Chapter Five
Bills of Rights as Centralising Instruments

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I am a long standing opponent of Bills of Rights, be they constitutionalised or statutory. I have developed something of a sideline interest and niche market writing about their sins, omissions, flaws, failings, tendency to promote puffed-up, sanctimonious moralisers in the judiciary and academia, and most tellingly their raw illegitimacy in democratic terms.[1]

What I have not done before is to write of their centralising, anti-federalist tendencies. It is with much gratitude, therefore, that I thank John Stone for having invited me to think about this topic and to address you on it today.

My initial inclination was to proceed straight to the issue of the effects these instruments have on federalist constitutional arrangements. Yet on second thoughts I have decided that would be a mistake. To make the case for the centralising tendencies of a Bill of Rights it is first necessary to be given a taste of how they work, how they enumerate a set of moral abstractions that virtually everyone supports, but that are so indeterminate their words resolve nothing. Instead, the resolving of the myriad rights-based disputes thrown up by Bills of Rights is handed over to the unelected judges, to committees of ex-lawyers. Bills of Rights are sold up in the Olympian heights of moral abstractions where there is near consensus. (Who, for example, is against the right to free speech?). Yet they have their real, practical effect down in the quagmire of social policy line-drawing, and down here there is only ever disagreement and dissensus – more exactly, there is disagreement between smart, reasonable, well-meaning, even nice people who just happen to disagree about where to draw lines when it comes to, say, immigration procedures, or who can marry, or how best to strike the balance between accused criminals and public safety, or even what sort of campaign finance rules or hate speech provisions we might want. (And notice that you can chant the mantra "right to free speech, right to free speech, right to free speech" for as long as you want, it will not help you answer these last two.)

Characterized in that way, rather than in the moral certainties and disagreement obfuscating abstractions of Bill of Rights proponents, and the immediate question that arises is why such essentially moral and political line-drawing should be translated into pseudo-legal disputes and handed over to unelected judges, rather than treated as political disputes and decided through the democratic process, meaning by voting and letting the numbers count.

Consider a sampling of what the judges of the Anglo-US world have done with these Bill of Rights instruments. In Canada and the US, jurisdictions with entrenched, constitutionalised models, the judges have decided that free speech concerns trump health and safety concerns in the context of tobacco and commercial advertising;[2] they have foreclosed the prevention of abortion (in the US)[3] or struck down, as procedurally flawed, the existing abortion regulations leaving nothing in their place (in Canada);[4] they have mandated that each and every refugee claimant be given an oral hearing;[5] they have created and imposed new criminal procedure standards;[6] they have twice over-ruled the Canadian federal Parliament on whether convicted and incarcerated prisoners must in all cases be allowed to vote;[7] they have even struck down (extrapolating from the Bill of Rights to the preamble to the Constitution) legislation reducing the salaries of provincial judges that was brought in as part of a general province-wide reduction of public servants' pay.[8]

Meanwhile in New Zealand and the United Kingdom, jurisdictions with statutory Bills of Rights of the exact sort the State of Victoria proposes to copy, the judges have done almost as much. True, with statutory models the unelected judges cannot overtly strike down statutes they feel infringe some enumerated right or other. However, they *can* do what amounts to rewriting or redrafting such legislation – they can go a long, long way towards reading 'black' to mean 'white', provided they think this is more in keeping with what *they believe* to be fundamental human rights.

The judges of the House of Lords in the United Kingdom have said that they can use their new statutory Bill of Rights to let them depart from the unambiguous meaning that a piece of legislation would otherwise bear:

> "Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, [the Bill of Rights] may none the less require the legislation to be given a different meaning… [It] may require the court to… depart from the intention of the Parliament which enacted the legislation. …. It is also apt to require the court to read in words which change the meaning of the enacted legislation, so as to make it [Bill of Rights] compliant".[9]

The New Zealand judges have travelled almost as far. Only five years ago three of seven judges on their highest domestic court were prepared to say that because of New Zealand's statutory Bill of Rights it was no longer the case that later statutes impliedly prevail over earlier, inconsistent statutes.[10] They were of the view that they could use the Bill of Rights to prefer the earlier statute if they thought it more in keeping with a rights-respecting outcome.

Bills of Rights then are powerful tools, whether of the constitutional or statutory varieties. They are emotively attractive because they are sold to the public up in the Olympian heights of moral abstractions (such as "due process", "equality", "no unreasonable searches", "freedom of religion", etc). They hand a significant amount of power to the unelected, unaccountable judiciary – power that can on occasion go to their heads.[11] And this inevitably means a politicization of the judiciary, too. Why? Well, as judges become ever more powerful, their decisions will more and more infringe on what were before considered to be political line-drawing exercises. Relatedly, the desire to appoint people of a like-minded political and moral outlook will increase.

In brief, then, Bills of Rights are sold on the basis that moral answers are self-evident – that it is self-evident how a right to free speech, say, should affect campaign finance rules or hate speech enactments or defamation provisions. In actual fact, however, virtually no Bill of Rights cases involve morally self-evident outcomes – just trawl through all the Canadian *Charter of Rights* cases of the last 24 years, or all of the New Zealand *Bill of Rights Act* cases of the last 16 years. None involves moral blacks and whites and self-evidently right outcomes and answers.

Worse for proponents of these instruments, when judges disagree about the scope or reach of rights or whether an enactment imposes a reasonable limitation, the judges vote. Four votes beat three, full stop. Under a Bill of Rights the authoritative decision-making rule is *not* that the most references to Mill or Milton or the *International Covenant on Civil and Political Rights* prevails; it is a purely procedural rule. The judges vote. A Bill of Rights merely affects the size of the franchise (and, too, the accountability of those exercising power).

Bear all that in mind now as we turn to the question of how a Bill of Rights might affect federalism. In particular, bear in mind the absolutist-sounding, universalist nature of rights guarantees, because an immediate and initial question that arises is the extent to which such guarantees can co-exist with the pluralistic, different-sizes-for-different-States approach that underlies and justifies federalism.

Listen to US Supreme Court Justice Antonin Scalia's defence of federalism:

> "Now there are many reasons for having a federal system, but surely the most important is that it produces more citizens content with the laws under which they live. If, for example, the question of permitting so-called 'sexually oriented businesses' – porn shops – were put to a nationwide referendum, the outcome might well be 51 per cent to 49 per cent, one way or the other. If that result were imposed nationwide, nearly half of the population would be living under a regime it disapproved. But a huge proportion of the pro-sex-shop vote would be in states such as New York, California, and Nevada; and a huge proportion of the anti-sex-shop vote would be in the south, and in such western states as Utah and New Mexico. If the question of permitting sexually oriented businesses were left to the states – which is surely where the First Amendment originally left it – perhaps as much as 80 per cent of the population would be living under a regime that it approved. Running a federal system is a lot of trouble; a large proportion of the time of my Court is spent sorting out federal-state relations. It is quite absurd to throw away the principal benefit of that system by constitutionalizing, and hence federalizing, all sorts of dispositions never addressed by the text of the Constitution".[12]

When Justice Scalia there talks of federalizing, he refers to the centralising effect of court decisions made under the US Bill of Rights – decisions that produce "one coast-to-coast disposition of such controversial issues as pornography, abortion, homosexual rights, and (soon to come) suicide".[13]

Our task, in this paper, involves some speculation about Australia. Were Australia to adopt a Bill of Rights, what would its effects be in terms of producing uniformity, one-size-fits-all outcomes, and coast-to-coast dispositions at the expense of diversity and different-outcomes-for-different-States?

What follows will be my conjectures as regards that question. However, some caveats, provisos and

stipulations are needed before this can be done. Firstly, I will for the most part assume a Commonwealth Bill of Rights is what we are considering. Of course I know – and am delighted – that this awful possibility is *not* in fact looming on the horizon or an immediate prospect. State Bills of Rights are the real, actual threat at present (and I will say a brief word or two about them at the end). Yet it is a Commonwealth Bill of Rights that raises the preponderance of federalist issues, so I will assume one of those for the purposes of this paper.

Secondly, and this needs to be made explicit, the centralising effects of a Bill of Rights are hard to disentangle from division of powers or division of legislative authority questions. In other words, the Justices of the High Court already have scope and tools (whatever one might think of the legitimacy of those tools) to weaken federalism and to impose one-size-fits-all outcomes. Nor is it any revelation to say that the States of Australia look to be pretty enfeebled, enervated entities compared to their Canadian provincial cousins, or even compared to the US States.

So what follows is in that sense a relative claim – the effects of a Bill of Rights here in Australia would be grafted on to the existing reality as regards the relatively weak position of our States. In addition, that reality needs also to acknowledge that the Commonwealth can, and does, centralise things through its preponderant control over taxation and the purse strings. Bluntly put, it buys its way into matters affecting, say, health care and education, and by that means exercises a fair degree of control over matters that are State responsibilities.

Thirdly, I will start by assuming an entrenched, constitutionalised, Canadian or US-style model. I realise, of course, as we all do – including those pushing for a Bill of Rights – that the requirement to win a s. 128 referendum before a constitutionalised model could come into existence in Australia means that a statutory model is by far the more likely possibility.[14]

Nevertheless, this model has the most obvious centralising effects. So I will start there. Later I will consider what a statutory version might do.

All those provisos and caveats need to be kept in mind as we turn to speculate on where a Bill of Rights' centralising effects will be most keenly felt.

Let us begin our musings by setting out the four ways a Bill of Rights might potentially affect a legal system once it comes into force. The first way (and first, too, in terms of when it happens) has to do with criminal procedure. A justiciable Bill of Rights inevitably has some influence on how criminals are required to be investigated, processed and tried – things such as how searches need to be executed, or when access to a lawyer needs to be provided, or the prescribed timing and sorts of trials, or whether reliable, incriminating but arguably improperly obtained evidence is to be excluded.

The second potential influence or effect is the birth of a Bill of Rights cause of action sounding in money damages. In other words, a Bill of Rights might lead to civil actions against government and public bodies that garner successful plaintiffs money, sometimes lots of money.[15]

A third possible effect relates to the way in which statutes and secondary legislation are interpreted. A Bill of Rights can give rise to a new, less text-based or less plain meaning approach to interpretation. The judges, relying on such a newly enacted or adopted instrument, might prefer "Bill of Rights-friendly" approaches (or more accurately put, their own contestable view of what is a Bill of Rights-friendly approach) to what meaning they give regulations, statutes, or even constitutional provisions. The House of Lords case cited above makes this abundantly plain.[16] This can be thought of as an "interpretation on steroids" or Alice in Wonderland effect of Bills of Rights.

The last potential effect is a version or offshoot of the third. Instead of the Bill of Rights changing the way statutes (and secondary legislation, and perhaps even constitutional provisions) are interpreted and understood and have meaning imputed to them, the effect here is to change how the common law is understood. The third effect amounts to the redrafting of statutes; this one amounts to a re-writing of the common law, of the rules built up over time from the case-by-case adjudication of the judges.[17]

Those are the four main ways that a Bill of Rights might potentially affect a legal system, once one comes into force. As regards the question of the centralising effects of these instruments, though, it is the first and third of those ways that most obviously matter.

So my prediction would be that the first centralising effects of our mooted Bill of Rights would be felt in the realm of criminal procedure and criminal law. As it happens, in this realm the different-sizes-for-different-States outlook happens to be alive and well here in Australia. Three of our States have Criminal Codes; three do not. Queensland's *Criminal Code* was drafted by none other than Sir Samuel Griffith; unlike Canada's *Criminal Code* and New Zealand's *Crimes Act*, Griffith's Code was in the comprehensive Macaulay

and Bentham tradition, not the narrow Stephen tradition. This is the Criminal Code more or less copied by Western Australia. Tasmania, however, opted for the narrower sort of codification that preserved the common law. And as I just noted, the three other States have no Code at all.

But let us focus on criminal procedure. All Bills of Rights these days mention something like "the right to a fair trial" and "the right to be secure against unreasonable searches", to take just two examples. Put such absolutist sounding tools in the hands of the judiciary, and what would happen to the present differential requirements across the States vis-à-vis the need for a unanimous jury verdict,[18] or trial by jury versus judge alone,[19] or how juries are chosen,[20] or legal aid entitlements,[21] or when access to a lawyer must be provided,[22] or even the fate of myriad varying reverse onus provisions? In the United States what has happened is that:

> "The Supreme Court has created what Congress itself has no power to create: a highly detailed national Code of Criminal Procedure. Nowadays it is a rare state prosecution indeed that does not give rise to some arguable claim that this national Code of Criminal Procedure has been violated".[23]

Or let us speculate about other matters that would appear to fall under the aegis of the criminal law. Abortion is a good example. Start with an explicit right to due process, observe the creation of a "right to privacy", then watch the judges infer or imply from that a right to abortion (as happened in the US), and all the differences between the Australian States as regards the regulation of abortion would surely disappear.

Or what about euthanasia? The Northern Territory's recent experiment with a liberalized euthanasia regime was quashed by the Commonwealth. Had it been a State experimenting with such a regime, though, the Commonwealth could have done nothing – or at least nothing other than threatening to hold back GST money or some such purse string menace. Thrust a Bill of Rights into the equation, however, one with "the right to life" as a central feature, and we all know that such experimentation could be stopped in an instant by the High Court judiciary. These judges might stop it, or they might not. But the point is that it would be wholly up to them, and nothing in the three words "right to life" would constrain them either way. Their own moral sentiments would be determinative. And whatever one thinks of such an ultimate decision-making rule, it is not obviously best described in terms of federalism. The judges' ruling would be a one-size-fits-all one.

The same questions raised by euthanasia (and any more laissez-faire attitude taken in future by one of the States) could (in theory) be raised by suicide. Or, provoking at least as strong feelings, there is prostitution, a close cousin of Justice Scalia's example above of pornography. Post-Bill of Rights uniformity would seem a strong likelihood vis-à-vis regulating prostitution.

Of course, coast-to-coast standardization has frequently happened in Australia already, without a Bill of Rights – think of blood alcohol limits, say, or Justice Scalia's pornography example. In fact, the latter (notwithstanding past efforts to produce uniformity) is a good vehicle for sketching in more detail how Bills of Rights act as centralising instruments.

Adopt a Bill of Rights and there would certainly be included "the right to free speech". Whatever the unelected judges decided, as regards how that amorphously phrased, indeterminate right ought to play out down in the quagmire of social policy-making line drawing, its implications as regards pornography would inevitably be coast-to-coast. If the fundamental human right to free expression has implications X, Y and Z as regards the purveying of pornography in New South Wales (or rather, the majority of top judges vote amongst themselves that it is to have those implications), then it can hardly be held to have different implications and ramifications in South Australia, or Tasmania, or even (dare one suggest it) Victoria. Turn an issue into one of transcendent and fundamental human rights, and a one-size-fits-all outcome is carried in its wake. The moral absolutism and self-assuredness (or less kindly put, sanctimoniousness) of rights-talk and of framing issues in terms of universal entitlements seem to me to be anathema to the federalist, experiment-to-see-what-works-best mindset.

Consider some more examples. Hate speech provisions (which presently differ from State to State) would appear open to the same sort of "coast-to-coast" treatment due to this right to free speech.

Then again, we could leave behind the criminal law but stay with this particular right. Imagine how a personal "right to free speech" would affect campaign finance provisions. Let us assume that one of the States wanted to experiment, and try to take some of the money out of electioneering by enacting a statute that allocated television broadcast time to the political parties based on some combination of how they did at the last election and current polling, while also forbidding the purchase of such broadcast time. How would such an experiment fare? Could we see the six States each opting for different campaign finance laws?

Here, in fact, we do not need to make use of our imaginations. The first of the so-called "implied

rights" cases[24] shows us what the centralising effects would be. Once the judges create or invent "a freedom of communication concerning political matters" (discerning it in some mystical fashion from the text and structure of a Constitution whose authors explicitly, deliberately and after much thought foreswore any personal right to free speech), and this new entitlement, albeit a limited one, must – and does – apply across the board. Whatever the States might want, they are foreclosed from trying it. And that is the centralising effect of an implied right, of a dwarf right, of a non-personal right, of a bracketed and (for now) contained freedom applying only against the legislature.

We all know that the effect of an explicitly enumerated, personal "right to free speech" would be greater still.

Allow me to indulge myself with one last foray into speculation before moving on. Consider the potential centralising effects here in Australia as regards:

- "The right to vote" and electorates or constituencies that favour rural voters (because such constituencies contain fewer voters than urban ones).
- "The right to freedom of religion" (a beefed-up s. 116, and one now applying to the States too) and the wearing (or not wearing) of headscarves to schools.
- "The right to freedom of religion" (again, a beefed-up s. 116 applying to the States as well) and the funding of parochial schools from the public (State) treasury.
- "The right to vote" and rules regarding when prisoners can (and cannot) vote.

In all four of these examples, assume that one or more of the States either already has laws to this effect or wants to bring them in. Assume further that others of the States do not. My bet is that the enumerated right would lead to a centralised, one-size-fits-all outcome.

Over time, we would be sure to see other centralising outcomes, though some would be unexpected and others still unintended.

Return to my third assumption, now, and put it away. No longer will we imagine the effects of an entrenched, constitutionalised Bill of Rights. Instead, consider what a statutory version enacted by the Commonwealth Parliament might do.

Such a version would be sure to have a reading down provision, a section that tells the unelected judges to read all other statutes in *what they consider to be* a Bill of Rights friendly manner. The New Zealand version, section 6, reads:

> "Whenever 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". (my italics)
>
> The UK version, section 3 (1), reads to start:
>
> "So 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 Convention rights". (my italics)
>
> And in the State of Victoria's Bill, sections 32(1) and (2) read:
>
> "(1) So far as *it is possible to do so* consistently with their purpose, all statutory provisions *must be interpreted* in a way that is compatible with human rights.
>
> (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right *may be considered* in interpreting a statutory provision". (my italics)

As I indicated above, it is mainly these reading down provisions that empower the judges to achieve most of what they could under a constitutionalised Bill of Rights. Instead of striking down statutes, they re-write them. And the evidence from New Zealand and the UK makes plain that this is a possible – no, a probable – outcome. (Victoria's added section 32(2) makes things even worse. This certainty-destroying adornment is exceedingly likely to lead to a ratchet-up effect, in my opinion.[25])

In terms solely of its centralising effects, the potency of any Commonwealth statutory Bill of Rights would depend upon the extent to which it could be used to read Commonwealth legislation more expansively. There would be no question of striking down or rescinding State legislation (as there would be with a constitutionalised instrument). But where Commonwealth legislation is otherwise constitutional, an expansively interpreted or re-written statute could have centralising effects.

Moreover, the very existence of such a statutory Bill of Rights will soon be given – by the judges – a quasi-constitutional status. This happened in New Zealand.[26] It will happen here. And that means it will affect how the judges read the Constitution itself. Throw a statutory Bill of Rights into the equation, and the debate in *Al-Kateb*[27] over whether to interpret the Constitution in the light of international human rights-

based decisions – a debate Justice Kirby lost resoundingly[28] – may come out the opposite way. In fact, I think it virtually certain that it would.[29] And once that happened, we would get rights-based constitutional interpretation – or rather, the picking and choosing and application of those overseas precedents felt by the particular judge and his or her clerks to be sympathetic and agreeable ones – through the backdoor.

It is unclear which of my speculations above could be achieved only with a statutory Bill of Rights. Here, I simply say, "more than you would expect". Bills of Rights always surprise most of their original drafters and proponents in terms of their potency and ability to shift decision-making powers to the highest court. And that generally entails, in a federal system such as Canada's or the US's or Australia's, a degree of centralisation, of anti-federalism.

That leaves just State Bills of Rights. They would appear, despite their many other faults, to have no centralising effects. At any rate, that is one's *prima facie* impression. However, even that may be too optimistic, at least in the following sense. Such a Bill of Rights will fall ultimately to be interpreted by the High Court, by Commonwealth appointed judges. So such State instruments will increase the power of centrally appointed judges, which can be thought of as a sort of centralising effect.

Worse, were two or more States to enact Bills of Rights, we can be abundantly confident that there would be considerable overlap as regards content, as regards which rights are enumerated. Now these rights, as I have already stressed, are articulated in broad, amorphous, indeterminate terms. They constrain hardly at all where the many highly debateable and disputed lines have to be drawn by the unelected judges. It is almost never the case that sincere, reasonable, smart, well-meaning people all agree about what some right demands down in the quagmire of where Bills of Rights are litigated and have real, actual effect. Accordingly, we would expect different judges to draw the lines in different places. The most cursory glance at the ramifications of, say, the right to free speech and how it has played out in Canada, the US and New Zealand as regards campaign finance laws, or hate speech provisions, or defamation rules or anything else shows this to be true. The same goes for other enumerated rights. The judges decide and no two jurisdictions decide in precisely the same way.

The irony of an Australian situation where there were multiple State Bills of Rights is that the High Court would impose uniformity and coast-to-coast dispositions. The Justices of the High Court are extremely unlikely to allow the right to be secure against unreasonable searches to mean one thing in Victoria and something different in New South Wales. The same goes for the right to life, or to freedom of religion or association. So in that sense, an ironic one really, even various State Bills of Rights might engender a sort of centralising effect.[30]

I want to finish by considering whether the basic notion of parliamentary sovereignty is compatible with federalism. This may appear to be a question unrelated to whether Bills of Rights are, or are not, centralising instruments. Yet I think that appearance is mistaken. The motivating rationale and justification for parliamentary sovereignty is that each generation should be left to decide fundamental issues for itself – including issues about rights – by letting the numbers count and majorities rule (rather than letting the numbers count only on the High Court and resorting to majority rules only there).

Parliamentary sovereignty, understood in this way as being a system in which the voters' elected representatives make all the fundamental decisions for society (including moral decisions translated into the language of rights), has only one plausible rival in today's world; it is juristocracy, or kritarchy, or what you find when there exists a justiciable Bill of Rights in place in a jurisdiction. Under this rival system, a great number of moral and political line-drawing decisions (after being suitably translated into the language of rights) are handed over to unelected judges, to committees of ex-lawyers. In its least aggressive embodiment, it still gives the judges much more line-drawing power than they have under a parliamentary sovereignty set-up.

To assert, then, that parliamentary sovereignty is *not* compatible with federalism is to imply that a Bill of Rights regime *is* compatible, or at least is *more* compatible, with federalism.

I think that is wrong. Yes, in any federal system there will be tensions between the two levels of elected legislatures – the States and the Commonwealth. That in itself, however, does not undermine the basic justification and reality of parliamentary sovereignty, which is that the elected representatives (who are accountable on a regular basis to the voters by means of elections) make the fundamental line-drawing political and moral decisions – that, in a rough sense, the majority rules.

True, federalism amounts to a bargain. It may be the price needed to be paid to form a nation, or the

most sensible way to deal with vast geographical areas. Whatever the motivating causes, some broad areas of responsibility will get allocated to the centre, some (residually or explicitly) to the regions. Who is responsible for what will sometimes be clear – will fall into "the core of settled meaning".[31] Sometimes, though, it will be unclear – will fall into the "penumbra of doubt"[32] or "of uncertainty".[33] That is the very nature of any rule; all rules are destined (in some circumstances) to be under- or over-inclusive. Alas, it may even be true that sometimes who is responsible for what in a federal system will appear clear (on a plain meaning reading, say) to the vast preponderance of interested people, and yet the point-of-application interpreters – the top judges – will allocate the power contrary to that clear reading.

Federalism necessarily carries with it division of powers disputes of the second sort, those in which it is genuinely unclear which side (regions or centre) is to have the power. No amount of specificity, however fanatical, can prevent this in all situations. As I said, it is the nature of rules. And so it is the nature of federalism itself.

In such circumstances someone has to decide, and I see nothing wrong with it being the top judges. If not them, then who? And this remains true even though all of us might suspect that judges appointed by the centre will (on average, over time, in the really important cases) tend to favour the side that appointed them.

That seems to me to be part of the federalist bargain. But nothing in that bargain undermines parliamentary sovereignty. Judges here are acting as umpires. One of the two levels of elected government, of the sovereign Parliaments, will get to draw the lines. The unelected judges are merely deciding which it will be.

How is that incompatible with parliamentary sovereignty? It is only when one imagines judicial manipulations – handing the power to the side more likely to reach decisions the unelected judges themselves favour – that parliamentary sovereignty begins to be undermined. One such manipulation is of the sort I mooted above, where the judges allocate the division of powers contrary to what appears to be the clear reading or plain meaning (or, in their absence, arguably the manifest intent of the founders). This, though, is not a sin to be laid at the feet of the elected branches.

There is a price to be paid by parliamentary sovereignty when it makes the bargain for federalism. Yet that price is a very small one indeed in so far as taking power out of the hands of elected representatives of the people (of one level or the other) is concerned.

The point to make here, though, is that the price of the bargain will not go down, but will only go up, when judges are given greater powers (as they are when a justiciable Bill of Rights is entrenched or enacted). Federalism will be and is enervated far more than when no such instrument is in play.

In that sense, I would say that parliamentary sovereignty is more compatible with federalism than is any sort of Bill of Rights regime. Under the former, it is considerably easier to opt for and keep in place differential State-by-State outcomes than under the latter, where issues get characterised in terms of amorphous, indeterminate but nevertheless timeless moral truths. And, of course, that is just another way of making my main point in this paper – that Bills of Rights are centralising instruments.

Endnotes:

1. See, for instance, my *Bills of Rights and Judicial Power – A Liberal's Quandary?* (1996), 16 *Oxford Journal of Legal Studies* 337; *Sympathy and Antipathy* (Aldershot: Ashgate, 2002); *Rights, Paternalism, Constitutions and Judges*, in G Huscroft and P Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (Oxford: Hart Publishing, 2002); *Paying for the Comfort of Dogma* (2003), 25 *Sydney Law Review* 63*; A Modest Proposal* (2003), 23 *Oxford Journal of Legal Studies* 197; *Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century* (2006), *King's College Law Journal* (forthcoming, April issue); and *Thin Beats Fat Yet Again – Conceptions of Democracy* (2006), *Law & Philosophy* (forthcoming).

2. See *RJR MacDonald Inc v. Canada* (1995) 127 DLR (4th) 1.

3. See *Roe v. Wade* 410 US 113.

4. *R v. Morgentaler* [1988] 1 SCR 30.

5. See *Singh v. Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177.

6. See *Miranda v. Arizona* 384 US 436 (1966).

7. See *Sauve v. Canada (Attorney General)* [1993] 2 SCR 438 and *Sauve v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

8. See *Reference Re Remuneration of Provincial Court Judges* [1997] 3 SCR 3.

9. *Ghaidan v. Godin-Mendoza* [2004] 3 All ER 411, paragraphs [29], [30] and [32] per Lord Nicholls of Birkenhead. All their Lordships expressed broadly similar sentiments in that case.

10. See *R v. Pora* [2001] 2 NZLR 37. Three others on the court disagreed. The seventh judge decided the case on other grounds.

11. In the second *Sauve* case referred to above, the Chief Justice of Canada referred obliquely to countries that disagree with her court's 5-4 ruling, including Australia, the UK, the US and New Zealand, as "self-proclaimed democracies". (Paragraph [41]). It is impossible to exaggerate the moral self-assuredness, nay sanctimoniousness, of such a remark. And in the course of an official judgment too!

12. Justice Antonin Scalia, *Romancing the Constitution: Interpretation as Invention*, in (eds) G Huscroft and I Brodie, *Constitutionalism in the Charter Era* (Lexis Nexis, 2004), p. 337 at p. 342.

13. *Ibid*..

14. And isn't it ironic that the same people who push for a catalogue of rights, including the right to vote and "to participate in the conduct of public affairs" (s. 18 (1) of the draft Victorian *Charter of Human Rights*), these days avoid referenda? My view is that they do so because they know they will lose.

15. In New Zealand, with a statutory Bill of Rights, and despite the remedies provision having had to be removed to get the Bill enacted, the judges simply read back in such a remedy; they created a public law remedy sounding in the new Bill of Rights. See *Simpson v. Attorney-General [Baigent's Case]* [1994] 3 NZLR 667, and my *Turning Clark Kent into Superman: The New Zealand* Bill of Rights Act 1990 (2000), 9 *Otago Law Review* 613.

16. See the main text to *Ghaidan v. Godin-Mendoza, supra*. For a New Zealand example, consider *Moonen v. Film & Literature Board of Review* [2000] 2 NZLR 9 (CA), in particular from p. 16:

> "Of necessity value judgments will be involved ..... [these will be] a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise".

Some readers might be surprised to find ex-lawyers claiming competence in many of these areas.

17. Hence, a Bill of Rights is relied upon in order to change (or if you prefer, "to develop" or "to update"), say, the law of defamation. See *Lange v. Atkinson & Consolidated Press Ltd* 3 NZLR 424. See too *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 for something similar using "implied rights".

18. See, for example, RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (Butterworths, 2004), ch. 5.81.

19. *Ibid*., chs. 4.13, 4.24, 5.76 and 5.77.

20. *Ibid*., ch. 5.79.

21. *Ibid*., ch. 4.35 and 4.36, and *Managing Justice: A Review of the Federal Civil Justice System*, Australian Law Reform Commission (2000), in particular ch. 5 and 5.62.

22. Consider the State policy guidelines and practices developed in response to the High Court's *Dietrich v. R.* (1992) 177 CLR 222. Admittedly, the variations are not pronounced here.

23. Justice Antonin Scalia, *Romancing the Constitution: Interpretation as Invention*, *op. cit.*, p. 341.

24. See *Australian Capital Television v. Commonwealth* (1992) 177 CLR 106. See too my *Paying for the Comfort of Dogma* (2003) 25 *Sydney Law Review* 63.

25. For a fuller argument to this effect see my and Grant Huscroft's *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts* (2006) *San Diego Law Review* (forthcoming, March issue).

26. See my *Turning Clark Kent into Superman*, *loc. cit.*, pp. 617 *ff.*

27. See *Al-Kateb v. Goodwin* (2004) 208 ALR 124.

28. See my *'Do the Right Thing' Judging? The High Court of Australia in Al-Kateb* (2005) 24 *University of Queensland Law Journal*, No. 1, 1-34.

29. Consider the clear implications of Justice McHugh's comments in *Al-Kateb* (*loc. cit.*, paragraphs [73] – [74]) re Bills of Rights.

30. Note that this does not happen in the United States – or at least not easily – because there the interpretation of State Constitutions, just as with the interpretation of State common law, is *not* a matter for the US Supreme Court (making it different from Australia and Canada in that regard). That said, if the US judges are prepared to point to a Bill of Rights provision, this can be got round. So in *NY Times v. Sullivan* 376 US 254 (1964), for example, the US Supreme Court made the defamation law of Alabama a federal matter.

31. See HLA Hart, *The Concept of Law* (OUP, 1961), p. 140, *inter alia*.

32. *Ibid*., p. 119, *inter alia*.

33. *Ibid*., p. 131, *inter alia*.