AN AUSTRALIAN BILL OF RIGHTS:
GLORIOUS PROMISES, CONCEALED DANGERS

REVIEW ESSAY BY JAMES A THOMSON*

An Australian Charter Of Rights?
by Murray R Wilcox (Law Book Co, Sydney, 1993)

I INTRODUCTION

Wilcox1 is not Posner.2 Perhaps, three months (even at Harvard Law School3) is simply not sufficient ‘to explore’ questions relating to Bills of Rights.4 Super-


Richard A Posner is law’s most successful agenda entrepreneur since Oliver Wendell Holmes, Jr. He has already earned a place in the history of legal studies as a parent of the law and economics movement and as an important contributor to the renaissance of academic interest in statutory interpretation, to the law and literature movement, and to ‘practical legal studies’ and the pragmatist revival in legal scholarship. Posner’s ... book Sex and Reason is an important contribution to the growing literature on law and sexuality in general, and law and homosexuality in particular.


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ficiality, errors and failure to articulate opposing and alternative positions and to expose and grapple with inherent complexities could, in such circumstances, constitute understandable, even if undesirable, consequences. Equally unavoidable might be quotation, without critical and penetrating analysis, of lengthy extracts from judicial opinions. Of course, publishing a preliminary primer on an Australian Charter of Rights might have been Wilcox’s only objective. Given the voluminous and expanding Bill of Rights literature, it is difficult and, indeed, unnecessary to confidently rest upon that possibility.


4 Murray R Wilcox, An Australian Charter of Rights? (1993) ix (‘having the opportunity to spend three months at Harvard Law School in Fall Term 1991, I decided to explore these questions. During that time I read widely and spoke to many people in [the United States of America and Canada].


After a Harvard sojourn, does Wilcox’s exegesis — *An Australian Charter of Rights* — have anything to offer? Among a welter of stimulating assertions and questions in *An Australian Charter of Rights*, a hint of an answer emerges. For example, Wilcox’s Preface confidently proclaims:

There is no doubt that the composition and decisions of the United States Supreme Court are [in 1993] politically controversial, in a manner and to an extent unknown for Australian Courts. I am sure most Australians would share my view that, if an Australian Charter of Rights would similarly politicise the High Court of Australia, any benefits it offered would be purchased at too high a price.


those functions [under the Bill of Rights since 1791]? ... What has been [the effect of the 1982 Canadian Charter of Rights and Freedoms] on individual and minority rights, and on Canadian Courts?

[A]n independent judiciary [is] an essential prerequisite to effective constitutional rights ....

[What is significant about the [US] Bill of Rights is its history, not its current interpretation. As a model for Australia, the Canadian Charter ... is much more useful; so its judicial interpretation is important.]

Ponder, even momentarily, and ask: Isn’t the composition of Australian courts, including the High Court, politically controversial? From past, present and future perspectives, information, events and recommendations can easily be garnered in support of an affirmative response.

Have[n]t High Court decisions also engendered political controversy? Bank Nationalisation, Communist Party, Franklin Dam, and Political Broadcasting cases are among the obvious judicial

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9 Wilcox, above n 4, viii-ix.


11 Bank of New South Wales v Commonwealth (1948) 76 CLR 1 (High Court); Commonwealth v Bank of New South Wales (1949) 79 CLR 497 (Privy Council). Political and historical contexts (provided for this case and other cases in these footnotes, illustrate broader contexts in which judicial opinions are rendered and assist in addressing questions such as in the text below accompanying nn 189-93 and below n 278) are in A L May, The Battle for the Banks (1968); David Marr, Barwick (1980) 52-74; Peter Crockett, Evatt: A Life (1993) 5-7, 24-6, 299; Ken Buckley, Barbara Dale and Wayne Reynolds, Doc Evatt: Patriot, Internationalist, Fighter and Scholar (1994) 326-33; Galligan, above n 10, 118-9, 121-4, 135-40, 148, 169-83. Legal analyses include: Zines, High Court, above n 6, 100-2, 131; Michael Coper, Freedom of Interstate Trade under the Australian Constitution (1983) 92-6, 103-7. See also below nn 220-2.


14 (1992) 177 CLR 1. Political context is in K D Ewing, ‘The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study’ (1992) 22 University of Western Australia Law Review 239. Legal analyses include: K D Ewing, ‘New constitutional constraints in Aus-
decisions suggesting a negative answer would be incorrect. Join both responses: Isn’t the High Court already ‘politicise[d]’? However, presume that this has not occurred. Wilcox does not answer the question whether this is a necessary occurrence or proffer any example of a justiciable Charter or Bill of Rights which has not politicised the judiciary. Therefore, does Wilcox’s insinuation...
tence on ‘an independent judiciary [as] an essential prerequisite’ inevitably entail the consequence that an Australian Charter of Rights will ‘politicise’ the High Court and other Australian judges?

Difficult conundrums also surround the beguiling phrase ‘benefits of ... individual rights in the Australian Constitution’. For example, who are ‘the weak’? Who are ‘the strong’? Easy and obvious retorts are usually given: the economically and socially disadvantaged; racial and ethnic minorities; and women and children. However, what if those groups, individually or in conjunction, control, for example, legislative power? Can others, too politically weak to resist or change, for example, legislation redistributing income or property from them to the politically powerful, invoke a Charter or Bill of Rights as protection? Assume this situation never occurs. Do majorities always control the legislature? At least, three inter-related reasons often mandate a negative answer. First, the concept of the tyranny of the minority over the majority. Second, the prevalence of interest group politics. Third, representatives of the majority may not control the upper House of the legislature because of the representation or electoral.


18 Possible examples are below nn 105-10.


system. In these circumstances, should majorities be able to invoke, with judicial assistance, a Bill of Rights against minorities? Of course, other questions concerning the effect on individual rights of a Charter or Bill of Rights and of judicial decisions interpreting and enforcing such rights require empirical and sociological, not legal, assessment. On these problems, like all areas in this human rights arena, controversy abounds.23

Finally, why is the ‘current [judicial] interpretation’24 of the US Bill of Rights not significant for Australia? Two possibilities might be postulated: it does not form part of the Bill of Rights’ history or Wilcox does not like it. Again, assume

21 For example, Australian and American States, regardless of population or electors, have equal numbers of senators: section 7, para 3 of the Australian Constitution and US Constitution, Art I, s 3.


Wilcox’s approach, to discard ‘current [judicial] interpretation’, is correct. Even so, isn’t it superfluous? The ‘current interpretation’ is similar to previous interpretations and may, therefore, merely represent a return to the historically pre-dominant method of interpretation and results of judicial decisions.25

II United States of America

Permeating the protection of individual rights — original 1787 Constitution (structural arrangements and substantive provisions),26 1791 Bill of Rights (Amendments 1 to 10),27 1865-1870 Reconstruction (13th, 14th and 15th)

25 Literature illustrating this possibility is below nn 143-4.
Amendments\(^28\) and other (for example, 19th, 24th and 26th) Amendments\(^29\) — in the US Constitution\(^30\) is complexity, nuance, debate, dialogue and change.\(^31\)


Simplicity and dogmatism, therefore, require careful evaluation. For example, even seemingly clear and unambiguous words in the text of the Constitution and its amendments have, through historiographic, hermeneutic and judicial debates, been rendered opaque. Therefore, the ‘two reasons’ — ‘content and structure’ — which Wilcox assigns for rejecting the US Bill of Rights as ‘a useful model for Australia’ are, at best, surprising.

As to the Bill of Rights’ content, Wilcox’s initial assertion is dogmatic: ‘It has never been amended.’ Of course, that is a correct, albeit simplistic, proposition if even seemingly clear and unambiguous words in the text of the Constitution and its amendments have, through historiographic, hermeneutic and judicial debates, been rendered opaque. Therefore, the ‘two reasons’ — ‘content and structure’ — which Wilcox assigns for rejecting the US Bill of Rights as ‘a useful model for Australia’ are, at best, surprising.


In addition to literature above nn 26-29 and below n 256, this is illustrated by textbooks: see, eg, Tribe, above n 27, 29, 546-1720.

In addition to literature above nn 26-29 and below nn 48-61, debate over US Constitution, Art II, s 1, cl 5 (Presidents must ‘have attained ... the Age of thirty-five Years’) provides a wonderful example: Anthony D’Amato, ‘Aspects of Deconstruction: The “Easy Case” of the Under-Aged President’ (1989) 84 Northwestern University Law Review 250; Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law (1988) 60-2. On ‘Congress’ in the 1st Amendment, see Thomson, ‘Mirages of Certitude’, above n 17, 79 n 80 (extends to federal and state executive and judicial action and state legislative action). ‘[T]he terms used in the Constitution ... are open to numerous interpretations ...’: Tushnet, above n 20, 23.

Amendment procedures, scope and judicial review are discussed in John Vile, Contemporary Questions Surrounding The Constitutional Amending Process (1993); Russell Caplan, Constitutional Brinksmanship: Amending the Constitution by National Convention (1988); Sanford
omits the vast textual changes\textsuperscript{35} that occurred\textsuperscript{36} in the Reconstruction Amendments, especially section 1 of the Fourteenth Amendment, which possibly was at least intended to apply against the States or incorporate into that Amendment the Bill of Rights' provisions,\textsuperscript{37} and the important textual changes in the 19th, 24th and 26th Amendments.\textsuperscript{38} A second Wilcox content suggestion is also dogmatic:

[T]he Bill of Rights says nothing about a subject central to modern\textsuperscript{39} human rights concern: freedom from discrimination arising out of personal factors


\textsuperscript{36} Debate on whether Reconstruction Amendments are constitutional is in Thomson, above n 28, 182 n 20 (references); Forrest McDonald, 'Was the Fourteenth Amendment Constitutionally Adopted?' (1991) 1 Georgia Journal of Southern Legal History 1.


\textsuperscript{38} Their history and constitutional consequences are above n 29.

\textsuperscript{39} This footnote is not in Wilcox's text. Concerns Wilcox mentions have important historical antecedents. Race and colour, especially their manifestation in slavery generated human rights concerns for centuries. Sex discrimination has a similar lineage. Literature includes: Kenneth Pennington, The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal
such as sex, race, colour and the like. If the [US] Bill of Rights were being penned today, it would no doubt include an anti-discrimination clause.\textsuperscript{40}

Placed in the context of post-1865 textual changes, Wilcox's suggestion stimulates a response: Is that, especially the first sentence, a serious assertion? Merely glancing at a few — \textit{Brown v Board of Education},\textsuperscript{41} \textit{Roe v Wade}\textsuperscript{42} and \textit{Regents of the University of California v Bakke}\textsuperscript{43} — modern US Supreme Court cases suffices to engender a sceptical response. If so, is Wilcox simply indicating absence from the US Constitution and its Amendments of express terminology or reference to these matters? Obviously, that cannot be the intention: the 15th Amendment refers to 'race' and 'color'; the 19th Amendment refers to 'sex' and the 26th Amendment refers to 'age'. Even if those words were not included, the Constitution's terminology, especially the equal protection clause of the Fourteenth Amendment, has been interpreted as 'an anti-discrimination clause.'\textsuperscript{44} That, some argue, and others reject, is precisely what those words mean.\textsuperscript{45} Pre-Tradition (1993); Ellis Sandoz (ed), \textit{The Roots of Liberty} (1993); Knud Haakonssen, 'From natural law to the rights of man: a European perspective on American debates' in Lacey and Haakonssen (eds), above n 17, 19; David Brion Davis, \textit{Slavery and Human Progress} (1984); William Wisecek, \textit{The Sources of Antislavery Constitutionalism in America, 1760-1848} (1977); Eleanor Flexner, \textit{Century of Struggle: The Woman's Rights Movement in the United States} (rev ed, 1975); Brown, above n 29; J R Pole, \textit{The Pursuit of Equality in American History} (2nd ed, 1993).

\textsuperscript{40} Wilcox's initial assertion, above n 4, 26.


\textsuperscript{44} Wilcox, above n 4, 26. \textit{Brown v Board of Education} (above n 41) is the classic example. Its effect on non-racial discrimination is discussed in Tribe, above n 27, 1544-601 (aliens, illegitimates, gender, age, disabilities). Reverse incorporation of this 14th Amendment aspect into the 5th Amendment due process clause occurred in \textit{Bolling v Sharpe} 343 US 497 (1954) and is criticised in John Ely, \textit{Democracy and Distrust: A Theory of Judicial Review} (1980) 32-3.

\textsuperscript{45} Vigorous controversy over this aspect of Framers' intent includes above n 28; Raoul Berger, \textit{Government by Judiciary} (1977); Raoul Berger, 'McAffee v Berger: A Youthful Debunker's Rampage' (1986) 22 Willamette Law Review 1, 20-31 (Framers intended only very limited
cisely at this juncture is the rich and complex mosaic debate over history and constitutional interpretative principles, such as textualism, structure, intention, purpose and context, which are utilised to ascertain and ascribe meaning to words in the Constitution and its amendments.

At the level of ‘structure’, Wilcox’s dogmatism re-emerges: ‘The United States Bill of Rights is cast in absolute language’ and that gives the Canadian Charter of Rights and Freedoms ‘a structural advantage’. Absolutism, as a technique of US constitutional interpretation and adjudication was particularly associated with Justice Hugo Black and his conception of the judicial function. Black’s tenure on the US Supreme Court stimulated a wide-ranging debate between absolutists and those who adumbrated a more flexible interpretative stance. One possibility, cast aside without consideration by Wilcox, is that words and their meaning or meanings are inherently flexible, uncertain and subject to modification and change. Even if that is incorrect, the Bill of Rights does contain words which, as a textual matter, are not absolute. Examples abound: ‘respecting’ and ‘abridging’ in the 1st Amendment; ‘unreasonable’ and ‘probable cause’ in the 4th Amendment; ‘speedy’ in the 6th Amendment; and ‘excessive’ and ‘cruel and unusual’ in the 8th Amendment. Of course, many American scholars and judges consider that such vital words as ‘Congress’, ‘speech’, ‘religion’, ‘press’, ‘State’, ‘privileges or immunities’, ‘due rights, not desegregation or suffrage); Raoul Berger, ‘Constitutional Interpretation and Activist Fantasies’ (1993) 82 Kentucky Law Journal 1.


Wilcox, above n 4, 26.


Ibid. See also Roger Newman, Hugo Black: A Biography (1994).


‘Abridge’ and ‘abridged’ are also in s 1 of the 14th and 15th Amendments. The 1st Amendment usage is discussed in Tribe, above n 27, 789-94.

See above n 32.

Examples of controversies over the meaning and scope of ‘speech’ are in Tribe, above n 27, 785-1061; Symposium, ‘Freedom of Expression: Theoretical Perspectives’ (1983) 78 North-
process of law" and 'equal protection of the laws' are far from absolute. Two pieces of evidence suffice: historiography and judicial decisions. Even if none


Breadth and vagueness of this word are illustrated in Tribe, above n 27, 1179-88.

Ambiguities and problems are explored in William Van Alstyne, Interpretations of the First Amendment (1984) viii, 50-67; Bill Chamberlin, 'Speech and the Press' in Kermit Hall (ed), The Oxford Companion to the Supreme Court of the United States (1992) 808, 810 ('Speech vs Press').


'[Quite inescapable]' is a typical description of this 14th Amendment provision: Ely, above n 44, 98. Controversy over its meaning and scope is in Ely, above n 44, 22-30 ('a delegation to future constitutional decision-makers to protect rights that are not listed' in the Constitution); Tribe, above n 27, 528-45; Berger, 'Constitutional Interpretation and Activist Fantasies', above n 45, 3-6 (limited and specific rights); John Harrison, 'Reconstructing the Privileges or Immunities Clause' (1992) 101 Yale Law Journal 1385.

Within the 5th and 14th Amendments, this is the most notorious phrase in American constitutional law. Debate on its open-ended and flexible quality includes Ely, above n 44, 14-21; (even if only procedural, not substantive, due process is mandated, judicial judgment about 'what process is due' is constitutionally 'untethered'); Berger, 'Constitutional Interpretation and Activist Fantasies', above n 45, 13-5 (only applies to judicial proceedings); Frank Strong, Substantive Due Process of Law: A Dichotomy of Sense and Nonsense (1986). See also below n 99 (substantive due process).

Substantial differences over 'equal protection's' meaning and scope are adumbrated in Ely, above n 44, 30-2 ('sweeping mandate to judge ... validity of governmental choices'); Archibald Cox, The Court and the Constitution (1987) 250-68 ('majestic phrase ... enable[ing] the [US Supreme] Court to lead a broadly egalitarian movement permeating American society'); Berger, 'Constitutional Interpretation and Activist Fantasies', above n 45, 8-12, 15-28 (very limited and specific rights).

of this is conceded, there are the 9th and 10th Amendments. Both are opaque, perhaps delphic, and each has generated a considerable array of views.61

Presume Wilcox’s description — ‘absolute language’ — still remains accurate. Can that characteristic of American constitutional rights, if it is a defect, be corrected? Mitigation, in two further respects, is possible. First, Congress has express constitutional authorisation ‘to enforce’ several rights ‘by appropriate legislation.’62 Particularly important is that all 14th Amendment provisions including the ‘due process’ and ‘equal protection’ clauses are subject to this legislative power.63 Secondly, as Wilcox recognises, the frequent ‘conflict’ between consti-

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62 Section 2 of 13th, 15th, 19th, 24th and 26th Amendments and s 5 of 14th Amendment. Similar legislative power is in s 2 of 23rd Amendment. Cf s 33 (legislative override) of the Canadian Charter of Rights and Freedoms (discussed in Wilcox, above n 4, 39-40, 177-82 and below n 181); s 2(1) (legislative override) of the Canadian Bill of Rights (discussed in Wilcox, above n 4, 30-3 and below n 171); and s 51(36) of Australian Constitution (discussed in Thomson, above n 35, 323 n 4); European Convention on Human Rights, art 15 (derogation procedure); and above n 17, 24 (non-judicial enforcement). Another attempt to reconcile judicial supremacy and non-justiciability over rights is in Francesca Klug and John Wadham, ‘The “democratic” entrenchment of a Bill of Rights: Liberty’s Proposals’ [1993] Public Law 579.

63 Section 5 of the 14th Amendment: ‘The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.’ Differing views of Congress’ power to adjust, dilute or expand 14th Amendment rights, including Supreme Court interpretations, are in Thomson, above n 28, 197-9; John Hayes, ‘Congressional Ratification of Otherwise Unconstitutional Local Affirmative Action: Can Congress Override Crosson?’ (1990) 35 New York Law School Review 681; James Wilson, ‘Reconstructing Section Five of the Fourteenth Amendment to Assist Impoverished Children’ (1990) 38 Cleveland State Law Review 391; Michael McConnell, ‘Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?’ (1992) 15 Harvard Journal of Law and Public Policy 181; P Chuey, ‘Rust v Sull-
tutionally guaranteed rights is ‘accommodated’ by the US Supreme Court. One method of achieving such accommodation is by the interpretative technique of balancing. Wilcox, however, prefers express textual qualifications or conditions on constitutional rights. That preference can, of course, be debated. Far less clear is another Wilcox assertion: such textual qualifications or conditions ‘frees the law from the gymnastics which American judges undertake’ in Bill of Rights litigation. However, those qualifications and conditions add more words to the Constitution’s text. That increases the quantity of interpretative material. Isn’t one virtually inevitable consequence promotion of more, not less, judicial gymnastics? Non-abatement of Canadian Charter of Rights and Freedom litigation seems to reinforce, rather than refute, that suggestion.

More than 200 years of continuous operation ought to suffice for the historical experience and judicial interpretation and enforcement of US constitutional rights, especially the Bill of Rights and 14th Amendment, to provide some comparative insight into possibilities and permutations that might be associated with ‘entrenching some individual rights in the Australian Constitution’. Within that evolution five broad epochs — pre 1776; 1776-1791; 1791-1861; 1861-1937; and 1937-1994 — are discernible. American colonists’ experience with rights was one factor in the American Revolution and the 1776 Declaration of Independence. Drafting of State Constitutions containing rights and negotiation


For example, is it more difficult for people to empathise with long convoluted legal texts? The beauty of the US Bill of Rights, compared to the Canadian Charter of Rights and Freedoms and international human rights treaties, is its brevity, crisp language (but see above nn 50-61) and simplicity.

Below nn 186-93. ‘[G]ymnastics’ is in Wilcox, above n 4, 27.


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and ratification of the 1787 Constitution and 1791 Bill of Rights occurred in the second epoch. Subsequently, postulating, particularly for interpretative purposes, the intentions of those who created these federal constitutional rights has been an ongoing and, more than occasionally, acrimonious debate.\textsuperscript{73}

1791-1861

Insignificance of written constitutional rights is the message conveyed by Wilcox's rendition of the 1791-1861 period.\textsuperscript{74} Three factors, Wilcox suggests, are responsible for that conclusion. First, the Bill of Rights applied only to Congress and other branches of the federal government, not to the States.\textsuperscript{75} Second, the US Supreme Court invalidated only two pieces of congressional legislation.\textsuperscript{76} Finally, 'the 1776-1791 obsession with constitutional rights' was replaced with 'apathy'.\textsuperscript{77} Another, somewhat antithetical, account might, however, be advanced. First, rights in the 1787 Constitution applied to States.\textsuperscript{78} Second, States, not Congress or the federal executive, were the dominant sphere of governmental authority. Political battles between Federalists and Jeffersonians indicated the emerging, but still subordinate, possibilities of expanding federal influence, power and activity.\textsuperscript{79} Paucity of federal action, including congressional legislation,\textsuperscript{80} therefore, might account for the absence of US Supreme Court decisions invalidating, for Bill of Rights contraventions, exercises of federal power. Another, perhaps more powerful reason was that these battles were not only fought in judicial arenas. Debate on the constitutionality of the Alien and Sedition

\textsuperscript{72}See above n 46 (Framers' intentions).
\textsuperscript{73}See, eg, above n 28 (Reconstruction Amendments, especially the 14th Amendment).
\textsuperscript{74}Wilcox, above n 4, 6-8.
\textsuperscript{75}Ibid 6. Details are in above n 37.
\textsuperscript{76}Wilcox, above n 4, 7-8 (referring to \textit{Marbury v Madison} 5 US (1 Cranch) 137 (1803) and \textit{Dred Scott v Sanford} 60 US (19 How) 393 (1857) (\textit{Dred Scott}). Legal and historical analyses include: Robert Clinton, \textit{Marbury v Madison and Judicial Review} (1989); Akhil Amar, \textit{Marbury, Section 13}, and the Original Jurisdiction of the Supreme Court' (1989) 56 \textit{University of Chicago Law Review} 443; James O'Fallon, \textit{Marbury'} (1992) 44 \textit{Stanford Law Review} 219 (rejecting traditional statesmanship view of Marbury); Don Fehrenbacher, \textit{The Dred Scott Case: Its Significance in American Law and Politics} (1978). Possible examples of pre-1803 Supreme Court review of congressional legislation are in Engdahl, above n 24, 287-89.
\textsuperscript{77}Wilcox, above n 4, 6.
\textsuperscript{80}However, some major federal legislation, such as the Judiciary Act 1789, was enacted: Charlene Bickford and Helen Veit (eds), \textit{Documentary History of the First Federal Congress of the United States of America} (1986) vols 4-6 (all Congressional Bills and Resolutions). Discussions include: Maeva Marcus (ed), \textit{Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789} (1992); Wilfred Ritz, \textit{Rewriting the History of the Judiciary Act of 1789} (1990); Wythe Holt, \textit{Judiciary Act of 1789} in Hall, above n 55, 472-4.
Acts\textsuperscript{81} \textit{vis à vis} the 1st Amendment is the seminal example.\textsuperscript{82} Their judicial interment in \textit{New York Times v Sullivan}\textsuperscript{83} only confirmed what Jefferson’s presidential pardons had previously recognised and achieved.\textsuperscript{84} Finally, even if ‘apathy’ prevailed in the federal sphere, did States’ Bills of Rights have a significant influence? Did State Courts actively enforce those rights?\textsuperscript{85} Especially if States were the predominant utilisers of governmental power, isn’t that important?

1861-1937

More and greater controversies swirl around the 1861-1937 epoch. Frenetic debate and multifarious conclusions are engendered, for example, over what occurred in and what was intended by the Civil War (1861-1865) and the Reconstruction (13th, 14th and 15th) Amendments.\textsuperscript{86} Two outstanding examples exist. First, were the Bill of Rights provisions intended to be incorporated into the Fourteenth Amendment so that States, like federal institutions, were subject to those provisions? Whatever the correct historical answer might be,\textsuperscript{87} judicial exegesis has not ‘effect[ed] a global application of the 1791 amendments to the States’.\textsuperscript{88} Rather, by an incremental process starting in 1897 and only gaining real momentum in the 1960s, the US Supreme Court has, via the 14th Amendment, applied ‘almost all’ Bill of Rights provisions to the States.\textsuperscript{89} Second, was the 14th Amendment’s equal protection clause intended to render State racial segregation unconstitutional? Again, historiography, with divergent methodol-
ogy, evidence, premises and conclusions on this issue, has not determined judicial decisions, as Brown v Board of Education illustrates.

From those beginnings at least three strands emerge. First, despite some exceptions, the US Supreme Court's failure, most notably exemplified by Plessy v Ferguson, to invalidate, as contravening 14th Amendment requirements, State racial discrimination legislation. In stark contrast, an initial judicial reaction characterised the Reconstruction Amendments' 'pervading purpose' as 'the freedom of the slave race, and the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him'. Subsequent judicial retreats obviously raise serious questions about what, if any, reliance can be placed on judges to enforce a Bill of Rights. A second strand is the US Supreme Court's use of the 14th Amendment's direction not to 'deprive any persons of ... property, without due process of law' to declare State legislation unconstitutional. Wilcox enunciates the traditional orthodox view of the resulting judicial substantive due process doctrine. Only when non-economic personal rights, such as individual 'autonomy,' are protected against State

91 Discussions include: above n 28; Berger, Government by Judiciary above n 45; James Thomson, 'Playing With a Mirage: Oliver Wendell Holmes, Jr. and American Law' (1990) 22 Rutgers Law Journal 123, 133 n 49 (dispute as to whether Abolitionists' cause encompassed not only abolition of slavery, but also equality of legal rights regardless of race).
92 See above n 41.
94 Debate on whether, following Dred Scott (above n 76) and the Civil War, the US Supreme Court was an irrelevant failure or a pivotal institution is in James Thomson, 'Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective' (1983) 62 Texas Law Review 559, 562 n 12.
96 Slaughter-House Cases 83 US (16 Wal) 36 (1873), 71 (state law establishing a slaughterhouse monopoly for one corporation did not contravene 14th Amendment). Historical and legal analysis is in Charles Fairman, Reconstruction and Reunion 1864-88 (1971) Pt 1, 1320-74; Herbert Hovenkamp, Enterprise and American Law: 1836-1937 (1991) 116-24 (challenging traditional view that government monopolies resulted from corrupt and venal special interest politics by suggesting this monopoly was an innovative statutory response to excessive pollution).
laws is the Supreme Court to be applauded. Otherwise, judges, under a due process camouflage, surreptitiously engaged in the conservative enterprise of constitutional protection of property rights, laissez-faire capitalism and other economic interests. Undesirable consequences — hindering regulatory reforms, harming employees and workers, favouring the wealthy to the detriment of the disadvantaged — ensued from adherence to such obsolete ideologies.

How was this accomplished? Judges’ personal predilections and preferences, in this instance social and economic Darwinism, were simply being converted into federal constitutional law. Vastly different and more congenial views of substantive due process and these Supreme Court decisions, including the notorious *Lochner v New York*, are, however, available.

99 Wilcox, above n 4, 18. Culmination of this is indicated in the text accompanying below nn 137-9.

98 Wilcox, above n 4, 17-8, referring to *Meyer v Nebraska* 262 US 390 (1923) (state law forbidding primary schools to teach a foreign language unconstitutional as violating 14th Amendment substantive due process) and *Pierce v Society of Sisters* 268 US 510 (1925) (state law banning private schools similarly unconstitutional). However, there is revisionist perspective which aligns *Meyer* and *Pierce* with the traditional view of *Lochner* (below nn 100-2) but opposes revisionist *Lochner* scholarship (below nn 102, 105-6): Barbara Woodhouse, ‘“Who Owns the Child?”: *Meyer* and *Pierce* and the Child as Property’ (1992) 33 *William and Mary Law Review* 995 (suggesting *Pierce* and *Meyer* liberties were to control children and confer freedom from government power over social and economic policy, rather than enhancing intellectual and religious liberty). See generally William Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (1994) 204, 246-9, 286-7; Gerald Gunther, *Learned Hand: The Man and the Judge* (1994) 376-80, 383. Substantive due process doctrine interprets 5th and 14th Amendments due process clauses ‘as incorporating a general mandate to review the substantive merits of legislative and other governmental action’ and classic examples are *Lochner* (below n 104) and *Roe v Wade* (above n 42): Ely, above n 44, 13. Elaboration is in Herbert Hovenkamp, ‘The Political Economy of Substantive Due Process’ (1988) 40 *Stanford Law Review* 379, 379-80; Peter Hoffer, ‘Due Process, Substantive’ in Hall, above n 55, 237-9.

100 Literature espousing this traditional view is in David Bernstein, ‘Roots of the “Underclass”: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation’ (1993) 43 *American University Law Review* 85, 89 nn 12-4; Fiss, above n 95, 12-9 (including opposing views).

101 Arguments, details and conclusions are in Bernstein, above n 100.

102 It has been suggested that ‘[u]ntil recently, most legal scholars and historians incorrectly attributed the origins of laissez-faire jurisprudence to the influence of “social Darwinism”: ibid 88 n 11 (citing references). However, ‘Social Darwinism actually had minimal influence on American laissez-faire liberal thought, inside or outside legal circles’: ibid.Rather, ‘Lochner era [judicial] antipathy to labor legislation ... benefit[ing] labor unions [has roots in] abolitionist “free labor” ideology [and] the Jackson antimonopoly tradition’: ibid 87-8 (footnotes citing references omitted).

103 This illustrates a perennial constitutional law conundrum: how to control and tether judicial discretion and freedom of choice. Solutions are suggested above n 46.

104 198 US 45 (1905) (*Lochner*) (state law prohibiting employees from working more than 60 hours per week unconstitutional 14th Amendment deprivation of ‘liberty ... without due process of law’). Historical and legal analyses include: Paul Kens, *Judicial Power and Reform Politics: The Anatomy of Lochner v New York* (1990); Fiss, above n 95, 4, 6-21, 43-8, 155-84 (not traditional 14th Amendment liberty of contract interpretation of *Lochner* but preservation, via contractarian theory, of individual liberty by enforcing constitutional limits on the States’ residual police power by enforcing a strict means-end connection between that power and the State leg-
One revisionist response is to characterise unconstitutional State laws as ‘monopolistic’ legislation protecting and benefiting ‘politically powerful discriminatory labor unions’ with intended and predictable detrimental consequences for the most vulnerable — black, women and immigrant — workers. From this perspective, substantive due process decisions ‘often served to protect the most disadvantaged, disenfranchised workers’, for example, by opening for them labour markets and reducing discriminatory employment practices. Therefore, ‘[t]he demise of laissez-faire jurisprudence’ is to be regretted, not celebrated. Another revisionist response characterises these State legislative interventions in economic affairs not as progressive or welfare reforms. Rather, they illustrated conservative big business’ political power to obtain regulatory measures which trimmed or disciplined, without controlling, the market to prevent adverse and stimulate favourable profit-making conditions. Consequently, substantive due process abrogated unconstitutional advantages commandeered through undue corporate influence in the legislative process. Furthest from Wilcox’s regurgitation of orthodoxy is revisionist scholarship extolling laissez-faire constitutionalism. Rehabilitating this doctrine and *Lochner* relies on arguments that the Framers of the Constitution and 14th Amendment intended to erect constitutional protections for economic liberty; that substantive due process has a textual warrant, for example, via the word ‘property’ in the 14th Amendment; that the Constitution can and should be characterised as an economic document; and that no dichotomy separates economic and personal rights. En-
entrepreneurial liberty is, therefore, constitutionally mandated and courts are required to facilitate and maintain conditions necessary for economic growth. Unrestricted markets are desirable not only as an attribute of personal liberty but also because implementation of free market ideology promotes the community's and individuals' economic welfare. If successful, such revisionism will repudiate the revulsion which has characterised these instances of judicial review.


110 Numerical tabulations may be misleading. Cf Wilcox, above n 4, 15 (invalidation 'in an estimated 197 cases' and '228 State statutes held invalid between 1890 and 1937') with Fiss, above n 95, 15 (this traditional view 'is also at odds with a more complete account of the Court's behaviour' including the dissents) and Kainen, above n 97, 99-100 (more cases upholding, against substantive due process challenges, constitutionality of governmental regulation). An overview is provided by Ellen Paul and Howard Dickman (eds), Liberty, Property and the Foundations of the American Constitution (1989); Ellen Paul and Howard Dickman (eds), Liberty, Property and Government, Constitutional Interpretation Before the New Deal (1989); Paul and Dickman (eds), above n 20.
Freedom of speech constitutes a third strand of the 1861-1937 epoch. Recitation of important US Supreme Court cases persuades Wilcox to conclude that 'the court appeared to deny First Amendment rights, or at least to give them little weight.' Therefore, the lesson concerning 'the ability of courts to protect individual rights' is obvious. But, are those propositions correct? Immediately, a paradox emerges. In substantive due process cases, Wilcox maligns courts for enforcing constitutional rights. With free speech cases, the same castigation is delivered against judicial refusal to enforce constitutional rights. That, of course, exposes a central dilemma of modern American constitutional law: how to reconcile praise for Brown with condemnation of Lochner. Is it possible to formulate a principled basis from which to advocate judicial abstention regarding economic or property rights and vigilant judicial maintenance of other, for example, free speech and equality, rights? An Australian Charter of Rights? does not do so.

A second response is that this third strand is much more ambiguous than the traditional posture, which Wilcox's narrative adopts, concedes. From that perspective, free speech law only developed in the twentieth century's first decade. With few exceptions, the US Supreme Court during the second and third decades affirmed and strengthened a restrictive non-libertarian approach to free

111 'Congress shall make no law ... abridging the freedom of speech, or of the press ...' US Constitution, 1st Amend. One connection between Lochner and 1st Amendment free speech is an argument that the latter 'has replaced the due process clause as the primary guarantor of the privileged. Indeed, [the free speech clause] protects the privileged more perversely than the due process clause ever did': Mark Tushnet, 'An Essay on Rights' (1984) 62 Texas Law Review 1363, 1387.


113 Wilcox, above n 4, 18.

114 Ibid.

115 Ibid 12-6.


117 See above n 41.

118 See above n 104.

119 Can economic substantive due process be reconciled with substantive due process vindicating other personal rights and liberties? If so, how? Attempts to expose and address this dilemma include: Fiss, above n 95, 9-12, 19-21; Robert Schopp, 'Education and Contraception Make Strange Bedfellows: Brown, Griswold, Lochner, and the Putative Dilemma of Liberalism' (1990) 32 Arizona Law Review 335. Conservatives, unlike liberals, may not confront this dilemma because they advocate stringent judicial review under Lochner and free speech (below n 128). However, conservatives have opposed Brown (above n 41) and Roe (above n 42). See also below n 133 (tension between Lochner and Abrams) and n 135.

120 Attempts to do so are above nn 97, 119.

speech issues. Change occurred slowly. Only by the 1960s was there an anti-theoretical Bill of Rights jurisprudence — a Supreme Court imposed civil rights revolution — where, for example, First Amendment free speech provisions invalidated federal and State legislation. Others advance an alternative historical exegesis. A robust-free speech tradition developed at least as early as the 1798 *Sedition Act*, the pre-Civil War mailing of antislavery literature, the evolution of academic freedom, early twentieth century labour agitation and the Free Speech League. At least three free speech traditions — conservative libertarian, radical libertarian and civil libertarian — illustrate the vibrancy of this alternative perspective. Added to this intellectual and social milieu -


124 Tribe, above n 27, 785-1061; Lewis, above n 81.


126 See above nn 81, 83, 84.


129 Libertarian radicals ‘rejected ... competitive individualism of laissez-faire capitalism and ... social harmony in progressive thought [were committed] to individualist anarchism, free-thought, and free love ... and interposed personal sovereignty and rationality ... against the power of church and state.’: Rabban, above n 127, 53. Analysis is in Rabban, above n 127.

130 From 1919 to 1990s ‘civil libertarians severed the [speech-property] link ... [considering speech, not an individual right, but] a social interest to promote civic debate in the search for truth about issues of public concern’: ibid 52 (footnote omitted) (referring to Graber, above n 128).
[t]he judicial landscape ... was not unrelievedly bleak. A few Supreme Court decisions contained some fragments of theory and hints of a more tolerant attitude toward freedom of expression. In addition, a minority of State and lower federal courts provided substantial protection for free speech, and several evaluated the meaning of the First Amendment with extraordinary care and sophistication ....

[Also] some State Supreme Courts protected political expression, often under the free speech provisions of their State constitutions.\(^{131}\)

Even more obvious is the fact that the Holmes-Brandeis opinions provided, at least from 1919,\(^ {132}\) foundations for a libertarian free speech jurisprudence.\(^ {133}\)

1937-1994

Of course, Wilcox refers to President Franklin Roosevelt’s 1937 ‘court-packing plan’ and to the ‘switch in time that saved nine.’\(^ {134}\) Whatever motiva-

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\(^ {132}\) Abrams v United States 250 US 616 (1919) (convictions, under 1918 congressional espionage legislation, for conspiring and attempting to harm war efforts by publishing and distributing leaflets not breach 1st Amendment) (Holmes and Brandeis JJ dissenting). Discussed in Polenberg, above n 27; Rabban, ‘The First Amendment in its Forgotten Years’, above n 122, 1204-17; Frederick Lawrence, ‘The Coastwise Voyager and the First Amendment: The Fighting Faiths of the Abrams Five’ (1989) 69 Boston University Law Review 897. A major First Amendment question is: Did Holmes J change from a restrictive to libertarian position between March and November 1919? Wilcox, above n 4, 15 unhesitatingly concludes Holmes changed to ‘a more liberal position’. Opposing views include: Rabban, ‘The First Amendment in its Forgotten Years’, above n 122, 1209-13, 1311-7; Rabban, above n 127, 49-50 (despite earlier contrary analysis, Holmes’ views changed); Fiss, above n 95, 328-30 (fundamental change); John Wirenius, ‘The Road to Brandenburg: A Look at the Evolving Understanding of the First Amendment’ (1994) 43 Drake Law Review 1 (evolutionary progression); Sheldon Novick, ‘The Unrevised Holmes and Freedom of Expression’ [1991] Supreme Court Review 303 (no change); Sheldon Novick, ‘Holmes and the Art of Biography’ (1992) 39 William and Mary Law Review 1219, 1228-31 (no change). In 1907, Harlan J may (compared to Holmes, below n 133) have taken a more libertarian position: Hunter, above n 122, 90-2; Rabban, ‘The First Amendment in its Forgotten Years’, above n 122, 540-1; Fiss, above n 95, 325-6; Thomson, above n 91, 165-6 nn 236-7.

\(^ {133}\) Wilcox, above n 4, 15-6, especially 16 n 96. Greater recognition of and elaboration on this development is in Thomson, above n 91, 161 n 206 (references); Rabban, ‘The First Amendment in its Forgotten Years’, above n 122, 584-6, 591-4; Rabban, ‘The Emergence of Modern First Amendment Doctrine’, above n 122, 1303-46; G Edward White, Justice Oliver Wendell Holmes: Law and The Inner Self (1993) 412-44, 607-8; Helen Garfield, ‘Twentieth Century Jeffersonian: Brandeis, Freedom of Speech, and the Republican Revival’ (1990) 69 Oregon Law Review 527; Strum, above n 97, 116-35. Discussion of and attempt to resolve tensions between Holmes’ dissents in Lochner (above n 104) (liberty to contract not in 14th Amendment) and Abrams (above n 132) (liberty to speak is in 1st Amendment) are in Fiss, above n 95, 326-30.

tions activated these events, its consequences are clear. An Australian Charter of Rights?, however, makes an initial mistake. Wilcox boldly asserts: 'the effect of the switch was that substantive due process was dead.' It is not. As Wilcox recognises, at least from 1923, substantive due process protected ‘personal autonomy’ rights which evolved into ‘a constitutional right of privacy.’ Here, something ought to be made explicit: that evolution culminated in Roe v Wade. Even when concerned with economic interests, substantive due process survives. Legal scholars articulate reasons why it is and should continue to be a central aspect of modern constitutional law. A modicum of judicial support also exists. A second consequence is related to judicial enforcement of the Bill of Rights. Wilcox’s summary indicates that -

during the 1940s and early 1950s [there was] a more consistent recognition of the nature of [civil liberties] issue[s], but still with considerable legislative deference; and, after the appointment of Chief Justice Warren in 1954, [there emerged] a more full-blooded readiness to apply the Bill of Rights, with the court making its own assessment of the justifiability of the legislation rather than deferring to the opinion of the legislature.

[The cut-backs [by the Supreme Court under Chief Justices Burger and Rehnquist of the civil liberties protections upheld by the Supreme Court under Chief Justice Earl Warren] are mostly at the margins. There has been no attempt to revive pre-Warren notions. The United States Supreme Court contin-

135 First, Wilcox appears to suggest ‘use of the doctrine of substantive due process ... caused a constitutional crisis’ which led to Roosevelt’s plan: Wilcox, above n 4, 16. However, the most important invalidations of congressional legislation were separation of powers, federalism and commerce clause issues (Bernstein, above n 100, 86 n 3) and Wilcox, above n 4, 16 n 78 cites those cases. For contrasting evaluations of the so-called 1937 constitutional revolution, see Richard Friedman, ‘Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation’ (1994) 142 University of Pennsylvania Law Review 1891; ‘Twentieth Century Constitutional History’ (1994) 80 Virginia Law Review 201-90. Second, Robert’s switch ‘was not related to Roosevelt’s proposal’ is Wilcox’s conclusion: Wilcox, above n 4, 17. He also suggests ‘political factors’ may have caused the switch: Wilcox, above n 4, 17 n 82. More complex scenarios are in Ariens, above n 134. For example, linkage between explanations of Roberts’ switch and tensions between Lochner and Brown. Was Frankfurter J, by endeavouring to change the perceived motivation of Roberts’ switch from political to principled, trying to preserve the 1937 Supreme Court from looking like Lochner to help the 1954 Supreme Court deal with Brown? An affirmative response is in Ariens, above n 144. Other suggestions are in Richard Friedman, 'A Reaffirmation: The Authenticity of the Roberts Memorandum, Or Felix the Non-Forger' (1994) 142 University of Pennsylvania Law Review 1985; Friedman, 'Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation', above n 135, 1935-53.

136 Wilcox, above n 4, 17.

137 See above n 99.

138 Wilcox, above n 4, 18.


140 See above n 109.

141 See McCormack, above n 109; Fino, above n 109; Gordon, above n 109.
ues to affirm the doctrine of incorporation. It has not reduced its area of application. The Bill of Rights continues to be a major bulwark of personal liberty, against all governments.142

That clearly illustrates one matter: vigorous judicial enforcement of such civil liberties only occurred between 1954 and 1969. Indeed, contrary to the Wilcox position, many legal scholars now argue that the 'cutbacks' significantly reduce, not just 'at the margins,' the Warren Court's expansive interpretation and protection of Bill of Rights provisions.143 Pressed further, a larger question emerges: Has the accolade 'a major bulwark' ever been an appropriate or correct response to the Bill of Rights, at least in its judicial manifestation? Again, debate, even on the Warren era, ensues.144

_Evaluation_

Given this cacophony, even suggesting that there exists '[t]he American model'145 is somewhat ambitious. Even so, other claims also proliferate. For example, given the inherent complexity and contingency associated with word meanings and usage,146 does the proposition that '[d]rafting precision is essential'147 render a Bill of Rights unachievable? _An Australian Charter of Rights?_

also argues

that politics is substantially concerned with issues of wealth-distribution [and, therefore], any guarantee which, by plain words or possible interpretation, protects property interests is almost certain to propel the courts into the political arena and confrontation with legislatures.148

But, cannot politics also be characterised as 'substantially concerned' with protecting, preserving and maintaining human rights? A proliferation of statutory enactments seems to mandate an affirmative response.149 If so, would not courts

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142 Wilcox, above n 4, 24.
143 Differing assessments as to whether a change occurred and, if so, when and at what rates are in Thomson, 'Mirages of Certitude: Justices Black and Douglas and Constitutional Law', above n 17, 76 n 66; 81 n 95. See also Stanley Friedelbaum, _The Rehnquist Court: In Pursuit of Judicial Conservatism_ (1994).
145 Wilcox, above n 4, 25.
146 See above nn 50-61.
147 Wilcox, above n 4, 25.
148 Ibid.
be entering 'the political arena' and, inevitably, thrust into 'confrontation with legislatures'?\textsuperscript{150}

Any claim that 'it can be cogently argued that, between 1890 and 1937, the nett [sic] effect of the Bill of Rights was adverse to the interests of ordinary Americans'\textsuperscript{151} should recognise that equally cogent opposing arguments and conclusions also exist.\textsuperscript{152} To espouse the former view, however, provides a vivid contrast to and, therefore, surreptitiously strengthens the claim that more recently the Bill of Rights has been a 'success'.\textsuperscript{153} Initially, Wilcox's reasons seem obvious and correct:

[C]onstitutional guarantees will not necessarily ensure the maintenance of civil liberties. That maintenance depends upon the values, integrity and courage of judges. The selection of people with those qualities depends in turn, upon the maintenance of a vigorous, open democracy espousing liberal values. The effectiveness of a Bill of Rights, at different periods of American history, seems to have closely reflected the degree to which the United States achieved that condition.\textsuperscript{154}

At least, three rejoinders can be proffered. Firstly, is it empirically obvious that maintenance of civil liberties depends on judges? Absence of constitutionally entrenched rights may render courts impotent against parliaments or legislative sovereignty. Yet, civil liberties may still exist. Australian, Canadian, New Zealand and United Kingdom history may constitute only the obvious examples.\textsuperscript{155} Even where such rights exist, do courts only operate at the margins? Do the real safeguards and determinants of civil liberties repose elsewhere? Vigilance of the people, community values and historical traditions may be more important and durable than a multitude of good judges.\textsuperscript{156} Second, why does Wilcox choose

\textsuperscript{150} Wilcox, above n 4, 25.
\textsuperscript{151} Ibid. However, as Wilcox appears to recognise, the commerce clause (US Constitution, Art 1, s 8, cl 3) and substantive due process were also involved: Wilcox, above n 4, 16.
\textsuperscript{152} See above nn 100-10.
\textsuperscript{153} Wilcox, above n 4, 26.
\textsuperscript{154} Ibid.
\textsuperscript{156} There is a fear

that dependence on [judges] will rob the people of the awareness that they ... must be the ultimate defenders of their ... freedom. Judge Hand ... contends that no court can save a people who have lost the desire to defend their .... liberties and that none is needed to protect the rights of those who feel responsible for their own defense ... Professor Freund has pointed out that this argument is based on a false dichotomy between a people ... lost beyond saving or secure beyond help. There are no such people. The question is not whether ... courts can do everything or nothing. It is whether they can do something.

and make foundational ‘liberal values’? As a desirable attribute of democracy such values are being questioned, denigrated and discarded. Other values, such as republicanism and conservatism, are increasingly perceived as better for people and the community.157 Finally, a formidable implication is manufactured: an effective Bill of Rights determines whether ‘a vigorous, open democracy’ exists. Again, that linkage is open to empirical refutation and intellectual debate.158

III CANADA

Compared to the USA, Canadian experience with constitutional rights159 has been considerably shorter and, therefore, less vibrant and without the range of historical vicissitudes. In quantity and quality, depth and breadth, the comparison is stark.160 An Australian Charter of Rights? traverses the three major epochs — 1867 to 1960, 1960 to 1982 and 1982 to 1993 — which constitute the history of human rights in Canada. From Confederation in 1867161 to 1960, Canada


158 See above nn 155-7.


160 See above n 17 (comparative analyses).

survived without a federal Bill of Rights. The Canadian Constitution,\textsuperscript{162} as Wilcox suggests, contained ‘no [express] guarantee of individual rights’.\textsuperscript{163} However, it did include structural protections,\textsuperscript{164} ‘two group-right provisions’\textsuperscript{165} and the potential for an ‘implied Bill of Rights’ to be judicially developed.\textsuperscript{166} The Canadian Parliament was more adventurous. Enacted, by that Parliament, in 1960, the Canadian Bill of Rights\textsuperscript{167} continues to operate as federal law. However, despite judicial characterisation as a ‘quasi-constitutional instrument’, the Canadian Supreme Court\textsuperscript{168} has only utilised the Bill of Rights to hold inoperative one federal legislative provision.\textsuperscript{169} At least from this perspective, this Bill of Rights adventure might be deemed a failure. Confinement also occurs in two other respects: non-applicability of the Bill of Rights ‘to rights and freedoms under provincial control’\textsuperscript{170} and the Canadian Parliament’s ability — via the notwithstanding clause — to expressly declare that federal legislation was to operate despite abridging Bill of Rights requirements.\textsuperscript{171}

Reaching the third epoch required constitutionalising rights. That was done in the Canadian Charter of Rights and Freedoms\textsuperscript{172} which, except for section 15,\textsuperscript{173} became operative on 17 April 1982.\textsuperscript{174} Simultaneously, patriation of the Canadian Constitution occurred.\textsuperscript{175} Endeavours to accomplish both events were intertwined. Ascertaining the intentions behind the Canadian Charter of Rights and Freedoms, its words, phrases and structure, therefore, requires resort to over a

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\textsuperscript{162} In 1982, the 1867 BNA Act was renamed Constitution Act 1867. Texts of Constitution Acts 1867-1982 are in Hogg, above n 61, 1301-68.

\textsuperscript{163} Wilcox, above n 4, 28.

\textsuperscript{164} Ibid (‘presumably ... a combination of parliamentary democracy, an independent judiciary and the common law’). A similar view of Australia’s Constitution is in \textit{Australian Capital Television} (1992) 177 CLR 1, 180-8 (Dawson J dissenting). The 1787 US Constitution had stronger structural rights protections: see above n 26.


\textsuperscript{166} Wilcox, above n 4, 28-9. Elaborated in Hogg, above n 61, 774-7 (including post 1982 revival of implied rights); Zines, ‘\textit{ Constitutional Change in the Commonwealth}’, above n 6, 43-5 (including post-Charter revival). See below nn 216, 226-32.

\textsuperscript{167} Reproduced in Hogg, above n 61, 1369-71. Discussed in Hogg, above n 61, 779-91.


\textsuperscript{169} Wilcox, above n 4, 31-3 (quoting and referring to \textit{R v Drybones} [1970] SCR 282). Elaborated in Hogg, above n 61, 781-7, 789 n 49 (Supreme Court remedies other than inoperative legislation).

\textsuperscript{170} Wilcox, above n 4, 31, 33. Cf above nn 78, 159, 165.


\textsuperscript{173} Equal protection provision, operative 17 April 1985 because of s 32(2): Wilcox, above n 4, 39; Hogg, above n 61, 1155.

\textsuperscript{174} Wilcox, above n 4, 36; Hogg, above n 61, 53.

\textsuperscript{175} Hogg, above n 61, 53-9.
decade of debates, negotiations and drafting. Accompanying that historical excursion are questions concerning the relevance of those intentions, for example, for the meaning of the Charter's words and interpretative principles or methodologies usually, though not exclusively, used by courts when confronting constitutional provisions.

In addition to specific rights, the Charter has several important and fundamental features. They include express subjugation of all Charter rights and freedoms to 'reasonable limits prescribed by law'; application of those rights and freedoms to federal and provincial executive and legislative authority but not to judicial power or private actions; and express federal and provincial legislative power to enact legislation to operate 'notwithstanding' resulting abrogation of some constitutional rights and freedoms. That litany is not exhaustive. Qualifications or conditions in specific rights, in addition to the 'reasonable limits' proviso, render those rights a good deal less than absolute. Further contributions to that result are made by the varying interpretative strategies enunciated by courts to deal with the Charter. Several consequences emerge. Legislative and judicial interplay is sanctioned. Dialogue, not dominance or supremacy, appears to be envisioned and encouraged. Balance between constitutional rights and other values is sought. Some aspects of Canadian life are rendered immune from federal constitutional rights. Like the US Bill of Rights, which in varying degrees and ways replicates those consequences, perennial questions emerge: which prevails, express rights, legislation or judicial interpretation; who decides, parliaments, the people or courts; and, ultimately, is a constitutional system more

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177 Suggestions are in David Schneiderman, 'Taking Documents Seriously' (1991) 2 Supreme Court Law Review (2nd ed) 555; Hogg, above n 61, 824-5, 1286-91; Wilcox, above n 4, 98. See also above n 45.
178 Discussed by Wilcox, above n 4, 56-176 and above n 172.
179 Section 1 discussed by Wilcox, above n 4, 45-56; Hogg, above n 61, 851-89. It has been conceded that:
   the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test' ... Although the nature of [this test] will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. R v Oakes [1986] 1 SCR 103, 139 (Dickson J) (quoted in Wilcox, above n 4, 52). Examples of judges 'balancing competing values' are in Wilcox, above n 4, 65-6. Cf above n 64 (judicial balancing under Australian and US Constitutions).
180 Section 32(1) discussed by Wilcox, above n 4, 37-9, 74 n 281; Hogg, above n 61, 829-50. See above nn 56, 90 (US Constitution public/private dichotomy controversies).
181 Section 33 discussed by Wilcox, above n 4, 39-40, 177-82; Hogg, above n 61, 891-901; Gibson, above n 23, 431-4 (s 33 permits 5 year suspension of all overridable constitutional rights by federal, provincial or territorial legislatures, even by an omnibus statute overriding all such rights in all existing and future legislation, perhaps subject to s 1 judicial review, as discussed in above n 179). Cf above nn 62, 63 (US congressional power).
182 For example, ss 6(3), 7 ('fundamental justice' principles), 8 ('arbitrarily'), 11(a) ('unreasonable'), 11(b) ('reasonable'), 11(c) ('military law'), 15(2) ('affirmative action'), 24 ('appropriate and just').
183 See, eg, above n 179; Wilcox, above n 4, 40-5; Hogg, above n 61, 809-25.
conducive to the people's welfare and happiness with or without a Bill of Rights?

A vast bulk of *An Australian Charter of Rights?* is devoted to strolling through particular aspects — the minutaie — of the Canadian Charter's fundamental features and specific rights. Long quotations from Canadian Supreme Court opinions enunciate, for example, positions individual judges have formulated or taken on substantive issues of law; distinctions and tests which are evolving; and differences of judicial opinion on results in individual cases. Almost inevitably, therefore, most, if not all, of these specifics will, over time, change. In this respect, *An Australian Charter of Rights?* may quickly become obsolete. Of course, that defect can be obviated by a continuing plethora of published judicial and scholarly commentary on the Canadian Charter. Perhaps, more important, significant and long-term benefits can be derived from Wilcox's Canadian excursion by endeavouring to discern 'the universal in the particular.' One generality can immediately be distilled from the already large and rapidly expanding volume of Charter litigation. Judicial 'gymnastics' abounds. The vast latitude and discretion which the Charter's words and phrases, for example, 'reasonable limits ... as can be demonstratedly justified in a free and democratic society,' seemingly gives judges can and has been utilised to convert personal preferences and values into constitutional law. Here, exercises of power and compromises are reminiscent of accusations hurled at American judges in relation to substantive due process cases, such as *Lochner*, and civil liberties decisions under the equal protection clause, for example, in *Brown*. This raises important questions: Do personal preferences influence judicial decisions? If so, how and to what extent? Do judges become politicians? Is constitutional law, even in the Canadian Supreme Court, politics? Of course, such conundrums raise larger jurisprudential debates: Is this inevitable? Can judges be restrained? If so, how and to what extent?

184 See above n 5.
186 Figures and discussion are in Gerry Ferguson, above n 23, 217-9; Morton, above n 23; Gibson, above n 23, 425 (1982-1992 'huge body of Charter law').
187 Wilcox, above n 4, 27.
188 Section 1 (above n 179).
189 Traditional examples above n 100. See also above n 103. Others argue that judges do not constitutionalise personal preferences and such preferences and judicial decisions often diverge. Frankfurter J is the classic example: Thomson, above n 17, 74 n 55 (references).
190 Wilcox recognises this occurs on the Canadian Supreme Court: Wilcox, above n 4, 68 ('In fashioning the necessary compromise').
191 See above n 104.
192 See above n 41.
194 Attempts to deal with this issue by creating and destroying Canadian theories of judicial review include: Manfredi, above n 172; Bayefsky, above n 17; Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (1987) 3-138, 245-
Another universal theme inheres in the types of cases involving the Canadian Charter. Their similarity to American, and occasionally Australian, cases is notable. That is, cases involving similar subjects or controversial problems are universally litigated. Prominent examples include abortion; one vote one value electoral systems; pornography; commercial, hate and political speech; religious rest days; and numerous criminal law matters. Given a relevant degree of factual similarity often produces decisional diversity, a broader issue protrudes. Does a Bill of Rights make any difference? If so, what difference? For example, would the same result have eventually emerged or been sustained if the constitution did not contain a Bill of Rights? Given those issues, the Canadian Charter portion of An Australian Charter of Rights, not surprisingly, reveals a third general theme. Are Bills of Rights beneficial? Again, opinions differ. Added to opinion polls, political rhetoric and general literature, is a diversity of academic scholarship on this issue. As Wilcox hints, a student and articulate opposition, including ideologies associated with the non-conservative political views, deprecates the Canadian Charter. Similar comments; Robyn Martin, ‘Legitimizing Judicial Review under the Charter: Democracy or Distrust?’ (1991) 41 University of Toronto Faculty of Law Review 62; Allan Hutchinson, ‘Waiting for Coral (or the Beautification of the Charter)’ (1991) 41 University of Toronto Law Journal 332. See also above nn 45, 46, 60 (American judicial review theories).

See above n 17 and below nn 196-203. Comparative constitutional law casebooks are in Thomson, ‘Comparative’, above n 6, 25 n 6.

Glendon, Abortion, above n 17; Glendon, ‘A Beau’, above n 17; Beschle, above n 17. Discussion (Wilcox, above n 4, 109-11) of Canada’s Charter abortion decision ( Morgentaler [1988] 1 SCR 30) does not refer to Roe (above nn 42, 139). However, Wilcox (above n 4) recognises that s 7 of the Charter, on which Morgentaler was ‘based entirely’ (108), has been ‘used substantively’ (103) and given ‘substantive content’ (97) and quotes Canadian Supreme Court discussions of the substantive and procedural due process dichotomy (95-6) and their relevance to Canadian constitutional interpretation of this US debate (98-9). However, Wilcox does not elaborate upon the vital issue: What is the significance of this for judicial review and the fundamental questions (above nn 103, 109, 116, 133, 135, and below n 279) it imports into constitutional law?

Wilcox, above n 4, 56-60 (Canada); Harvie and Foster, above n 17. :


Wilcox, above n 4, 67-71; Australian Capital Television (1992) 177 CLR 1 (Australia); and above n 53 (USA).

Wilcox, above n 4, 56-60 (Canada); Laurence Tribe, above n 27, 1193 (USA).

Wilcox, above n 115-59; Harvie and Foster, above n 17.

See above n 23 (normative and empirical assessments). See also below n 207.

Wilcox, above n 4, 182-93.

Ibid 38 n 156, 74 n 28.

See above n 157 (Canadian communalism); ‘Book Review’ above n 17; Joel Bakan, ‘Constitutional Interpretation and Social Change: You Can’t Always Get What You Want (Nor What You Need)’ (1991) 70 Canadian Bar Review 307; Monahan, above n 23, 387; Andrew Petter, ‘The Politics of the Charter’ (1986) 8 Supreme Court Law Review 473 (Charter’s detri mental effect on the politically, socially and economically disadvantaged); Andrew Petter,
cerns have, of course, been expressed in America\textsuperscript{208} and Australia.\textsuperscript{209} Inevitably, that generates attempts to amend which, occasionally, result in amendments to the Constitution.\textsuperscript{210} Within a decade of the Charter's enactment, major constitutional reform proposals were debated and drafted by Canadians and, in particular, federal and provincial legislatures and governments.\textsuperscript{211} That process was long, protracted and often acrimonious. No constitutional amendments, however, eventuated as the 1987 Meech Lake Accord\textsuperscript{212} and 1992 Referendum on the Charlottetown Accord\textsuperscript{213} were rejected.\textsuperscript{214}

IV \textbf{A U S T R A L I A}

\textit{An Australian Charter of Rights?} espouses the traditional view of federal\textsuperscript{215} constitutional rights.

The Australian Constitution contains no Bill or Charter of Rights, so called. It does confer [in sections 8, 24 and 30] what might be called 'democratic rights', relating only to Commonwealth elections. It also contains provisions [in sections 51(xxxi), 80, 116 and 117], each of limited application, in respect of four topics of individual concern.


208 See, eg, above nn 26, 27 (Federalists' 1787 opposition to including a Bill of Rights) and below nn 258-63.

209 See above nn 6, 7.

210 For example, in the USA (above nn 28, 29, 34), Canada (above n 176 and below nn 211-4) and Australia (below n 225).

211 Proposed amendments are below nn 212, 213. Amendment powers and procedures are in Hogg, above n 61, 61-95. Are these subject to the Charter?: Hogg, above n 61, 72-3 (negative answer). Possibilities of unconstitutional amendments are above n 33, 34 (USA); James Thomson, 'Reserve Powers of the Crown' (1990) 13 University of New South Wales Law Journal 420, 426-7 n 41 (India); The Report of the Republic Advisory Committee, An Australian Republic: The Options (1993) vol 1, 118-22.


213 Russell, above n 176, 237-63 (text of Accord).


As recent High Court decisions have demonstrated, some rights are implied by the form of the Constitution.\(^{216}\)

Perhaps, to bolster arguments for an Australian Charter of Rights, that is, even from the traditional perspective, a very restrictive enumeration of federal constitutional rights. However, other express provisions might also be included. Section 7, for example, gives people the right to directly choose Senators. Section 25 can be characterised as an anti-racial discrimination provision.\(^{217}\) ‘Civil conscription’ is expressly prohibited in relation to Commonwealth legislative power ‘with respect to … [t]he provisions of … medical and dental services’ in section 51(xxiiA). Section 109 has been invoked as a protection against some retrospective Commonwealth laws.\(^{218}\) Strangely, Wilcox also omits the constitutional injunction on federal and state powers that ‘trade, commerce, and intercourse among the States … shall be absolutely free.’ Freedom of ‘intercourse’ has been invoked, even in war-time, against Commonwealth restrictions on personal movement.\(^{219}\) Perhaps more importantly, section 92, especially when its individual rights theory and the conception that it constitutionalised an economic \textit{laissez-faire} doctrine were predominant, has been compared with substantive due process under the American Constitution.\(^{220}\) Of course, given the High Court’s general record on overruling precedents, particularly in section 92 cases,\(^{221}\) a

\(^{216}\) Wilcox, above n 4, 194, 202. Subsequent High Court decisions on these provisions include: \textit{Goryl v Greyhound Australia Pty Ltd} (1994) 179 CLR 463 (s 117); \textit{Cheatle v Queen} (1993) 177 CLR 541 (s 80); \textit{Mutual Pools & Staff Pty Ltd v Commonwealth} (1994) 119 ALR 577; \textit{Health Insurance Commission v Peverill} (1994) 119 ALR 675; \textit{Georgiadis v Australian & Overseas Telecommunications Corporation} (1994) 119 ALR 629; \textit{Re DPP; ex parte Lawler} (1994) 119 ALR 655 (s 51 (xxii)).


\(^{219}\) \textit{Gratwick v Johnson} (1945) 70 CLR 1 (order under National Security (Land Transport) Regulations prohibiting interstate travel without a permit issued at Director-General’s discretion held unconstitutional): discussed in Coper, above n 11, 89-90. See also below n 223 (implied right of movement). Further discussions are in \textit{Australian Capital Television Pty Ltd v Commonwealth} (No 2) (1992) 177 CLR 1, 191-6 (Dawson, J.). Pending litigation is \textit{Phillip Morris v Commonwealth} (No M55 of 1994); Cheryl Saunders, ‘Challenge on Points of Power’, \textit{Weekend Australian} (Sydney), 11-12 June 1994, 25 (validity of Tobacco Advertising Prohibition Act 1992 (Cth)).

\(^{220}\) Section 92’s individual rights theory is analysed in \textit{Zines, High Court}, above n 6, 100-2; Coper, above n 219, 305-6 (‘ostensibly value free interpretation … entrenched in the Constitution the principle of laissez-faire’); Sir Anthony Mason, ‘Law and Economics’ (1991) 17 \textit{Monash University Law Review} 167, 175-7; Geoffrey Sawer, \textit{Australian Federalism in the Courts} (1967) 187 (concept of ‘reasonable regulation … import[ed] into [s 92] the range of ideas appropriate to the US due process clause … when it was given a substantive interpretation’).

\(^{221}\) Section 92 ‘has given rise to … more overrulings, explicit or disguised, than any other main topic’: Sawer, above n 220, 174. Discussion is in Coper, above n 11, 306-7. Volatility of s 92 precedents continued in \textit{Cole v Whitfield} (1988) 165 CLR 360.
return to those views cannot be precluded.\textsuperscript{222} Finally, a much stronger and wider-ranging implied rights theory than Wilcox concedes has been articulated.\textsuperscript{223}

A newer view promulgates a more robust approach to existing constitutional rights.

It is often said that the Australian Constitution contains no bill of rights. Statements to that effect, while literally true, are superficial and misleading. The Constitution contains a significant number of express or implied guarantees of rights or immunities. The most important of them is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the ‘courts’ designated by Ch[apter] III (s 71). Others include: ... s 80; the guarantees against discrimination between persons in different parts of the country in ... ss 51(ii), 51(iii), 86, 88 and 90; ... s 92; ... ss 24 and 25; ... s 116; and the guarantee against being subjected to inconsistent demands by contemporaneously valid laws (ss 109 and 118).

All of those guarantees of rights or immunities are of fundamental importance in that they serve the function of advancing or protecting the liberty, the dignity or the equality of the citizen under the Constitution. Some of them, such as ss 71, 90, 92, 109 and 118 are also integral parts of the very structure of the federation. Section 117 falls into that last-mentioned category.\textsuperscript{224}

Perhaps, propelled by the realisation that there may well not be constitutional amendments adding a comprehensive Bill of Rights or a few specific rights,\textsuperscript{225} this perspective endeavours to read the Constitution’s words, structures, silences and implications in the most rights oriented way possible. Its principal propo-


\textsuperscript{223} Elaboration (including adumbration of arguments for and against such judicially created rights) is in Zines, Change, above n 6, 39-42, 45-6, 51-2, 54; Zines, High Court, above n 6, 330-9; Winterton, above n 60, 223, 227, 228-35, 239; George Winterton, ‘The Separation of Judicial Power as an Implied Bill of Rights’ in Lindell, above n 6, 185; Dennis Rose, ‘Judicial Reasoning and Responsibilities in Constitutional Cases’ (1994) 20 Monash University Law Review 195; O’Neill and Handley, above n 6, 75-84; D Smallbone, ‘Recent Suggestions of an Implied “Bill of Rights” in the Constitution, Considered as a Part of a General Trend in Constitutional Interpretation’ (1993) 21 Federal Law Review 254; and above n 6 and below nn 226-32. See also above n 215 (Union Steamship).

\textsuperscript{224} Street v Queensland Bar Association (1989) 168 CLR 461, 521-2 (Deane J.). Section 44, eg, might also be included: Sykes v Cleary [No 2] (1992) 176 CLR 77, 121 (‘democratic right’ to be elected to Commonwealth Parliament). [The list of rights in the Constitution is surprisingly large, and [Australians] ... have in extraordinary measure overlooked or ignored them’; Bailey, above n 6, 79. Elaboration in Bailey, above n 6, 79-105.

\textsuperscript{225} Rejected constitutional proposals are in Final Report, above n 6, 456; Geoffrey Sawer, Australian Federal Politics and Law: 1929-1949 (1963) 171-3; Galligan and Nethercote, above n 35 (overwhelming 1988 referendum rejection of rights provisions); Hanks, above n 6, 123, 126, 128; Lee, above n 6, 627 (‘resounding [referendum] defeat’ not a ‘clear indicator’ denying the High Court a ‘popular mandate to [create] new rights’); [Queensland] Electoral and Administrative Review Commission, above n 6, 64-5, 71-6. See also below n 238 (rejected statutory proposals).
nents include Justices Murphy, Deane, Toohey and Gaudron. Others occasionally include Chief Justice Mason and Justice Brennan.

What differentiates Wilcox from real adherents to the traditional view is Wilcox’s quickness to grasp and eulogise implied rights which appear attractive. For example, he considers *Nationwide News* and *Australian Capital Television*, where several Justices articulated an implied ‘[f]reedom of communication in relation to public affairs and political discussion,’ to be decisions representing the high-water mark, so far at least, in relation to the implication of human rights guarantees in Australia. They demonstrate the possibility of human rights being constitutionally protected, even in the absence of express words.

But, the result of these cases was stark: those judicially created ‘human rights’ protected and benefited large media corporations. The latter, not humans, were the aggrieved litigants. Commonwealth legislation, particularly provisions in *Australian Capital Television*, enacted to provide individual electors time to think and reflect free from media interference, was held unconstitutional. One consequence is clear. Large, wealthy and powerful corporations were given constitutional rights and protections. Smaller, poorer and weaker individuals, who had gained legislative protection, were rendered constitutionally vulnerable. That, of course, is reminiscent of American constitutional law between 1861 and 1937. More pertinently, it may be analogous to post 1970 First Amendment law, which has been viewed as ‘replacing the due process clause [of the Fourteenth Amendment] as the primary guarantor of the privileged. Indeed, [the First Amendment] protects the privileged more perniciously than the due process clause ever did.’ Curbing his enthusiasm, Wilcox recognises that ‘a policy question’ is involved: ‘how far ... go in discerning constitutional implications?’ Lurking behind this intellectual conundrum is, how-

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227 See above n 7 (Mason CJ). Brennan’s position is in Brennan, above n 6; Sir Gerard Brennan, ‘The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response’ in Alston, above n 1, 177; and cases in above nn 6, 15, 226.

228 See, eg, Dawson J (above n 164). However, Wilcox suggests Dawson J may be prepared to imply some constitutional limitations: above n 4, 203 n 745.


232 Wilcox, above n 4, 207 (footnotes omitted).

233 See above n 14.

234 Tushnet, above n 111, 1387. This inequality is explored in Nicholas Wolfson, ‘Equality in first amendment theory’ (1993) 38 *St Louis University Law Review* 379 (‘disparities in speech power’). See also above n 14 (Australia).

235 Wilcox, above n 4, 208.

236 Some responses are in ibid 208 (quoting John Doyle and Belinda Wells, ‘How Far Can the Common Law Go Towards Protecting Human Rights’ in Alston, above n 1, 107, 120); and above nn 223, 226-7.
ever, a much more fundamental problem: should courts be implying constitutional rights at all? Of course, *An Australian Charter of Rights?* concedes that numerous attempts to insert express rights into the Constitution\(^237\) and enact a statutory Bill of Rights\(^238\) have been strongly and consistently rejected by Australian electors and Commonwealth parliamentarians. At least, that appears to indicate a political or democratic response to quandaries over judicial implications. Assume that is correct. Is something more at stake? At this juncture, Wilcox recapitulates the standard intellectual manoeuvres for and against a Bill of Rights.\(^239\) Avoidance of repetition, therefore, requires only selective responses.

To ‘easily’ cure the danger of courts interpreting the constitutional protection given by a Bill of Rights to expressly adumbrated rights ‘as an implied repeal or negation of unspecified rights,’ Wilcox suggests its exclusion by a provision akin to ‘the Ninth Amendment to the United States Constitution and s 26 of the *Canadian Charter of Rights and Freedoms*.\(^240\) But, at least the former,\(^241\) may do much more. It was pivotal in the adumbration of constitutional privacy rights\(^242\) which culminated in *Roe v Wade*.\(^243\) Whether the 9th Amendment contains even more — an unlimited repository of unwritten and amorphous constitutional rights — remains a matter of vigorous debate.\(^244\) A suggestion ‘that the constitutional recognition of particular rights represents a transfer of State power to the central government’\(^245\) is dealt with by Wilcox reiterating the Constitutional Commission’s reply: ‘all spheres of government will be equally constrained.’\(^246\) Does that response suffice? If rights were inserted into the Austra-

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\(^{237}\) See above n 225.

\(^{238}\) Details, including the Murphy (1973), Evans (1984) and Bowen (1985) Bills, are in [Queensland] Electoral and Administrative Review Commission, above n 6, 65-71; *Final Report*, above n 6, 456-9; Charlesworth, above n 6, 205-10; Issues Paper, above n 215, 89-90. That ‘there has been no widespread support for the adoption in Australia of a comprehensive catalogue of fundamental rights, freedoms and values’ is clearly evidenced by these and above n 225 referendum rejections: Hanks, above n 6, 128. See also above n 215 (rejected State Bills of Rights). Therefore, are High Court Justices (eg, above nn 226, 227), especially as statutory rights exist, acting too much as counter-majoritarians? Commonwealth human rights legislation includes: the Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Human Rights and Equal Opportunity Act 1986 (Cth); Privacy Act 1988 (Cth); Disability Discrimination Act 1992 (Cth). Analyses include: Charlesworth, ‘Reluctance’, above n 6, 211-8; Bailey, above n 6, 106-247; Melissa Conley Tyler, ‘The Disability Discrimination Act 1992: Genesis, Drafting and Prospects’ (1993) 19 MULR 211.

\(^{239}\) Wilcox, above n 4, 214-48. See also above nn 6, 7.

\(^{240}\) Wilcox, above n 4, 216. A similar suggestion is in *Final Report*, above n 6, 480-3.

\(^{241}\) The 9th Amendment’s potential as an unenumerated rights repository: above n 61. Is section 26 of the Charter ‘equivalent’? Hogg, above n 61, 827 n 154 (affirmative answer).

\(^{242}\) *Griswold v Connecticut* 381 US 479 (1965) 485 (state law punishing married couple’s use of contraceptives held unconstitutional) (‘zone of privacy created by [1st, 3rd, 4th, 5th, 9th Amendments which] have penumbras, formed by emanations from [them] that help give them life and substance’). Discussed in Tribe, above n 27, 775-7, 1338, 1348, 1605-6.

\(^{243}\) 410 US 113 (1973). See above nn 42, 139. ‘[T]he Supreme Court ... took the dramatic step of extending Griswold ... in *Roe*: Tribe, above n 27, 1341 (footnotes omitted).’ Six decades of privacy precedents, from *Meyer* [above n 99] ... to *Griswold* [above n 242] ... and *Roe* [above n 42]: Tribe, above n 27, 1422.

\(^{244}\) See above n 61.

\(^{245}\) Wilcox, above n 4, 216.

\(^{246}\) Ibid 217 (quoting *Final Report*, above n 6, 448).
lian Constitution, they would be federal constitutional rights. Therefore, rights litigation could constitute an exercise of federal jurisdiction\(^{247}\) which, apart from the High Court, might be exclusively vested in the Federal Court.\(^{248}\) State courts would be unable to decide such cases.\(^{249}\) Given US experience,\(^{250}\) might not that involve a transfer of power from State to Commonwealth authority?

In addition to standard arguments concerning a Bill of Rights exacerbation of counter-majoritarian judicial review problems,\(^{251}\) *An Australian Charter of Rights?* advances an argument — 'the benefit to government of judicial review'\(^{252}\) — of seemingly irresistible force. Here, reliance is placed on Justice Brennan’s assertion:

There are some issues which, in a pluralist and divided society, are the subject of such controversy that no political party wishes to take the responsibility of solving them. The political process may be paralysed. If governments can create a situation where such issues are submitted to curial decision, political obloquy can be avoided by governments, though it is sometimes transferred to courts, as the continuing controversy over *Roe v Wade* illustrates. However, the judicial method commands a broader acceptance than the political process, and the courts, in the exercise of a jurisdiction under a Bill of Rights, can sometimes cut a political Gordian knot. The desegregation decisions of the [US Supreme Court] provide the classic example.\(^{253}\)

Can it be true? Are *Roe v Wade*\(^{254}\)\(^{255}\) and the desegregation decisions, presumably including *Brown v Board of Education*,\(^{256}\) being paraded to prove or support the central tenets and foundational premises of this argument for judicially enforced constitutional rights? Slowly and surely — perhaps, inevitably, given the

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\(^{247}\) Australian Constitution ss 76(i) and 77(i) enable Commonwealth legislation to vest jurisdiction in the High Court and any federal court ‘in any matter ... arising under [the Australian] Constitution.’ By s 76(ii), the same effect can be achieved with a Commonwealth statutory Bill of Rights.

\(^{248}\) Ibid s 77(ii).

\(^{249}\) Ibid. A possible exception (based on s 5 of the Commonwealth of Australia Constitution Act 1900 (UK)) is in Lee Harvey and James Thomson, ‘Some Aspects of State and Federal Jurisdiction Under the Australian Constitution’ (1979) 5 *Monash University Law Review* 228.


\(^{251}\) Wilcox, above n 4, 231-5 (referring to Bickel and Thayer). Subsequent elaborations and variations are above n 116; ‘One Hundred Years of Judicial Review: The Thayer Centennial Symposium’ (1993) 88 *Northwestern University Law Review* 1-468. Attempts to dissolve judicial counter-majoritarianism and responses are also in Wilcox, above n 4, 235-8; and above n 116, 251.

\(^{252}\) Wilcox, above n 4, 236.

\(^{253}\) Brennan, above n 227, 183 (footnote omitted) (quoted by Wilcox, above n 4, 237).

\(^{254}\) 410 US 113 (1973): above nn 42, 139, 243.

nature of American constitutional law discourse and, indeed, the whole 1954-1969 Supreme Court rights revolution era are being attacked. Conservatives, of course, from the outset repudiated the Supreme Court’s decisions and doctrines and disdained judicial activism. Current denigration is perpetrated by scholars who espouse ‘liberal values’ and, originally, may have applauded the Supreme Court’s decisions. Their arguments and empirical evidence focus precisely on the features of judicial review An Australian Charter of Rights? considers to be irresistible. That is, judicial intervention was detrimental, not beneficial, to civil rights and liberties. The Supreme Court interfered with or interrupted political process which, though slower than courts, would, after more extensive debate and discussion, have made decisions. Political initiatives and alternative solutions were irrevocably blocked by judicial review. Judges did not initiate or lead a civil rights revolution. Rather, courts impeded or retarded progress on rights. Those needing meaningful recognition of their rights would have been better off without judicial assistance. Of course, intertwined with these assertions are more general, but no less significant, jurisprudential and utilitarian critiques of rights.

256 That is, the law, history and politics of the US Constitution are continually subject to revision. Dramatic examples include: above nn 28, 61, 97-110, 113-33, 135, 142-4 and below nn 259, 262.


258 First, this includes individual judicial decisions, constitutional law doctrine and the general concept of rights. Second, differing assessments proliferate as to when and how much Warren Court era rights decisions have been repudiated: above n 143. Third, political, normative and empirical attacks are below nn 269, 270.


260 Wilcox, above n 4, 26. Wilcox wants ‘the maintenance of a vigorous, open democracy espousing liberal values.’: Wilcox, above n 4, 26. However, others, articulating different visions and democratic values, disagree: above n 157 and below n 263.

261 Thomson, ‘Mirages of Certitude’, above n 17, 69 n 10 (pro Black and Douglas JJ scholars), 81 n 90 (pro Warren Court scholars).

262 Expanding political, normative and empirical elaboration (particularly debating Brown’s empirical and normative significance for the 1960s US civil rights revolution) is in Thomson, ‘Mirages of Certitude’, above n 17, 81-2; Seidman, above n 257; Mark Tushnet, ‘The Bricoleur at the Center’ (1993) 60 University of Chicago Law Review 1071, 1087-98 (ineffective judicial reform, because of courts’ institutional defects, hindering ‘development of sensible compromises’ in racial discrimination, anti-pornography legislation, abortion and poverty-welfare reform); Cass Sunstein, ‘How Independent is the Court?’ (22 October 1992) 39(17) New York
What if these current attacks are intellectually and empirically wrong? Does the ‘benefit’ argument prevail? Any response must take into account two more of its features. Not only does it ignore Thayer’s264 warning ‘that judicial review would have a debilitating effect upon the sense of responsibility of legislators


and electors.'265 It also expressly advocates abdication of such democratic and political responsibility. In a representative majoritarian democracy or even in a constitutional democracy,266 that is not an insignificant step to take.

Ultimately,267 is confidence in individuals 'the last best, hope'268 when major reliance is placed on judicial independence, integrity, competency and objectivity? Even if, at least to some degree, that can be achieved,269 in the final analysis, for Wilcox, does this all come down to the 'public perception of judges'270 and is this what really matters? Wilcox suggests that

[m]any decisions of the Australian High Court have considerable political significance. But that fact has not led to a loss of public regard. The court is seen as a group of highly competent, non-political-people. [Wilcox can] see no reason to doubt that this position can be maintained, for all Australian judges, under a Charter [of Rights] provided ... that proper selection processes are adopted and ... that judges follow [the] ... prescription of 'conspicuous objectivity and impartiality in word, conduct and reasoning.'271

But, for example, did not public imbroglios surround the tenures of Chief Justice Barwick272 and Justice Murphy?273 Haven't there been public revelations

265 Wilcox, above n 4, 232. Critiques and assessments are in 'One Hundred', above n 251.
266 That is, majoritarianism tempered by checks and balances: see, eg, Australian Constitution, ss 2 (Governor-General appointed), 7 (state, not population, basis of Senate representation), 15 (casual senator vacancies appointed), 64 (ministers appointed), 72 (judges appointed).
267 Wilcox, above n 4, 246-8 (selection of judges). Analyses of judicial appointments are in Thomson, 'Appointing High Court Justices', above n 10 (Australia); Thomson, 'Prologue to Power', above n 259 (USA); Mark Silverstein, Judicious Choices: The New Politics of Supreme Court Confirmations (1994).
268 'We shall nobly save, or meanly lose, the last best, hope of earth.': Abraham Lincoln, 'Annual Message to Congress' (1 December 1862) in Roy Basler (ed), The Collected Works of Abraham Lincoln (1953) vol 5, 518, 537. Context is in Mark Neely, The Last Best Hope of Earth: Abraham Lincoln and the Promise of America (1993).
270 Wilcox, above n 4, 248.
271 Ibid (quoting King CJ). However, empirical evidence confirms the conclusion that 'the behaviour of judges over the centuries has been rather erratic [as guardians of liberties].': Zines, Change, above n 6, 36.
about the High Court’s internal machinations? Is there an implication that US Supreme Court Justices do not follow that ‘prescription’? An Australian Charter of Rights? garners no empirical research or data on these matters. Do a majority of Australians know that the High Court exists? Do they know anything about its procedures and powers or the Justices? Would their knowledge and interest in courts change if Australia had a Bill of Rights? Then, what would be the ‘public perception of judges’ in Australia?

V Conclusion


Wilcox, above n 4, 248.

Some empirical data is in Final Report, above n 6, 43:

A survey conducted in April 1987 showed that only some 53.9% of Australians knew that Australia has a written Constitution. In the 18-24 age group, nearly 70% of the respondents did not know that [Australia has] a written Constitution. The survey showed that the people most aware of the Constitution and its significance are men ... over 35 years ... who left school at 17 years ... or older, who work full time and are white collar workers.

not dampens, this phenomenon. Without succumbing to routine or revolution, provocatively and nuanced narratives and analyses can be proffered. Especially for lawyers, one fundamental example protrudes: adumbrating, constructing and synthesising theories of judicial review, constitutionalism and justice. Celebration, not remorse, is, therefore, possible. If this eventuates, the very best features of Australian constitutional law will be prominently displayed.

277 Elaborated in Thomson, above n 28, 211 n 192.
278 Others are in above nn 23, 60, 90, 103, 109, 116, 119, 135, 193, 194.
279 Should legislators and judges respond to an interest-group and pluralistic conception of the political process?: above n 20. If so, is the judicial role process-perfecting and representation reinforcing?: Ely, above n 44. Or, should courts be above the 'play of interests' and endeavour to discern and protect substantive values?: Tribe, above n 27. If so, do principles of deliberative democracy, albeit external to the Constitution's text (above n 60), provide a requisite source for constructing principles of constitutional interpretation (above nn 46, 64, 179) and theories of judicial review (above n 194)?: Cass Sunstein, 'Liberal Constitutionalism and Liberal Justice' (1993) 72 Texas Law Review 305. Or, is such democratically based constitutionalism too partial or thin to adequately protect individual rights?: Fleming, above n 109. That is, which should prevail: republican civic virtue rights of democratic dialogue or liberal protections against governmental intrusions into private spheres?: above n 157. These conundrums implicate two fundamental inquiries. First, not only which rights should be 'trumps' but who — courts, legislatures, voters — should have the ultimate decision? (Above nn 17 (non-justiciability), 62-3 (politics, converted into legislation, may prevail)). For example, should courts have no role (above n 17), some role — ranging from weak (Ely, above n 44) to strong (Tribe, above n 27) theories of judicial review — or the ultimate role (above n 24)? Second, what, if any, relationship exists or should exist between constitutional law theories and theories of justice? Can constitutionalism ensure a good and just society?: Sunstein, above n 279.