

# BILLS OF RIGHTS IN FUNCTIONING PARLIAMENTARY DEMOCRACIES: KANTIAN, CONSEQUENTIALIST AND INSTITUTIONALIST SCEPTICISMS

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*[Most functioning democracies have charters of rights as part of the constitution or as a special statute. These instruments are generally accepted as valued constitutional features despite local debates about their scope and application. However, in the parliamentary democracies of the United Kingdom, Australia, Canada and New Zealand, there is continuing debate about the wisdom of having a bill of rights. This paper is a critical examination of the principal theoretical arguments against a bill of rights in any form, focusing on Kantian, consequentialist and institutionalist objections. The paper finds flaws in the Kantian and consequentialist arguments and proposes that the institutionalist approach to the issue is more instructive in evaluating the worth of a bill of rights. It concludes that, given the institutional settings of the Australian political and legal system, a statutory bill of rights narrowly focused on Lockean natural rights may strengthen constitutional government.]*

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## I INTRODUCTION

In many countries, a bill of rights is generally accepted as a valued constitutional feature. Local disagreements are mostly about the meaning and application of specific provisions than with the wisdom of having such an instrument. Yet the idea of a rights charter is, or has been, highly controversial in the United Kingdom, Canada, New Zealand, and Australia. It is only recently that the three first-mentioned countries adopted general charters of rights and freedoms. In

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1982, Canada adopted the *Canadian Charter of Rights and Freedoms* as part of its *Constitution*.<sup>1</sup> However, it allows the federal and provincial legislatures to override key provisions by express enactment.<sup>2</sup> In 1990, the New Zealand Parliament enacted the *New Zealand Bill of Rights Act 1990* (NZ). The Act remains subject to the express will of the New Zealand Parliament, though politically it may be difficult to repeal. In 1998, the British Parliament enacted the *Human Rights Act 1998* (UK) c 42, giving effect to the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR').<sup>3</sup> The Parliament may repeal the Act by express legislation,<sup>4</sup> although again, public opinion and ECHR obligations may prove to be difficult obstacles. Australia does not have a national rights charter, although the *Australian Constitution* expressly or impliedly protects a number of basic civil and political rights. A government-initiated National Human Rights Consultation recommended the enactment of a federal Human Rights Act based on the dialogue model,<sup>5</sup> but the previous government declined the recommendation for the time being in the midst of intense debate.<sup>6</sup> Even in Canada, New Zealand and the United Kingdom, there are ex post facto arguments about the adoption of the rights charters. I offer a critical assessment of some of the key philosophical arguments against bills of rights in parliamentary democracies and an alternative way of assessing the debate from the viewpoint of institutional theory. I hope to demonstrate that when the discussion of the relevant issues is informed by the institutional standpoint, the differences between the two sides in this debate will appear to be less serious than first thought.

Outside observers may be excused for some bemusement at this Anglophone controversy for, after all, the protection of human rights and freedoms is an aspiration of all liberal democratic societies and a bill of rights is considered a principal means to that end. A clue to understanding the controversy may be gained by noticing the following important political features that these four countries share. First, these countries have, and are firmly committed to, parliamentary systems of government, albeit with significant local variations. Secondly, they have inherited to a large extent the English common law with respect to basic rules, doctrines, presumptions and methods, including adversarial proceedings and the practice of judicial precedent. The common law has developed historical safeguards of basic rights and liberties to which reference is made later. Thirdly, and most importantly, for most of their modern history they

<sup>1</sup> *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

<sup>2</sup> *Ibid* s 33.

<sup>3</sup> *ECHR*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

<sup>4</sup> *Thoburn v Sunderland City Council* [2003] QB 151, 186–7 (Laws LJ).

<sup>5</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009). The dialogue model allows courts to interpret legislation consistently with specified rights and freedoms and, where that is not possible, make declarations to that effect, leaving the final resolution to the legislature.

<sup>6</sup> See Robert McClelland, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010); Australian Government, *Australia's Human Rights Framework* (2010) <<http://www.ag.gov.au/humanrightsframework>>.

have enjoyed a stable democratic government with a relatively high degree of respect for individual rights and freedoms unaided by judicially enforceable rights charters. It is not surprising given this experience that the idea of a bill of rights finds its most rigorous examination in these countries.

There is no strong sentiment in the United Kingdom, Australia and New Zealand to adopt constitutionally entrenched bills of rights in the sense of instruments that may only be changed according to more onerous procedures prescribed for constitutional amendment. In the case of the United Kingdom and also perhaps New Zealand, parliamentary sovereignty poses a serious obstacle to the constitutional entrenchment of rights otherwise than by revolution. The push has been to adopt statutory bills of rights that remain subject to legislative revision. This paper is an examination of some of the principal objections to the latter kind of charter. The most common objection to a bill of rights (in any form) heard in these countries is that it transfers power to determine contentious moral questions and matters of social policy from elected legislatures to unelected judges. This is an incomplete argument even if we assume that this is what a bill of rights does. Why is it bad to leave these questions for judicial resolution? Not all objectors address this question, but those who do give a variety of philosophical or practical reasons. Among the most interesting reasons are those grounded in Kantian individualism, consequentialism and some form of institutional theory. It is not possible in this paper to consider all variants of the basic objections. Instead, I will focus on the views of two contemporary and two historical sceptics who bring to the debate different reasons for opposing rights charters: Jeremy Waldron, James Allan, Michael Oakeshott and Friedrich A Hayek. Waldron and Allan combine their scepticism of bills of rights with confidence in simple majority parliamentary democracy. Oakeshott and Hayek are sceptical of both bills of rights and majoritarian democracy. It is useful to make some conceptual clarifications about the question we are addressing before engaging with these views.

## II WHAT IS MEANT BY 'BILL OF RIGHTS'?

'Bill of rights' is a term of convenience which has been attached to different kinds of instruments. Many democratic constitutions incorporate declarations of judicially enforceable rights and freedoms. These provisions cannot be set aside by legislation except in the manner prescribed for the amendment of the constitution. In other countries, a bill of rights may exist as a special statute that nevertheless is susceptible to change or repeal by legislation enacted in the ordinary manner. Usually, such change would require express language, in the absence of which courts will interpret laws consistently with the bill of rights. Thus, s 3(1) of the *Human Rights Act 1998* (UK) c 42 instructs courts that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read

and given effect in a way which is compatible with the *Convention* rights.<sup>7</sup> In practical terms, this means that the courts have power to change the meaning and effect of laws to make them accord as far as possible with the *ECHR* rights as interpreted by the European Court of Human Rights. Critics argue, correctly in my view, that this represents a substantial increase of the powers of courts to make decisions on moral and policy questions.<sup>8</sup>

In the parliamentary democracies that provide the background to this discussion (the United Kingdom, Canada, New Zealand and Australia), there is an extensive range of common law and statutory rules and presumptions that protect basic civil liberties and freedoms. Important parts of the law of criminal procedure and the law of evidence have as their chief aim the enforcement of procedural rights of persons. The presumption of innocence, the burden of proof, the prevention of detention without trial, the exclusion of hearsay evidence, rules concerning evidentiary relevance, and the inadmissibility of confessions to police are only some of the more prominent safeguards that the common law and its codifications offer citizens. They promote cumulatively the most fundamental right of persons not to be punished except according to law and after being found guilty at a fair trial. The substantive criminal law protects persons from torture and many forms of ill-treatment. The administrative law rules and remedies, common law presumptions against the violation of basic rights, and the independence of the courts are other parts of this framework of legal protection that citizens of these countries enjoy. However, these do not add up to a traditional bill of rights. The legislature can and does erode these protections from time to time, as most recently demonstrated by counter-terrorism laws in these countries.<sup>9</sup> What a statutory bill of rights does is aggregate the most important of these rights and certain other political rights, such as those relating to speech, association and participation and the right of equality before the law, and present them in an instrument that can be overridden only by express and transparent, and hence also politically hazardous, legislative acts.<sup>10</sup>

The opponents of rights charters argue that the power of the legislature to overrule judicial interpretations of rights does not significantly diminish the power of courts to determine important moral and political questions that should properly be left to the democratic process.<sup>11</sup> I will concede this point not only because it is hard to contest factually but also to get to the question that I really want to address: why should courts not have power to determine such questions?

<sup>7</sup> Cf *New Zealand Bill of Rights Act 1990* (NZ) s 6: 'Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this *Bill of Rights*, that meaning shall be preferred to any other meaning.'

<sup>8</sup> See, eg, James Allan, 'Oh That I Were Made Judge in the Land' (2002) 30 *Federal Law Review* 561, 566.

<sup>9</sup> See *Counter-Terrorism Act 2008* (UK) c 28; *Anti-Terrorism Act (No 2) 2005* (Cth); *Anti-Terrorism Act*, SC 2001, c 41; *Terrorism Suppression Act 2002* (NZ).

<sup>10</sup> See *R v Momcilovic* (2010) 265 ALR 751, 779–80 [103]–[104] (Maxwell P, Ashley and Neave JJA).

<sup>11</sup> See, eg, Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999) 268–9.

## III WALDRON'S KANTIAN ARGUMENT AGAINST BILLS OF RIGHTS

Waldron's opposition to bills of rights, painstakingly developed in *Law and Disagreement*, goes through the following stages.

First, Waldron argues that disagreement is a pervasive feature of social life. We are all familiar with disagreement on questions of fact and law and legal rights and duties. This is the stuff of legal practice. There is also routine disagreement on what laws we should have. All this is plain. Yet there is a widespread opinion that basic civil and political rights and freedoms (for example, the right not to be tortured, the right not to be punished in the absence of guilt found in a fair trial, the freedom to vote at parliamentary elections, the freedom to express opinions and the freedom to hold and practice one's religion) are self-evidently worthy of protection, even against the majority will. Not so, argues Waldron. It is disagreement all the way down to the very fundamental principles by which a society is organised. Waldron is right. There is disagreement about the limits of free speech, association and franchise, about what amounts to a fair trial, what forms of religious practice should be banned, how enemy combatants and terrorists should be treated and so forth. A bill of rights, Waldron argues, removes these contentious issues from elected assemblies to unelected judges.<sup>12</sup> This is an overstatement, as statutory bills of rights do not prevent parliaments from resolving these questions if they so wish, although the United Kingdom Parliament will be constrained by the *ECHR*. Even if Waldron's claim is true, what is the mischief?

Second, Waldron observes that society is held together in the face of disagreement by law. It is law that allows us to go about our lives in relative peace and harmony despite our differences.

The authority of law rests on the fact that there is a recognizable need for us to act in concert on various issues or to co-ordinate our behaviour in various areas with reference to a common framework, and that this need is not obviated by the fact that we disagree among ourselves as to what our common course of action or our common framework ought to be.<sup>13</sup>

Hence we (usually) obey the law (if we happen to know what it is) even when we dislike it.

This argument does not take Waldron very far. Law can be made in many different ways and by different kinds of bodies while claiming the same authority. Many societies in the past lived by customary laws that were products of social evolution. In absolute monarchies like the Roman and Sinic Empires, laws were made by the unilateral will of the monarch (*quod principi placuit, legis habet vigorem*<sup>14</sup>). In oligarchies like ancient Sparta the law was made by a select group. In England until the 19<sup>th</sup> century the development of the law and hence the declaration of rights and liberties of subjects was left chiefly to the common

<sup>12</sup> See, eg, *ibid* 213.

<sup>13</sup> *Ibid* 7.

<sup>14</sup> Thomas Collett Sandars, *The Institutes of Justinian with English Introduction, Translation, and Notes* (Callaghan & Company, 1876) 72.

law courts. In many countries today, including Australia and Canada but not in the United Kingdom and New Zealand, primary legislation is susceptible to invalidation by courts having constitutional jurisdiction. Thus, law made in different ways may serve the same object of making social life possible among people who disagree about what rights individuals ought to have.

This brings Waldron to the third stage of his case: a bill of rights removes questions that divide society to an unelected body such as the courts and hence violates what he considers the 'right of rights', which is the right of persons to have a say on contentious issues. In other words, this is the 'right of having a share in the making of the laws'.<sup>15</sup> He does not claim moral priority for this right. Waldron's argument is that this right does not conflict with any other right because it is concerned with the question of what rights we actually have.<sup>16</sup> This does not necessarily make the right of democratic participation the 'right of rights'. In fact, Waldron's 'right of rights' is in reality a right to have one's rights determined by a parliamentary majority. Yet in many societies people do not wish their rights to be determined by majority, but would leave such questions to councils of elders, wise persons, judges or religious authorities. In other words, in some communities the 'right of rights' may simply be the right of members to have their rights and duties determined by an established authority that may not necessarily be democratically elected. Waldron's case is still incomplete.

That brings Waldron to the fourth, Kantian stage of the argument. He contends that a bill of rights, by removing contentious moral questions to an unrepresentative body such as the courts, offends the dignity of the individual as an autonomous person. In entrenching a right, he argues, we show self-assurance in our own view and mistrust of the views of others.<sup>17</sup> This attitude of mistrust does not sit well with 'a view of the individual person as essentially a thinking agent, endowed with an ability to deliberate morally and to transcend a preoccupation with his own particular or sectional interests.'<sup>18</sup> Alternatively, he argues that such entrenchment is motivated by a 'predatory view of human nature and of what people will do to one another when let loose in the arena of democratic politics'.<sup>19</sup> Mistrust of majority views may not mean 'self-assurance in our own view' but a healthy scepticism of the way unrestrained majoritarian democracy works. This is the reason that Hume recommended constitutional designers to suppose every man to be a self-interested knave.<sup>20</sup> Of course one may have faith in majorities, but that does not make it a 'right of rights'.

<sup>15</sup> Waldron, *Law and Disagreement*, above n 11, 232, quoting William Cobbett, *Advice to Young Men, and (Incidentally) to Young Women, in the Middle and Higher Ranks of Life: In a Series of Letters Addressed to a Youth, a Bachelor, a Lover, a Husband, a Father, a Citizen, or a Subject* (1829), quoted in L J Macfarlane, *The Theory and Practice of Human Rights* (Temple Smith, 1985) 142.

<sup>16</sup> Waldron, *Law and Disagreement*, above n 11, 232.

<sup>17</sup> *Ibid* 221–2.

<sup>18</sup> *Ibid* 222.

<sup>19</sup> *Ibid*.

<sup>20</sup> David Hume, 'Of the Independency of Parliament' in Eugene F Miller (ed), *Essays: Moral, Political, and Literary* (Liberty Fund, first published 1777, 1987 ed) 42, 42. See below n 25 and accompanying text.

There is one more uncomfortable question for Waldron. What if the majority of the electorate through its elected representatives adopts a statutory bill of rights such as the *New Zealand Bill of Rights Act 1990* (NZ)? This Act may be amended or repealed at any time by other legislation passed by a bare majority in Parliament. Courts may not invalidate legislation for inconsistency with the *New Zealand Bill of Rights Act 1990* (NZ) but may read it down where possible to achieve conformity with the *Bill of Rights*.<sup>21</sup> Waldron calls this kind of rights charter ‘precommitment’ view of constitutional constraints.<sup>22</sup> He argues that even such precommitment undermines democracy by leaving moral disagreements to the decision of another authority. His favoured analogy is of Bridget, who, after much vacillation, adopts faith in a personal God. She locks up her library of theological books and gives the keys to a friend asking her never to return them to her. Later, though, her doubts return and she asks for the keys, but the decision is now in the friend’s hands and Bridget has no voice in the matter.<sup>23</sup> This scenario is a false analogy even with respect to a constitutionally entrenched bill of rights. Bridget represents the people and the friend the constitutional court. The analogy is false because the people have a means of taking the decision into their own hands by expressly or impliedly (in the case of the United Kingdom and New Zealand) amending the constitution, whereas Bridget may not have a legal (or moral) means of getting the keys back. The analogy is even weaker in relation to a statutory bill of rights that the elected legislature may overturn by bare majority. This is akin to Bridget saying to the friend ‘do not return the keys unless I ask for them three times and in writing’. Waldron has since conceded as much:

now, I do think it is important for individual legal systems to represent for themselves the principles of individual rights — human rights — to which they take themselves to be committed. Such rights will also be represented in positive law at the international level. And it is important for this to be matched by positivization at the level of municipal legal systems as well. I do not deny that the task of interpreting a bill of rights will necessarily fall to the judiciary in individual cases. But where major issues emerge — the sort of issues I have called ‘watershed’ issues — I think it is important that courts should not have the last word in any dispute with the legislature, even where that dispute can be represented as an issue of interpretation.<sup>24</sup>

However, Waldron maintains his argument against constitutional bills of rights. He takes the traditional case for limiting the power of democratic assemblies and turns it on its head. The demand for rights protection against majority or minority power has historically been a plea to recognise the dignity and autonomy of the individual. Mistrust of unlimited power has been the keystone of liberal

<sup>21</sup> *New Zealand Bill of Rights Act 1990* (NZ) s 6: ‘Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this *Bill of Rights*, that meaning shall be preferred to any other meaning.’

<sup>22</sup> Waldron, *Law and Disagreement*, above n 11, 258.

<sup>23</sup> *Ibid* 268–9.

<sup>24</sup> Jeremy Waldron, ‘Refining the Question about Judges’ Moral Capacity’ (2009) 7 *International Journal of Constitutional Law* 69, 72 (citations omitted).

constitutionalism. It is the reason why David Hume wrote that ‘in contriving any system of government, and fixing the several checks and controuls of the constitution, every man ought to be supposed a *knave*, and to have no other end, in all his actions, than private interest.’<sup>25</sup> It is the reason that James Madison wrote in the *Federalist No 51*: ‘If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.’<sup>26</sup> It is the reason that John Locke maintained that where the legislature violated the terms of the trust, ‘the *trust* must necessarily be *forfeited*, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.’<sup>27</sup> It is the reason that the greatest philosophical apologist for absolute power, Thomas Hobbes, wrote in *Leviathan*: ‘The end of obedience is protection’, and ‘[t]he obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he [the sovereign] is able to protect them.’<sup>28</sup> For Waldron, this concern for the individual is precisely the reason why democratic power should be unfettered.

#### *A Agreement and Disagreement*

There is another way of looking at law and disagreement. Waldron is right about disagreement. There is no society without disagreement at all levels. However, there is also no society where most members do not *substantially* agree on the fundamental rules of association. Where there is no substantial agreement on the basic rules of social life, there is no society. We must remember that societies existed long before governments and parliaments were established and those societies had law, not necessarily in the legal positivist sense of state law, but in the sociological and anthropological sense of rules by which people live, interact and cooperate. The various rules that protect person and property and demand the performance of contracts were not made by formal agreement or by legislatures established by social contract as Hobbes and Locke suggested. They were the outgrowth of human experience and necessity. As David Hume observed, rules of justice, like other conventional things such as language and currency, ‘[arise] gradually, and [acquire] force by a slow progression, and by our repeated experience of the inconveniences of transgressing [them].’<sup>29</sup> They arise through the coincidence of behaviour as when ‘[t]wo men, who pull the oars of a boat, do it by an agreement or convention, tho’ they have

<sup>25</sup> Hume, ‘Of the Independency of Parliament’, above n 20, 42.

<sup>26</sup> ‘The Structure of the Government Must Furnish the Proper Checks and Balances between the Different Departments’ in Michael A Genovese (ed), *The Federalist Papers: Alexander Hamilton, James Madison, and John Jay* (Palgrave Macmillan, first published 1788, 2009 ed) (*Federalist No 51*) 119, 120 (attributed to James Madison).

<sup>27</sup> John Locke, *Two Treatises of Government* (Cambridge University Press, first published 1689, 1970 ed) 385 (emphasis in original).

<sup>28</sup> Thomas Hobbes, *Leviathan* (George Routledge and Sons, 2<sup>nd</sup> ed, 1886) 105.

<sup>29</sup> David Hume, *A Treatise of Human Nature* (Clarendon Press, first published 1739–40, 1967 ed) 490.



never given promises to each other.<sup>30</sup> Or as Max Weber wrote, law formation happens when diffused habits are ‘incorporated as “consensus” into people’s semi- or wholly conscious “expectations” as to the meaningfully corresponding conduct of others.’<sup>31</sup> The fundamental rules of social life are therefore the results of a deeper and more profound consensus than anything formal contract or democratic legislation can achieve in a society of diverse individuals. They are more authentic and compelling for they have crystallised through the coincidence of individual expectations and the selective pressures of social life in an uncertain world. This process of legal evolution does not produce unanimity. Although a critical mass in society agrees on what is right behaviour, there are frequent disagreements not only about violations of rules but also about the rules themselves. Societies have learned through experience to entrust the resolution of disputes to trustworthy arbitrators such as elders and judges. These arbitrators not only applied the law in individual cases but also determined what the law was. Thus courts became integral to the process of legal evolution long before the emergence of parliaments as lawmakers. People turned not to parliaments but to courts to settle their disagreements on law and facts. Courts became the original custodians of the law of the land.

None of this refutes Waldron’s key objection to rights charters. Waldron may respond as follows. It is true that before there were elected parliaments, people relied on customary law and traditional courts to secure their rights and liberties. However, that type of political arrangement always involved the sacrifice of individual autonomy because disputed questions about the content and application of the law were decided *ultimately* by a body (the judiciary) according to a procedure that denied popular participation. The emergence of parliamentary democracy in England finally ended this sorry state of affairs by giving people the right to vote in parliamentary elections. It is true that in England, adult women and even men without property did not get to vote until 1928.<sup>32</sup> But since then, every adult (except those disenfranchised by Parliament from time to time) has the ‘right of rights’ to play a part in the resolution of disagreements. The crux of this argument is that we disrespect the individual as an autonomous agent if questions that affect them are not settled by a majoritarian parliamentary process that allows individual voices to be heard, however faintly. There are, however, further problems with this thinking.

### B Majoritarianism and Individual Autonomy

First, at a pragmatic level, we know that parliamentary majorities do not always respect the autonomy of the individual. History has repeatedly demonstrated that minorities under majoritarian systems do not always enjoy the Kantian consideration that underlies Waldron’s case against bills of rights. The

<sup>30</sup> Ibid.

<sup>31</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Bedminster Press, 1968) 754.

<sup>32</sup> See *Representation of the People (Equal Franchise) Act 1928*, 18 & 19 Geo 5, c 12.

*Weimar Constitution*<sup>33</sup> did not prevent (and some would argue even facilitated) the rise of the genocidal Nazi regime.<sup>34</sup> Zimbabwe's majoritarian democracy (even before the Mugabe regime systematically destroyed the opposition and corrupted the electoral process) sanctioned the oppression of minorities and political opponents. The Sri Lankan legislature, dominated by Sinhala majorities, systematically favoured the Sinhalese as against the Tamil minority through language policies and quota systems. The Malaysian democracy privileges the *Bumiputra* over other communities.<sup>35</sup> Public choice and interest group theorists have long argued that even in mature democracies such as the United Kingdom, the United States and Australia, legislation is often the outcome of interest group bargaining that represents collective choice only in a formal and distorted sense.<sup>36</sup> Waldron concedes that majoritarian democracy is flawed but argues that not all legislation is so tainted and that there is no reasonable ideal against which we can measure legislation.<sup>37</sup> Others, like myself, argue that there are ideals such as Aristotle's *politeia*<sup>38</sup> or classical republicanism that should guide constitutional development.<sup>39</sup>

Waldron's position that individual dignity and autonomy are best served by the type of participation rights associated with untrammelled majoritarian democracy faces further challenges. What Waldron calls the 'right of rights', the right to participate in decisions about what other rights we are to enjoy, is meaningless unless it is effective. It requires, minimally, the right of an adult person to cast a vote at parliamentary elections that is actually counted and is of roughly equal value to the votes cast by others. Additionally, the persons who vote must have a reasonable choice of candidates to select from. A one-party democracy makes nonsense of the right of rights. In turn, reasonable choice requires a reasonable degree of freedom to make known the choices and to discuss the choices, as the High Court of Australia unanimously held in *Lange v Australian Broadcasting Corporation*.<sup>40</sup> Waldron argues that the constitutional guarantees of these participation rights would be justified only if one or both of the following conditions are present, conditions that he claims have not been established by the proponents of bills of rights.

<sup>33</sup> *Die Verfassung des Deutschen Reichs (Weimarer Reichsverfassung)* [Weimar Constitution].

<sup>34</sup> At the 1933 election, Adolph Hitler's Nazi Party gained only 43.9 per cent of the vote, but following the Reichstag fire on 27 February 1933, Hitler persuaded the President to suspend all basic rights including the right to *habeas corpus*, paving the way for the systematic annihilation of the opposition beginning with the communists.

<sup>35</sup> See *Federal Constitution* (Malaysia) art 153, in particular art 153(2).

<sup>36</sup> See, eg, James M Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1962) 134–5; Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (Yale University Press, 1982) 37.

<sup>37</sup> See Waldron, *Law and Disagreement*, above n 11, 32–3.

<sup>38</sup> See Aristotle, *Aristotle's Politics* (Benjamin Jowett trans, Oxford University Press, 1916) 136, 157 [trans of: *Politica*].

<sup>39</sup> See Suri Ratnapala, 'Separation of Powers: Cornerstone of Liberty under Law' in Suri Ratnapala and G A Moens (eds), *Jurisprudence of Liberty* (LexisNexis, 2<sup>nd</sup> ed, 2010) 53.

<sup>40</sup> (1997) 189 CLR 520, 559–61 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

The first is that people are ‘constant and unanimous in their conception of majority-decision and of the conditions necessary for its effective realization.’<sup>41</sup> The second is that these freedoms are so fragile that precommitment to them is desirable.<sup>42</sup> He says that debates about voting systems, parliamentary terms, free speech limitations and so on show that in mature democracies there are healthy discussions of these questions.<sup>43</sup> Waldron is right about the existence of such debates but wrong about what conclusions we should derive from their occurrence. These debates happen because of the very freedoms that are debated. Discussion will come to a shuddering halt the day free speech is outlawed and adult suffrage is removed. Thus the kind of democracy that makes the right of rights realisable is one that ensures these freedoms to a reasonable degree by constitutional, statutory or other institutional means. As Christiano puts it, ‘if in all disagreements, individuals must have a say in the resolution, then we are in danger of a regress as a result of disagreements about equality, democracy, and even the value of the theses that Waldron himself proposes.’<sup>44</sup> Waldron concedes this implicitly in speaking of the second condition that proponents of rights charters must satisfy, which is that the existence of these freedoms are tenuous. In my view it is here that Waldron makes his most interesting contribution.

Waldron concedes that ‘[d]issidents do need an assurance that their opposition will not elicit a repressive or murderous response.’<sup>45</sup> But he says that in the United States and the United Kingdom, ‘there are robust and established traditions of political liberty’<sup>46</sup> that prevent such a reaction. He concludes:

For that reason, then, and because these background issues of political structure, political procedure, and political culture remain the subject of ongoing, healthy, and benign disagreement, the panic-stricken model of Odyssean precommitment seems singularly inappropriate as a basis or template for constitutional theory.<sup>47</sup>

If mistrust of unfettered democracy and precommitment to a few ground rules for political action amounts to panic-stricken theorising, then the rich tradition of Western constitutionalism has been panic-driven from Aristotle through Cicero, Aquinas, Grotius, Locke, Voltaire, Bentham, Kant, Montesquieu, Mill and Madison, and, in our era, Hayek, Oakeshott, Rawls and Dworkin. This of course is no answer to Waldron’s argument which is: where institutional constraints are sufficiently robust to restrain parliamentary excesses, a bill of rights is not necessary.<sup>48</sup> Four points may be made in this regard. First, not all countries enjoy the institutional strength of Britain. By institutions, I mean the less formal constraints, including but not limited to legal culture, political traditions and

<sup>41</sup> Waldron, *Law and Disagreement*, above n 11, 279.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* 279–80.

<sup>44</sup> Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press, 2008) 285–6.

<sup>45</sup> Waldron, *Law and Disagreement*, above n 11, 280.

<sup>46</sup> *Ibid.* 281.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

etiquette, judicial attitudes and techniques, professional ethics of key agents such as lawyers, public servants and journalists, and the customary social, moral and religious rules. Although difficult to measure, these are nevertheless real. Second, a bill of rights may make little or no difference in countries that are institutionally weak in the above sense. Third, assuming that institutionally strong nations may not need precommitment to basic participation rights, it does not follow necessarily that such precommitment will subvert the Kantian ideal of individual personhood and autonomy, which Waldron claims is the inevitable cost of judicial review. The point here is that in a strong institutional context judicial review may not diminish but may actually enhance autonomy. Fourth, in certain countries where institutions favourable to constitutional government are emerging but fragile, a bill of rights may prove catalytic.

I will return to the institutional dimension concerning rights protection to conclude this paper. However, before that, we should consider the views of other bills of rights opponents whom I mentioned at the outset.

#### IV JAMES ALLAN'S CONSEQUENTIALIST OBJECTION

My colleague James Allan, the Garrick Professor of Law at The University of Queensland, is perhaps the most consistently utilitarian critic of any form of bills of rights. Allan agrees with Waldron's disagreement thesis that in the face of pervasive disagreement, anything but a majoritarian system will deny individual autonomy.<sup>49</sup> However, Allan's view of the worth of autonomy is not based on Kantian self-evidence but on consequentialist considerations. Allan rejects the notion of 'natural rights' for being devoid of a scientific basis,<sup>50</sup> a view that I share. He maintains that apart from utilitarian considerations, there are only two ways of determining questions concerning rights. One is what Bentham called the 'principle' of sympathy and antipathy, which Bentham argued was no principle at all but simply one's disposition to approve or disapprove of something.<sup>51</sup> Allan rejects this way of thinking for the same reason.<sup>52</sup> According to Allan, the only other way of thinking about rights besides consequentialism is the Humean way that regards rights as 'an evolved system of intersubjective sentiments and evaluations'.<sup>53</sup> Allan says that this way of thinking 'provides no ultimate justification (as opposed to explanation) other than the way things happen to be.'<sup>54</sup> I think that the search for a foundation or ultimate justification for moral decisions is mistaken and, despite his choice of words, I believe Allan

<sup>49</sup> See, eg, James Allan and Andrew Geddis, 'Waldron and Opposing Judicial Review — Except, Sort of,' in New Zealand' [2006] *New Zealand Law Journal* 94.

<sup>50</sup> See James Allan, 'Utilitarianism and Liberty' in Suri Ratnapala and G A Moens (eds), *Jurisprudence of Liberty* (LexisNexis, 2<sup>nd</sup> ed, 2010) ch 14.

<sup>51</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, first published 1789, 1907 ed) 13–16 [XI]–[XII].

<sup>52</sup> James Allan, 'A Defence of the Status Quo' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 175, 186.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

is not trying to find one. Consequentialism does not look backwards to a foundation because none can be found. Rather, consequentialism looks forward to outcomes that result from the trial and error process of human inquiry and endeavour, seeking to retain what works.

Hume stated the principle of utility before Bentham:

It seems so natural a thought to ascribe to their utility the praise, which we bestow on the social virtues ... In common life, we may observe, that the circumstance of utility is always appealed to; nor is it supposed, that a greater eulogy can be given to any man, than to display his usefulness to the public, and enumerate the services, which he has performed to mankind and society. What praise, even of an inanimate form, if the regularity and elegance of its parts destroy not its fitness for any useful purpose! And how satisfactory an apology for any disproportion or seeming deformity, if we can show the necessity of that particular construction for the use intended!<sup>55</sup>

Hume's epistemology rejected the notion of innate ideas. All speculations are based on experience and the 'general habit, by which we always transfer the known to the unknown, and conceive the latter to resemble the former.'<sup>56</sup> Hume regarded the fundamental laws of social living as derived from their experienced utility and not by prescience and reason. Thus, rules of justice, like other conventional things such as language and currency, '[arise] gradually, and [acquire] force by a slow progression, and by our repeated experience of the inconveniences of transgressing [them].'<sup>57</sup> That is all there is to it — no foresight, no premonitions, no divine revelation, no mystical insight. Hume maintained that human selfishness and the scarcities of things provided by nature, and not the public interest or a strong sense of benevolence, are the origin of justice.<sup>58</sup> People are compelled to accept the rule concerning the stability of possessions in order to survive. If things were in abundance and people were naturally generous, justice would have no use. The impressions that give rise to the sense of justice are not natural '*but arise from artifice and human conventions*.'<sup>59</sup> Hume's message was that while utility is the only basis of moral judgment, in the absence of foresight and innate reason, we may only make judgments based on experience and speculation. Our basic rights are not natural but the result of social norms winnowed by experience. These norms are the 'three fundamental laws concerning the stability of possession, its translation by consent, and the performance of promises.'<sup>60</sup>

This interpretation of Hume does not undermine Allan's argument. Hume's fundamental laws encapsulate a minimal set of utilitarian rights that has been strongly supported by Bentham, John Stuart Mill and their latter day followers. Stability of possessions and their translation refer to property rights including

<sup>55</sup> David Hume, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (Clarendon Press, first published 1748, 1975 ed) 212.

<sup>56</sup> *Ibid* 107.

<sup>57</sup> Hume, *A Treatise of Human Nature*, above n 29, 490.

<sup>58</sup> *Ibid* 495–6.

<sup>59</sup> *Ibid* 496 (emphasis in original).

<sup>60</sup> *Ibid* 541.

self-ownership and the ownership of one's labour. The performance of promises refers to the freedom of contract. Even if these rights are accepted on utilitarian grounds, their limits and implications and their application in particular classes of cases remain to be determined. Allan's argument is that these matters involve moral questions about what rights we ought to have and their scope, and hence are better left to elected legislatures than to the judgment of unrepresentative courts. Allan argued in 1996 that a persuasive argument for a bill of rights can only be in terms of the 'long-term consequences'<sup>61</sup> of transferring power from legislatures and their electors to unrepresentative judges, and that for a moral subjectivist the 'consequential calculation will more often than not point *against* adopting a Bill of Rights.'<sup>62</sup> Allan's position with respect to statutory charters has since hardened with his observations of the judicial treatment of the *New Zealand Bill of Rights Act 1990* (NZ). The underlying utilitarian argument is that unelected judges are ill-equipped to make decisions that involve social policy and moral questions. 'Quite frankly', says Allan,

there are absolutely no grounds for thinking unelected judges have some sort of pipeline to heavenly wisdom and that *their* views are a better indication of truth than elected legislators' views on the questions of which statutory provisions are inconsistent with the [*New Zealand Bill of Rights Act 1990* (NZ)] rights and of whether they are anyway reasonable or justified.<sup>63</sup>

He thinks that courts empowered by a bill of rights have a tendency to extend their jurisdiction. 'An inflationary effect will kick in and the judges operating under a statutory model will simply take for themselves much of the power that was deliberately withheld from them.'<sup>64</sup> Whereas Waldron argues from the Kantian demand for equal respect for individuals, Allan appeals directly to the principle of utility. I find Allan's argument to be more forthright than Waldron's Kantianism. A parliament after all has more information at its command (including scientific studies), is electorally accountable to the community whose rights and expectations are in issue, is not limited by the scope of a specific dispute, has much wider discretion, and is not subject to the conflicting demands of fidelity to the law and moral judgment.

Yet, I do not think that consequentialist reasoning leads necessarily to the conclusion that a society is worse off with a judicially enforced bill of rights. At any rate, there is no significant perception in European parliamentary democracies that rights charters are harmful in the way that sceptics fear. Much more work has to be done before this conclusion is reached. The insights of new institutional economics may prove helpful for this task. It cannot be accomplished within the space of this paper, but the issues can be identified and tentative conclusions may be proposed. Allan and Waldron touch on the institu-

<sup>61</sup> James Allan, 'Bills of Rights and Judicial Power — A Liberal's Quandary' (1996) 16 *Oxford Journal of Legal Studies* 337, 338.

<sup>62</sup> *Ibid* 351 (emphasis in original).

<sup>63</sup> James Allan, 'Take Heed Australia — A Statutory Bill of Rights and Its Inflationary Effect' (2001) 6 *Deakin Law Review* 322, 328 (emphasis in original) (citations omitted).

<sup>64</sup> *Ibid* 322.

tional dimension of this debate but regrettably leave it unexamined. First though, let us consider the views of two thinkers who were sceptical of bills of rights but, unlike Waldron and Allan, also mistrust majoritarian democracy.

#### V SCEPTICS OF BILLS OF RIGHTS AND DEMOCRACY — OAKESHOTT AND HAYEK

The theories of Michael Oakeshott and Friedrich Hayek share two of the three elements of Waldron's theory, namely, the importance of individual autonomy and scepticism about rights charters. However, they lack Waldron's faith in majoritarian democracy as a means of upholding individual autonomy. Oakeshott and Hayek have strikingly similar views of democracy and the role of the state in a social order that gives primacy to the individual.

Michael Oakeshott was Harold Laski's successor in the Chair of Political Science at the London School of Economics and one of the leading conservative thinkers of the 20<sup>th</sup> century. He had no faith in what he termed the 'absurd device of a Bill of Rights',<sup>65</sup> for all the reasons discussed previously. Yet he was also one of the strongest conservative critics of majoritarian democracy. His polemic 'The Masses in Representative Democracy'<sup>66</sup> is a passionate defence of individuality against mass democracy. He wrote:

For, with universal suffrage have appeared the massive political parties of the modern world, composed not of individuals but of 'anti-individuals'. And both the instructed delegate and the *plébiscite* are devices for avoiding the necessity for making choices. The 'mandate' from the beginning was an illusion. The 'mass man', as we have seen, is a creature of impulses, not desires; he is utterly unable to draw up instructions for his representative to follow. What in fact has happened, whenever the disposition of 'popular government' has imposed itself, is that the prospective representative has drawn up his own mandate and then, by a familiar trick of ventriloquism, has put it into the mouth of his electors: as an instructed delegate he is not an individual, and as a 'leader' he relieves his followers of the need to make choices for themselves. And similarly, the *plébiscite* is not a method by which the 'mass man' imposes his choices upon his rulers; it is a method of generating a government with unlimited authority to make choices on his behalf. In the *plébiscite* the 'mass man' achieved final release from the burden of individuality: he was told emphatically what to choose.<sup>67</sup>

Oakeshott conceives the state that respects individualism as a *civil association* as opposed to an *enterprise association*.<sup>68</sup> An enterprise association is an association that exists to achieve a common substantive purpose known to the

<sup>65</sup> Michael Oakeshott, *Rationalism in Politics and Other Essays* (Liberty Press, revised ed, 1991) 459.

<sup>66</sup> Ibid 363.

<sup>67</sup> Ibid 380.

<sup>68</sup> See ibid 450–7.

associates. It is like an organisation or corporation that Hayek called *taxis*.<sup>69</sup> The Ford Motor Company, the Royal Navy, Arsenal Football Club and the Red Cross are such associations. Their rules of association are instrumental to achieving a substantive purpose<sup>70</sup> — the kind of rules that Hayek termed *thesei*.<sup>71</sup> The government of such an association functions as manager and the members as servants of the enterprise.<sup>72</sup> A civil association, on the contrary, has no shared substantive purpose.<sup>73</sup> It is in Hayek's terms, a *cosmos*.<sup>74</sup> Its members seek their disparate ends while obeying the association's general rules of conduct. They are

related to some others in all or any of the ways in which human beings may be related; but in *persona civica* they exist and are related solely in respect to their obligations to observe the conditions prescribed in these non-instrumental rules of conduct.<sup>75</sup>

These are the abstract and end-independent rules of just conduct that Hayek identified as *nomoi*.<sup>76</sup>

Hayek and Oakeshott agreed that the primacy of individual autonomy is achievable only where legislative power is limited to the enactment of general rules of conduct. They were also sceptical that a bill of rights was an effective means to this end. Oakeshott did not propose any alternative constitutional device. Hayek though developed a substantial constitutional design that has as its chief aim the containment of the legislative power of elected assemblies.<sup>77</sup> Like present day sceptics, he argued against a bill of rights on the ground that fundamental rights can never be absolute but are subject to the law of the land.<sup>78</sup> Yet for Hayek, the kinds of law to which rights must yield are not the end-focused legislative acts that elected parliaments enact for the benefit of particular classes or coalitions of special interests but the general rules of just conduct that form the basis of a civil association.

This will be clear when it is remembered that none of the traditional Rights of Man, such as the freedom of speech, of the press, of religion, of assembly and association, or of the inviolability of the home or of letters, etc, can be, or ever have been, absolute rights that may not be limited by general rules of law. Freedom of speech does of course not mean that we are free to slander, libel, deceive, incite to crime or cause a panic by false alarm, etc, etc. All these rights are either tacitly or explicitly protected against restrictions only 'save in accor-

<sup>69</sup> See F A Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy — Volume I: Rules and Order* (Routledge & Kegan Paul, 1973) 37.

<sup>70</sup> Oakeshott, above n 65, 450–1.

<sup>71</sup> See Hayek, *Law, Legislation and Liberty — Volume I*, above n 69, 20.

<sup>72</sup> Oakeshott, above n 65, 451.

<sup>73</sup> *Ibid* 454.

<sup>74</sup> See Hayek, *Law, Legislation and Liberty — Volume I*, above n 69, 36–7.

<sup>75</sup> Oakeshott, above n 65, 454.

<sup>76</sup> See Hayek, *Law, Legislation and Liberty — Volume I*, above n 69, 94–6.

<sup>77</sup> See F A Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy — Volume 3: The Political Order of a Free People* (Routledge & Kegan Paul, 1979) 128–30.

<sup>78</sup> *Ibid* 110.



dance with the law'. But this limitation, as has become only too clear in modern times, is meaningful and does not deprive the protection of those rights of all efficacy against the 'legislature', only if by 'law' is not meant every properly passed resolution of a representative assembly but only such rules as can be described as laws in the narrow sense here defined.<sup>79</sup>

Hayek imagined a constitution that implements a more effective separation of powers than what the founders of the *United States Constitution* achieved. The idea is to create two elected assemblies, one for governmental functions and the other for 'legislation proper'. Legislation proper in Hayek's conception is not 'governed by interests but by opinion, ie by views about what *kind* of action is right or wrong — not as an instrument for the achievement of particular ends but as a permanent rule and irrespective of the effect on particular individuals or groups.'<sup>80</sup> The governmental assembly performs its state functions subject to these laws. Hayek thought that a legislative assembly of relatively mature age persons elected for longer periods may be less vulnerable to interest group pressure. He did not rate the chances of such a scheme being embraced in any country with strong constitutional traditions but offered the model as an expository device to illustrate the background values that underpin constitutional democracy.<sup>81</sup>

The important philosophical point that both Oakeshott and Hayek made is that an unfettered parliament by its nature imperils individual autonomy. Democracy is self-defeating unless the theoretical omnipotence of parliament is practically limited by unwritten constraints and a disposition that values individuality.<sup>82</sup> The authors of many written constitutions in Western democracies, including the founders of the *Australian Constitution* and the *Canadian Constitution Act 1867*<sup>83</sup> did not place total faith in informal constraints and dispositions to limit the powers of elected governments. They installed judicially enforceable checks and balances, including a tripartite separation of powers to varying degrees, a federal dispersal of power (particularly in large or diverse nations), and in many cases constitutional guarantees of selected rights and freedoms. The exceptions among well-regarded democracies were the United Kingdom and New Zealand. These countries maintained an enviable standard of democracy and governance under law with virtually unlimited parliamentary sovereignty. Their success, as I argue, is because of the strength of their informal institutional constraints on those who wield political power, including the executive government, parliament, judges and other officials as well as private agents. The point that Hayek and Oakeshott make is not that elected legislatures must not be constrained but that bills of rights are not the right way to contain them.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid 112 (emphasis in original).

<sup>81</sup> Ibid 107–8. The model though is not very dissimilar to the British *Constitution* of the 19<sup>th</sup> century, under which the aristocratic and unelected House of Lords had the power to reject legislation.

<sup>82</sup> See Oakeshott, above n 65, 432–4.

<sup>83</sup> *Constitution Act 1867* (Imp) 30 & 31 Vict, c 3 ('*Constitution Act 1867*').

According to these thinkers, and this writer, the key ingredient of constitutional government that assures individual autonomy is not the unbridled power of elected assemblies or philosopher judges but the existence of real constraints on all centres of power. This is not achieved by well-written constitutions and charters (though they help) but by an institutional matrix that includes formal and informal rules as well as political tradition and culture. Written constitutions and rights charters are only as effective as the respect that they command in the political life of the community. Thus the advantage or disadvantage of a bill of rights and indeed whether it will be useful at all will depend on these underlying conditions. This is the lesson of history to which we now turn.

#### VI LESSON OF HISTORY

What lesson can we draw from the histories of rights protection across nations? At one end of the spectrum, we may locate the United Kingdom of the 20<sup>th</sup> century, which maintained, relative to most other nations, a strong (though blemished) record of human rights protection unaided by any rights charter.<sup>84</sup> At the other end, we find that in some countries, well-crafted (perhaps also well-intentioned) charters of rights have proved wholly ineffective against the might of the state. Over 130 countries have a bill of rights in one form or another but only a minority of them can truly claim a reasonable record of respect for human rights.<sup>85</sup> In many cases, reasons for failure are found in constitutional defects. Emergency powers and special majority devices, for example, allow governments to override or circumvent rights guarantees.<sup>86</sup> However, this is only a partial explanation. The abuse of constitutional powers by rulers requires a fuller explanation that takes account of the weakness of less formal institutional constraints on political power. In between these ends of the spectrum are two interesting categories. There are countries with respectable records of preserving basic rights and liberties where enforceable bills of rights are a feature of the constitutional structure. They constitute a majority of Organisation for Economic Co-Operation and Development democracies, including three of the largest economies: the United States, Japan and Germany. Then there is the case of the South Asian democracies, principally India, where the judiciary has positively usurped legislative and executive power by use of constitutionally guaranteed fundamental rights and other provisions and by the breathtaking expansion of its public interest jurisdiction. The Indian Supreme Court has employed this jurisdiction to legislate a code for the adoption of Indian children by foreign couples,<sup>87</sup> order the resettlement of illegal sidewalk squatters in Mumbai,<sup>88</sup>

<sup>84</sup> The *Human Rights Act 1998* (UK) c 42 commenced on 2 October 2000.

<sup>85</sup> See generally Kenneth Roth, 'The Abusers' Reaction: Intensifying Attacks on Human Rights Defenders, Organizations, and Institutions' in Human Rights Watch, *World Report 2010: Events of 2009* (2010) 1.

<sup>86</sup> See, eg, *Federal Constitution* (Malaysia) art 159; *Constitution of Zimbabwe* s 52.

<sup>87</sup> See *Lakshmi Kant Pandey v Union of India* [1984] 2 SCR 795.

<sup>88</sup> See *Janata Dal v H S Chowdhary* [1991] 3 SCR 752.

legislate elaborate rules for preventing sexual harassment in workplaces,<sup>89</sup> direct the Union government to appoint a Central Vigilance Commissioner,<sup>90</sup> prohibit smoking in public places,<sup>91</sup> and compel the use of compressed natural gas in all government vehicles.<sup>92</sup> These measures have been popular owing to long political neglect of the issues and the fact that judges are held in greater esteem than politicians, who are generally thought to be corrupt and self-interested. However, this level of activism will surely invite a political backlash in most Western democracies.

What do we make of all this? The effects of a bill of rights, whether positive or negative, depend critically on the institutional settings of the relevant political society. Institutions in the economic sense refer to all constraints that give structure to social life, including laws and less formal rules such as customs, social practices, moral rules and all forms of self-restraints that people voluntarily assume.<sup>93</sup> As Douglass North states, '[i]nstitutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction.'<sup>94</sup> Oliver Williamson analyses social ordering into four interacting levels:

- 1 *Level of social embeddedness.* We find at this level, customs, mores, traditions and religion.
- 2 *Level of the institutional environment.* This level comprises formal rules such as constitutions, statutes and judicial precedents.
- 3 *Level of governance.* This level (somewhat misleadingly termed governance by Williamson) comprises the world of transactions or private ordering.
- 4 *Level of resource allocation and employment.* This is the level at which prices and quantities are determined by incentive structures within the system.<sup>95</sup>

The key point to notice is that these levels are not discrete but interact in feedback loops.<sup>96</sup> The embedded cultural constraints critically influence the institutional environment while simultaneously the more formal institutions influence culture. The formal institutions also come under pressure from private orderings. And so on.

Institutions are incorporeal. They are patterns of action arising from the coincidence of the behaviour of individuals on which individuals rely. I cannot physically grasp in my hand the rule *pacta sunt servanda* (contracts must be

<sup>89</sup> See *Vishaka v State of Rajasthan*, Supp [1997] 3 SCR 404.

<sup>90</sup> See *Vineet Narain v Union of India* [1998] 1 SCC 226.

<sup>91</sup> See *Murli S Deora v Union of India* [2001] 8 SCC 765.

<sup>92</sup> See *M C Mehta v Union of India*, AIR [2002] SC 1696.

<sup>93</sup> See Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990) 3.

<sup>94</sup> *Ibid.*

<sup>95</sup> See Oliver E Williamson, 'The New Institutional Economics: Taking Stock, Looking Ahead' (2000) 38 *Journal of Economic Literature* 595, 596–600.

<sup>96</sup> See *ibid* 596.

honoured) or the rule prohibiting murder. The contract rule exists not only because it is written in a statute, judgment or a commentary but because most people most of the time perform contracts, and when they do not, their disputes are settled privately or in rare cases by courts according to legal rules and procedures. Institutions are not independent and self-sustaining but exist as parts of a complex web of interacting constraints. It is generally accepted that Australian courts by and large apply the law as it is enacted by the legislature. Why do they do that? It does not take us very far to say that courts apply the law because the law tells them to apply the law. In many countries the courts do not apply the law because judges fear executive wrath or because they are corrupt or incompetent. The capacity or tendency of the courts to apply the law depends on many other 'rules of the game'. Among them are the willingness of the executive and legislative branches and the affected parties to respect judicial decisions, the extent of the courts' moral authority built on a long tradition of judicial impartiality, the efficiency and ethical standards of the legal profession and the vigilance of other actors such as political parties, civil rights organisations and interest groups. The latter kinds of organisations also owe their existence to other formal and informal rules. The whole system is an interlaced fabric of interdependent institutions. The fraying of one part may corrupt other parts and conversely improvements of some institutions may strengthen others.

#### VII PATH DEPENDENCY

An important question in political science concerns the reasons why all nations do not gravitate to the more successful models of governance and economic performance.<sup>97</sup> The pathways of institutional change are shaped by history. Sometimes institutional settings can be locked in, or institutional change impeded by, historical circumstance. For example, in dictatorships and oligarchies people lack the bargaining power of the kind that they might enjoy under genuine representative democracy to effect change. This may explain the ineffectiveness of bills of rights in countries such as Zimbabwe, Cuba and the People's Republic of China. Again, in some societies, entrenched ethnic, religious or caste divisions impede change even where such change is formally mandated by law.<sup>98</sup>

Douglass North finds instructive the divergent pathways of constitutional development in the United States and Latin American countries after independence.<sup>99</sup> The English colonies of North America were established during the 17<sup>th</sup> and early 18<sup>th</sup> centuries, a period of political struggle in England that established the sovereignty of Parliament and ended the prerogative legislative claims of the monarch. The ideas and the institutions of democracy took root in the colonies and critically shaped their constitutional development after the War of Independence. The administration of the Spanish colonies of Central and South America

<sup>97</sup> North, above n 93, 92.

<sup>98</sup> See generally Wolfgang Kasper and Manfred E Streit, *Institutional Economics: Social Order and Public Policy* (Edward Elgar, 1998) 385–94.

<sup>99</sup> North, above n 93, 101–3.

mirrored the very different political history of Spain. The *Cortes Generales* was losing its power to centralised authoritarian governance and this pattern was reflected in the Vice-Royalties of New Spain and Peru. The Spanish colonies adopted United States-styled presidential constitutions after their independence from Spain. However, in the absence of entrenched democratic institutions and traditions, the new nations soon reverted to dictatorial rule.

The *United States Constitution* mirrored the distribution of powers in England following the Glorious Revolution of 1688. In England, the Parliament had legislative supremacy while the monarch enjoyed *de jure* and *de facto* executive power.<sup>100</sup> Judicial power was exercised by courts whose independence was protected by the famed clause in s III of the *Act of Settlement 1701*.<sup>101</sup> In the new United States Federation, a President indirectly elected *via* an electoral college replaced the hereditary monarch. United States Founders added federal provisions, and later the *Bill of Rights*<sup>102</sup> to this 18<sup>th</sup> century English model of government. The other key institutional difference was that the *United States Constitution* was written down and became judicially enforceable after *Marbury v Madison*,<sup>103</sup> whereas the English Constitution remained unwritten and pliant to the judicially unreviewable will of Parliament. This was a critical factor that set the two countries on diverging pathways of constitutional evolution. The English Constitution evolved into parliamentary government with an executive that was theoretically the servant of Parliament but practically its master. The *United States Constitution*, in contrast, maintained (by and large) the original tripartite dispersal of power because of its system of internal checks and balances. The adoption of the American *Bill of Rights* was not automatic. There was strong opposition to it led by Alexander Hamilton.<sup>104</sup> However, without it, the Anti-Federalist opposition could not be quieted and it formed the basis of the ‘Massachusetts Compromise’ that allowed the ratification of the *Constitution*.<sup>105</sup> Once adopted in the first ten Amendments, the *Bill of Rights* with all its imperfections became ingrained in the American political culture and remains deeply respected by all mainstream shades of political opinion.<sup>106</sup>

<sup>100</sup> See F W Maitland, *The Constitutional History of England* (Cambridge University Press, 1911) 388. Remember that ministerial responsibility to Parliament developed only in the 19<sup>th</sup> century after the Reform Acts: *Representation of the People Act 1832*, 2 & 3 Wm 4, c 45; *Representation of the People (Scotland) Act 1832*, 2 & 3 Wm 4, c 65; *Representation of the People (Ireland) Act 1832*, 2 & 3 Wm 4, c 88.

<sup>101</sup> *Act of Settlement 1701*, 12 & 13 Wm 3, c 2. The relevant clause of s III stated: ‘Judges Commissions be made *Quam diu se bene Gesserint* and their Salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawful to remove them.’

<sup>102</sup> *United States Constitution* amends I–X.

<sup>103</sup> 5 US (1 Cranch) 137 (1803).

<sup>104</sup> See Alexander Hamilton, ‘Certain General and Miscellaneous Objections to the *Constitution* Considered and Answered’ in Michael A Genovese (ed), *The Federalist Papers: Alexander Hamilton, James Madison, and John Jay* (Palgrave Macmillan, first published 1788, 2009 ed) 265 (‘*Federalist No 84*’).

<sup>105</sup> See Edward P Smith, ‘The Movement towards a Second Constitutional Convention in 1788’ in J Franklin Jameson (ed), *Essays in the Constitutional History of the United States in the Formative Period 1775–1789* (Houghton, Mifflin and Co, 1889) 46, 114.

<sup>106</sup> The *Bill of Rights* is held in such regard that the original document is preserved and displayed in the Rotunda of the National Archives Building in Washington DC.

The governments of the Settled Colonies were created by the British Parliament (not revolutionary conventions) in the image of 19<sup>th</sup> century English cabinet government, which by this time had superseded the 18<sup>th</sup> century tripartite division. The drafters of the *Australian Constitution* were naturally influenced by this model and at any rate they could not have departed from it without seriously fracturing Australia's links to the British Crown. A republic was not on anyone's agenda. Hence a compromise was needed and it produced a *Constitution* that combined features of Westminster-type parliamentary democracy with the federal structure borrowed from the United States model and a limited bill of rights expressly or impliedly embedded in several provisions of the *Constitution*.

Does institutional history provide any clues as to what we may expect in the event that Australia adopts a constitutionally entrenched or unentrenched bill of rights? We can never *prove* that Australians as a nation will be better or worse off under a constitutional or statutory bill of rights, for the future cannot be proved. We can only prognosticate. Fortunately, the institutional history of Australia offers some encouragement of the view that a bill of rights will not be the disaster predicted by sceptics and may even be beneficial overall though perhaps not to the degree that its enthusiastic proponents predict. The *Australian Constitution*, unlike those of the United Kingdom and New Zealand, established a system of government with dispersed and limited powers. The *Constitution* also embedded a series of important judicially enforceable fundamental rights and freedoms expressly or by implication. The *Australian Constitution* thus conferred on the High Court of Australia enormous powers both in relation to the structural limits of legislative and executive power and with respect to the many limitations on political power that arise from constitutional rights and freedoms of the individual. It is instructive to consider how the High Court has used or misused this power, the task I undertake in the following Part.

#### VIII WILL THE HIGH COURT BE RADICALISED BY A STATUTORY BILL OF RIGHTS?

The remarkable judicial activism in India coincided with the decline of the political and moral authority of the Indian Parliament and government. Indian scholars have attributed the assertiveness of the Supreme Court partially to the 'clear deterioration of the Indian parliament ... in view of the decline of "the moral credibility" of the elected representatives'<sup>107</sup> and the waning of the 'adherence to the basic norms of parliamentary debate'.<sup>108</sup> I might add uncontroversially that the weakening of the unwritten moral constraints of parliamentary democracy owed at least partially to the loss of strong and stable political authority that underlies the effectiveness of parliamentary democracy. A parliamentary system with no-one in charge invites disintegration.

<sup>107</sup> Bidyut Chakrabarty, *Indian Politics and Society Since Independence: Events, Processes and Ideology* (Routledge, 2008) 176.

<sup>108</sup> Sumanta Banerjee, 'Salvaging an Endangered Institution', *Economic and Political Weekly* (Mumbai), 9 September 2006, 3838.

Will the adoption of a statutory bill of rights in Australia lead to a sub-continental type of judicial adventurism? I doubt that even the most alarmist objectors to rights charters expect that. The institutional setting in Australia militates against that sort of judicial usurpation. However, opponents fear that a bill of rights — even in a statutory form — will transform the High Court into something like the United States Supreme Court.<sup>109</sup> In my view, this is unlikely for two connected reasons. The first relates to a key difference in the constitutional systems of the two countries. The other is the High Court's own historical record.

First, the three branches of government in the United States are structurally and functionally separated to a much greater degree than found under the *Australian Constitution*. The system of parliamentary government in Australia works on the confidence rule. A government remains in office only so long as it can command majority support in the House of Representatives. The rule ironically grants the executive a vice-like grip on the legislature. Only a party whose leadership can control the voting behaviour of its members can realistically form a government. The 'first-past-the-post' method of election (as opposed to proportional representation) also promotes a two-party system that diminishes the number of minor party members and independents in the lower house, further strengthening executive control of the legislature. This means that in the legislative field, the parliamentary executive has much greater power than, say, the United States President. The judiciary is no match for the undivided will of the legislature. The Indian Supreme Court provides an illustration. The Supreme Court was restrained in construing the fundamental rights provisions of pt III of the *Constitution of India* during the post-independence period of Congress Party dominance in the Parliament. Its adventurism began after the electoral decimation of the Indira Gandhi government in 1977 and the end of strong executive control of the legislature.<sup>110</sup> Australia has not experienced one-party dominance but its experience is that the party or coalition which is in power controls the agenda impeded only by occasional Senate resistance. In contrast, the political power under the *United States Constitution* is sharply divided. The President does not control the legislature even when his (or her) party has majorities in the two houses. Members of the legislature are more independent as they have no role in the establishment or maintenance of the executive. The United States Supreme Court, in this context, assumes a more powerful political status than the High Court of Australia.

Second, the High Court's history of constitutional interpretation over 100 years gives no cause for alarm. The *Australian Constitution* guarantees explicitly or impliedly many of the rights and freedoms that would form the core of a minimal charter based on classic civil and political rights. The High Court's record on enforcing them has been conservative. Consider the following. Sections 7 and 24 of the *Constitution* demand that the two Houses of Parliament be composed of

<sup>109</sup> See, eg, Allan, 'Take Heed Australia', above n 63.

<sup>110</sup> See Mamta Kachwaha, *The Judiciary in India: Determinants of Its Independence and Impartiality* (PIOOM, 1998) 85–6.

members ‘directly chosen by the people’. Yet, for more than 100 years, the High Court refused to acknowledge that the ‘people’ meant all adult persons with no regard to gender or property qualifications. It now does,<sup>111</sup> but the Court still refuses to uphold the principle of equality of voting power.<sup>112</sup> The just terms clause of s 51(xxxi) has been narrowly construed by the High Court despite its enormous potential. The Court, for example, has narrowly construed the idea of ‘acquisition’ and has only recently entertained the possibility of compensation for regulatory takings.<sup>113</sup> It has only recently applied the mandate to laws passed under s 122 with respect to the territories.<sup>114</sup> The freedom of interstate trade, commerce, and intercourse which s 92 declares ‘shall be absolutely free’ has been narrowed by the High Court to a prohibition on the imposition of ‘discriminatory burdens of a protectionist kind.’<sup>115</sup> The High Court has reduced the religious establishment clause in s 116 to a mere prohibition of a state religion, and has allowed state funding of religious schools.<sup>116</sup> Even the freedom of religious observance has been read down, as shown by the Court’s approval of compulsory military service against the religious objections of the Jehovah’s Witnesses.<sup>117</sup> Trial by jury, assured by s 80, has been restricted by High Court majorities who have read the words ‘trial on indictment’ literally, in a way that allows Parliament to avoid juries by dispensing with the indictment procedure.<sup>118</sup>

The High Court has given a robust rendering of procedural due process through the interpretation of the judicature provisions of ch III. Yet, its jurisprudence on the separation of powers has not drawn widespread criticism. On substantive due process, the Court has declared the inadmissibility of bills of attainder<sup>119</sup> but has allowed retrospective extension of imprisonment of dangerous prisoners through judicial detention.<sup>120</sup> It has refused to acknowledge a general rule of equality before the law or of equal protection of the law.<sup>121</sup> The Court disapproves of legislative attempts to oust constitutional jurisdiction of federal courts and has read down privative clauses to preserve constitutional jurisdiction.<sup>122</sup> The High Court has also extended constitutional protection to the

<sup>111</sup> See *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* [2010] HCA 46 (15 December 2010).

<sup>112</sup> See *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140.

<sup>113</sup> See *Commonwealth v Western Australia* (1999) 196 CLR 392, 488 (Callinan J). See also *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140.

<sup>114</sup> See *Wurridjal v Commonwealth* (2009) 237 CLR 309, overruling *Teori Tau v Commonwealth* (1969) 119 CLR 564, 570 (Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ).

<sup>115</sup> *Cole v Whitfield* (1988) 165 CLR 360, 398 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

<sup>116</sup> See *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 582 (Barwick CJ), 604 (Gibbs J), 612, 616–18 (Mason J), 653 (Wilson J).

<sup>117</sup> See *Adelaide Co of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

<sup>118</sup> See *R v Archdall and Roskrige; Ex parte Carrigan* (1928) 41 CLR 128.

<sup>119</sup> See *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

<sup>120</sup> See *Fardon v A-G (Qld)* (2004) 223 CLR 575.

<sup>121</sup> See *Kruger v Commonwealth* (1997) 190 CLR 1, 153–5 (Gummow J).

<sup>122</sup> See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 504–6 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).



supervisory jurisdiction of state supreme courts to correct jurisdictional errors of inferior courts and tribunals.<sup>123</sup> It has upheld indefinite detention of an illegal immigrant whom no other country would admit.<sup>124</sup>

The recognition of an implied freedom of political communication has been the most controversial aspect of the High Court's treatment of constitutional rights. Even here, the Court has limited the freedom to political matters broadly construed. The High Court has declined to extend the freedom to commercial communications<sup>125</sup> and has broadly cast the scope of permissible restrictions.<sup>126</sup>

This record is not encouraging for those who hope that a bill of rights will usher in an age of judicial creativity. One may speculate that the High Court's reticence reflects deference to Parliament but that a bill of rights may be just the legislative signal the Court needs to become more active. The evidence is not very strong even for this speculation. Parliament has in fact enacted piecemeal rights legislation in the forms of the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Age Discrimination Act 2004* (Cth) and the *Freedom of Information Act 1982* (Cth). The High Court has not been accused of adventurism under the authority of these statutes. It is fair to speculate from its century-long track record that the High Court is unlikely to change its ways on the enactment of a limited bill of rights securing the basic traditional personal liberties and rights. This is by no means a scientific theory. A scientific theory cannot be based on the kind of data available to us. We may only speculate with anecdotal evidence and our intuitions. Fortunately, there are ongoing experiments on statutory bills of rights in the parliamentary democracies of the United Kingdom and New Zealand as well as in Victoria and the Australian Capital Territory. A sustained and dispassionate study of the extent to which these bills have realigned political powers, and their impact on rights and freedoms, remains to be undertaken.

#### IX SO, IS A BILL OF RIGHTS A GOOD IDEA IN A REASONABLY FUNCTIONING PARLIAMENTARY DEMOCRACY SUCH AS AUSTRALIA?

If, as Oakeshott and Hayek (and before them Hume, Madison and other thinkers in the classical liberal tradition) argue, the cause of individual autonomy is served not by legislative omnipotence but by limitations on all power, does a bill of rights advance that cause? The answer will depend on the contents of the bill and how it is interpreted and applied. That, in turn, will be determined by the nature and strength of institutional constraints. A narrowly focused bill of rights that protects life, liberty and property interpreted in the Lockean sense, may do so. An instrument that confers positive welfare rights will almost certainly create an alternative judicial forum for distributional contests. Australia's current status

<sup>123</sup> See *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

<sup>124</sup> See *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>125</sup> See *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

<sup>126</sup> See *Levy v Victoria* (1997) 189 CLR 579; *Coleman v Power* (2004) 220 CLR 1.

as a nation with a high degree of respect for human rights has been achieved by a combination of formal constitutional constraints, parliamentary democracy, piecemeal rights protection, civil society vigilance and an informal fabric of favourable institutions embedded in its evolved political culture. This is not to say that the constitutional system cannot be improved. The main weakness of the parliamentary systems of government is the decline in accountability to Parliament and thence to the electorate for legislative and executive actions. There are too many laws made by unseen executive bodies that receive no public scrutiny until injury is felt by a well-resourced party. There are too many executive discretions that are unreviewable in practice if not in law. There are too many laws enacted to serve special interests as against the general good. If the end of constitutionalism, as Oakeshott avers, is a civil association that respects individual autonomy, the main constitutional task of our times is the containment of legislative power as far as practicable to the making of general rules of conduct under which individuals may pursue their own life ends without injury to others. A bill of rights, to the extent that it limits end-directed discriminatory laws and open-ended discretions, may lead to a marginal gain. However, I suspect that the energies of the well-meaning rights campaigners may in the context of Australian parliamentary democracy be better directed to the promotion of a more rigorous separation of powers.