single vote. These issues seem too momentous to be decided by such narrow margins.

The third recommendation that I would make relates to the remedies that the courts may select, once they have determined that the rights of an Australian have been violated. In the United States, the remedies were never spelled out in the Constitution, with the result that the courts have had to innovate. That is why Americans assign such importance to the 1803 decision of the Supreme Court in *Marbury v. Madison*. In this decision, the Court simply asserted a right to nullify the offending law in its entirety.

The authors of the *Canadian Charter of Rights and Freedoms* were aware of this shortcoming in the U.S. Constitution, so they included a provision that stated, ‘Anyone whose rights or

²⁵ *Financial Post* (Toronto), 31 October 1992, p. 53.

²⁶ F.L. Morton, ‘The politics of rights’, *Literary Review of Canada*, May 1993, p. 14.

freedoms, as guaranteed by this Charter of Rights, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers justified in the circumstances.’

The intention of this clause was noble, but its effect has been to greatly—and in my view dangerously—enhance the powers of the courts at the expense of all other sectors of society. Over the past decade and a half, the Supreme Court has developed an array of six remedies which may be applied, depending upon the situation.²⁷ Four of these remedies seem to me to be practical. Briefly, these remedies are:

- nullifying a statute in its entirety;
- nullifying only the offending portion of the statute;
- nullifying a statute after a period of delay specified by the court to permit Parliament to enact a replacement law that does not offend the Charter;²⁸ and
- reading a statute narrowly, where a narrow reading makes it compatible with the Charter but a broad reading would render it repugnant to the Charter.

The Court has also developed two additional remedies that seem clearly to move it out of the judging business and into the legislating business. The first of these is the creation of what the Court calls ‘constitutional exemptions’. This rule was applied in a series of cases regarding laws that require shops to close on Sundays.²⁹ These laws were judged to be an unconstitutional restriction on freedom of religion, because they forced members of other religious groups to honour the Christian Sabbath. But the Court indicated that if the law were to be revised to permit an exemption to non-Christians (that is, to make the law applicable to Christians but not to Jews, Muslims and so on), it would be valid. This is a novel doctrine that seems to me to lead dangerously in the direction of different rights for different classes of citizens, on the model of the Ottoman Empire’s ‘millet’ system.

²⁷ These remedies are discussed in detail in Hogg, *op. cit.*, section 37.1.

²⁸ This remedy strikes me as being particularly useful, in that it allows the courts to impose solutions that *would* impose considerable hardships upon society, if good laws were to be struck down immediately due to a breach of a right that is protected in the Constitution. By imposing a temporary period of validity, the court is able to impose an uncompromisingly Kantian solution, while turning the business of the general well-being over to the legislative branch, where it belongs. The only utilitarian consideration that is made by the court therefore is one that is of temporary duration. The classic Canadian example of the use of this remedy is in reference to a right that is protected in the general text of the Constitution of Canada rather than in the *Canadian Charter of Rights and Freedoms*. In *Re Manitoba Language Rights* (1985) 1 S.C.R. 721, the Supreme Court ruled that the provincial government of Manitoba had for nearly a century been in violation of its constitutional obligation to enact all laws in both English and French. The only remedy available to the court would have been to invalidate the entire provincial statute book, which would have produced anarchy. Moreover, it would not have been possible to produce well-drafted French-language versions of all Manitoba laws rapidly, so the legal vacuum would have been a period of long duration. The court’s solution was to give the laws a temporary validity, after which they would cease to be of force and effect if not yet translated.

²⁹ The remedy is discussed, although not always applied, in *R. v. Big M Drug Mart* (1985) 1 S.C.R. 295, 315; *R. v. Edwards Books* (1986) 2 S.C.R. 713, 783; and in *R. v. Westfair Foods* (1989) 65 D.L.R. (4th) 56 (Saskatchewan C.A.).

The second remedy is known as ‘reading in’. When a law is found by a court to be inconsistent with the Charter, the court may now exercise the option of adding such words to the statute as would make it consistent with the Charter, and hence valid once more. For example, in a 1995 case,³⁰ the Supreme Court ruled that a provision of one province’s auto insurance laws were invalid because they made accident benefits payable to the ‘spouse’ of the victim, and this excluded common-law spouses, thus discriminating unconstitutionally on the basis of marital status. Rather than strike down the law or declaring it temporarily valid pending the passage of remedial legislation, the Court simply ‘read in’ words that made the law include common-law spouses as beneficiaries.

This particular remedy is utterly unnecessary, since there is no wrong that it cures that is not equally curable under one or more of the other remedies established by the Court. But it does deprive Parliament and the provincial legislatures of the chance to review and reconsider the relevant legislation.

The proposal that I make here is simply to include in a Bill of Rights a clause giving an exhaustive list of the remedies that the courts may apply in dealing with violations of individual rights. This exhaustive list would simply exclude those remedies that seem inappropriate to the authors of the Bill of Rights.

The fourth and final recommendation that I will make today is the one that I regard as most important of all. I suggest that, as a part of the process of judicial review, any Bill of Rights ought to include a provision mandating popular review of those decisions of the High Court that nullify statutes. A draft constitutional amendment that is approved in Parliament must be submitted for the approval of the voters, so it is difficult to see why a *de facto* amendment drafted by the High Court should be exempt from a similar review.

I can think of two concerns that would naturally occur to someone hearing of this suggestion for the first time. The first of these is that an enormous number of overturned laws would find their way before the voters, and there would be an unending series of referenda. In practice, this seems highly unlikely. In 1996 I calculated that the Supreme Court of Canada was striking down laws at the rate of 7.9 federal and provincial statutes combined, per year (this is in a country with ten provinces).³¹ The Canadian Supreme Court is generally regarded as being pretty activist. In the United States, the Supreme Court nullified federal statutes in only two decisions between the Revolution and the Civil War.³²

³⁰ *Miron v. Trudel* (1995) 2 S.C.R. 418.

³¹ Scott Reid, ‘Penumbra for the people: placing judicial supremacy under popular control’, in Anthony Peacock (ed.), *Rethinking the Constitution*, Toronto, Oxford University Press, 1996, p. 204.

³² *Marbury v. Madison* (1803), and *Dred Scott v. Sandford* (1857).

The second reason for concern might be that this seems to be a radical new idea which has never been tested anywhere else, and that it's never a good idea to volunteer to be the test case for any new-fangled idea, particularly when tyranny of the majority seems to be a conceivable outcome.

This is a reasonable concern, so for this reason I draw your attention to the fact that Switzerland's constitution permits citizens to overrule any decision at all of any of the other branches of government. For over one hundred years, Swiss citizens have enjoyed not only the right to strike down laws that they find unsatisfactory, but to initiate any new law that seems to them to be needed. Although this right does not apply expressly to overriding judicial decisions, it is clear that the unrestricted right to initiate new laws necessarily involves the right to initiate laws that override any decision of the courts. The constitutions of all but one of the Swiss cantons³³ contain similar provisions, and two cantonal constitutions have for decades contained provisions that specifically allow for referenda to deal with the clearly judicial function of interpreting statute law in cases of ambiguity.³⁴

What I am proposing here is a great deal less dramatic than this. It would be a version of a provision entrenched in section 33 of the *Canadian Charter of Rights and Freedoms*. This provision states, 'Parliament or the legislature of a province may expressly declare in an Act ... that the Act or a provision thereof shall operate notwithstanding a provision included in ... this Charter.'

The legislatures of Quebec and Saskatchewan have enacted laws that make pre-emptive use of this provision in order to avoid the possibility of judicial review, which is to my mind a practice that should not be permitted. But the exercise of such an override after the fact of a court decision, re-enacting a law that the court has nullified, indicates that the court has misjudged its interpretation of its constitutional obligation to allow such 'reasonable limits' on Charter-protected rights as are 'demonstrably justified in a free and democratic society'.

In practice, the section 33 override provision in Canada seems to be falling into disuse, because of the fact that Canadians appear to have a greater confidence in their courts than in their parliaments. There is a justifiable fear that in the hands of a legislature, and used in its pre-emptive form, the override might one day be used to prevent judicial review of a rights abuse on the scale of the wrongs perpetrated on the Japanese Canadians in 1942. This is one reason why the policy manual of Canada's largest opposition party calls for the override provision to be exercisable only when authorized by a referendum.

But if the override were to be usable only retroactively, and only by means of referendum, and if any such referenda were to be placed at some distance from the date of the actual court decision (for example, to be held concurrently with the next general election), then I think that the passions of the moment would be eliminated from any popular review of the judges, and a very

³³ The exception is Fribourg.

³⁴ The cantons are St. Gallen and Solothurn. See William Rappard, 'The initiative and the referendum in Switzerland', *American Political Science Review*, vol. VI, no. 3, August 1912, p. 351.

useful line of communication would be opened to the High Court, relieving it of the obligation to take policy considerations into account in interpreting the Bill of Rights.

The legislators and the people could concern themselves with the greatest good of the greatest number, and the courts could return to doing what they do best: judging individual cases on the basis of statute and of the ancient principles of our common law, and judging laws on the basis of the letter and spirit of the Constitution.



Question — I guess my question is more a request than anything. In the case that you talked about in Canada where the judge made a ruling on reasonable time in gaol before your case was heard, I was wondering if you could expand on what happened once that ruling was made in regard to whether Parliament then called a referendum and people voted against. I wondered if you could discuss how it worked.

Scott Reid — The case often gets cited as an example. I can't recall the full citation, but it is generally known as the 'Askov Decision' from 1990. There was a one-time event where a large number of individuals awaiting trial were freed and the charges against them dropped. Since that date the six-month rule has applied. A rule which, incidentally, I think is quite fair. I don't see why, if I were accused of something—maybe wrongly accused—I should have to wait, sometimes in custody, for a period that could exceed a year. That being said, there was a fair bit of public outrage in the immediate aftermath of the Askov decision. It wasn't open to Parliament to enact a law establishing an alternative procedure to the six-month rule, unless they were willing to use the section 33 override that I mentioned. The use of the section 33 override—the 'notwithstanding clause', as we call it in Canada—is politically difficult because of the fact that the best-known case in which it has been used was in reinstating a Quebec law that took away rights that a lot of people regard as pretty fundamental, regarding freedom of speech. So as a result, the section 33 override had fallen largely into disrepute in this period and the government simply did not want to risk taking on the courts following this particular precedent.

Question — Does the Canadian Charter have a particular problem, given that it's bilingual and both versions are equally valid? Of course, the U.S. Bill of Rights is in a sense bilingual; words like 'probable cause' or 'privileges' have quite a different meaning today than they did 200 years ago. Firstly, is that a distinct problem that Australia wouldn't have? Secondly, it occurred to me that you have hit the nail on the head in saying the U.S. Supreme Court is libertarian. It seems to me, regardless of the left/right distinction, it has always been libertarian; whether striking down affirmative action laws or abortion laws, it has always been a case of stopping the government from intervening. I'm curious whether this perhaps illustrates Abraham Maslow's saying that when the only tool you have is a hammer, every problem looks like a nail. When the only tool you have is to declare a law invalid—you can't appropriate funds, you can't order the government to set up a program—the biggest threat seems to be government action rather than inaction.

Scott Reid — You are certainly right that, in a sense, courts are only equipped with a hammer. They are given a very narrow range of remedies to apply. The range of available remedies is much broader in Canada, in recognition of this problem in the United States. I don't want to seem unfair to the Canadian courts, I think most of the remedies they have invented are good. They have tried to equip themselves with tools other than hammers. My reservations about some of the tools they have invented were noted in the talk.

With regard to the first question, obviously this wouldn't be an issue in Australia. A Bill of Rights would be drafted in English and that would be that. In Canada, there is one particular example, exclusion of evidence, where the two texts are a little bit different—the relevant provision is more generous in French than in English. All that happens is that the court is forced to choose between the two. It happens that exclusion of evidence is a hot issue in Canada, but not because of the inconsistent French and English texts of the Charter. The problem is more fundamental: we've basically thrown out the common law rule regarding the exclusion of evidence discovered in the course of a warrantless search. If the police enter premises without a warrant and they find evidence that can then lead to the conviction of a person on a certain offence, the very fact that the police found it there serves as an indication that they entered in a justified manner. There are caveats on that, but that general rule applies in the common law. The American rule has been very much the other way around. The police must provide extraordinary reasons, before evidence found in the course of such a search will be permitted in court.

In the case that I cited in the talk, a man named Mr Feeney killed an elderly man and went back to the trailer where he lived. I gather he was drunk at the time. He went inside, making a great deal of noise, and went to sleep. The police were advised by a neighbour to enter Mr Feeney's trailer. They did so. Finding Mr Feeney still dressed in blood stained clothing, they arrested him. Well, of course, the blood on his clothing was then entered in the case against him, and the court ruled that this evidence would have to be thrown out, that the exclusionary rule was put into effect. Part of the reason here is that the exclusionary rule was actually written into the Charter of Rights. It hadn't been there before, so the courts weren't enabled to consider other potential remedies.

This is a shame, because it elevates a single remedy to constitutional, unamendable status, while ignoring the function that this rule is intended to serve. The whole point of the exclusionary rule—and the literature is very clear on this—is to dissuade the police from entering private property as a means of intimidation, or on 'fishing expeditions'. So, perhaps some kind of tort against the police would be appropriate when they enter premises wrongly, rather than excluding evidence when they have entered premises rightly, but without having first carried out the proper formalities.

Question — The greatest example of judicial activism I remember concerns Garfield Barwick's deliberate destruction of the punitive provision of the Income Tax Act. They are to be remedied by the new government here. Back in 1971 I recommended that we have a Koori Bill of Rights for the ACT and Australian territories. That was in dealing with Murphy, and when he went into power he did discuss it with me. I based that upon some material I'd read when we did law back in the 1940s, when there was talk about the legal systems of the Indian tribes. In Canada you have the French areas with a different traditional law. What's the situation regarding a Bill of

Rights and the indigenous tribal laws, and could this be rectified by such a thing as a special Bill of Rights for them?

Scott Reid — In Canada, as in Australia, you are not dealing with one reasonably homogenous community of aboriginal people. They are in fact as diverse internally as, say, the people of different parts of Europe. So I suppose there would be a problem trying to draft up a special ‘one size fits all’ provision that reflects indigenous values in the sense that there is no single set of indigenous values. I’m not sure I’m actually getting at the question you asked, but I’ll just keep on going a little bit further.

In 1992, as part of a proposed set of quite extensive amendments to the Canadian Constitution, which were voted down in referendum, there was included a provision that would have excluded aboriginal governments from the workings of the Charter of Rights, the argument being that it had been drafted for societies that were very different from the ones in which aboriginal Canadians participate. It was quite a controversial proposal. A lot of people felt that what this would actually do was to allow aboriginal governments—which are in some cases corrupt and not always democratically elected—to ride roughshod over the rights of their citizens. I am not sure that would universally have been the case, probably it wouldn’t, but nonetheless that was the fear.

The other thing you mentioned very briefly, was a different set of laws for the French. What’s happened is that, in the Province of Quebec (and also in the state of Louisiana in the US), for questions that deal purely with private relations, a civil law code is used, similar to the Napoleonic Code of France. But only in those areas, and not in relation—in Canada anyway—to, for example, criminal law. I don’t know how criminal law works in Louisiana, because in the United States the criminal law is under state jurisdiction. I suspect, therefore, that the civil law code may actually be used more extensively in Louisiana than it is in Quebec.

Question — In Australia, as I think is the same in Canada, the High Court has been much more respectful of indigenous peoples’ rights than certainly the democratically elected governments of Australia. I’m curious how your proposal of having citizens’ referenda reviewing a High Court decision of any future bill of rights would go in protecting minority groups against the tyranny of the majority. Particularly indigenous rights. If, in the future, you had a bill of rights with a non-racial discrimination principle in it, if that principle was interpreted by the High Court with a particular development of native title or land rights in a way that has happened in Wik and in a way that the Delgamuukw case happened in Canada; and if say the Wik decision then went to a citizens’ referendum as to its fairness or unfairness, then I would bet that in Australia it would go down. Surely that’s an issue of population percentage and an issue of media power and all sorts of things?

Scott Reid — What you’re describing is an ideological difference between where the majority of the people stand and where the justices of the High Court stand. Right now, both in Canada and in Australia, the High Courts are generally more favourable towards indigenous rights than is the population at large. I give the cautionary note that I’ve given before regarding the longer term. Remember how justices are appointed to High Courts: they are appointed by the politicians. So, if indigenous rights became one of the primary issues under consideration for a future High

Court, you could expect that future Prime Ministers (not all of whom may be terribly favourable towards these rights) might start appointing justices who are on the opposite track to that favoured by the current High Court. It is very hard to believe that any specific ideology will dominate the High Court over an extended period of time, so I caution against placing all of one's policy hopes in the actions of the judges.

To deal directly with the specific consideration which you have raised, there is an option open that is used under the Canadian Charter of Rights and Freedoms. Certain provisions of the Charter—these are the ones dealing with freedom of speech, religion, assembly and so on—are open to the legislative override that I described. Certain other rights that were perceived as being particularly open to legislative abuse, given the highly politicised nature of the language issue in Canada—for example, the right to expect the laws to be written in two languages and to be of equal validity in either language—were not subject to legislative override; they were sheltered from section 33. So, if it was felt that some kind of additional protection of that sort was necessary and that it would be inappropriate to have a popular override, you could include a similar provision in an Australian Bill of Rights.

There is one last point that I want to make. Imagine that the people of Australia were sufficiently unsympathetic to Aboriginal rights that they would support a government that overruled the High Court on the issue. Given such a population, it is very difficult to see how you could entrench any Aboriginal rights in a Bill of Rights in the first place. Remember: you have to have the support of more than a simple majority of voters in order to entrench a Bill of Rights at all.