Democracy, Human Rights, and Positive Law[†]

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1. *Legal Positivism and Human Rights*

Those who care about human rights may instinctively welcome the High Court's recent bold step in using the concept of implied rights within the Constitution to elicit a constitutional right to freedom of political communication. Reflection may dispel this good cheer, for it is not at all clear that this extension of High Court power places the elucidation of such human rights in safe or legitimate hands. Indeed, the substance of the decision, which disallows a change in the political broadcasting regulations, in part on the ground of its novelty, displays an indifference to existing inequalities of communicative capacity that manifests a limited, negative, property-oriented and unimaginative approach to the articulation of fundamental rights.[1]

Further, there are important reasons of democratic principle which cast doubt on the propriety of giving courts a veto over human rights interpretation. Courts have not the capacity, and should not have the authority, to overturn the duly enacted legislation of the Parliament when this is within its federal powers. The fact that the legislation concerns human rights strengthens rather than weakens this stricture. Individual autonomy rights, on which so much of the human rights tradition rests, must include the right to an equal share in determining what is to count as, for instance, the fundamental right of freedom of communication.[2]

These familiar enough criticisms of court-defined fundamental rights are often countered with philosophical objections to their presupposed distinction between legislation and adjudication. The idea that the people's representatives can enact rights and courts merely apply them is dismissed as a jurisprudential anachronism which misses the current doctrine that every adjudication is an interpretation, in that rules and principles can be applied only with the meaning that is given to them by those who decide the particular

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1 See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 66 ALJR 695 (hereinafter cited as *Australian Capital Television*) at 695: "Pt IIID was invalid in its entirety because of the freedom *previously* enjoyed by citizens ..." [my italics] Perhaps more extreme is *Leeth v The Commonwealth* (1992) 174 CLR 455 at 498 particularly Gaudron J who argued that an implied doctrine of equality entails "in constitutional context discrimination is constituted by different treatment of persons or things that are not relevantly different". This may be a very acceptable moral principle but as a constitutional rule it enables courts to decide that any piece of legislation which they believe to be morally misconceived is invalid.

2 For an excellent recent articulation of this thesis, see Waldron, J, "A Rights-Based Critique of Constitutional Rights" (1993) 13 *Oxf J Leg Stud* 18.

case.[3] The criticism that courts are not the proper forum for the development of fundamental constitutional rights is therefore put to one side as an expression of outmoded Legal Positivism.[4]

There is no doubt that Legal Positivism is on the decline as an intellectually respectable approach to law and adjudication. Moreover this decline is evidently justified to the extent that the claims of Positivism to be a descriptive theory of actual legal and political process are in many respects false and often covertly political, in that the theory helps to hide the political views of judges behind the misleading rhetoric of detached literalism.[5] Courts do not in practice restrict themselves to implementing the readily identifiable general commands of the sovereign nor do they merely administer plain rules identified in a morally neutral way. Descriptive Positivism is, to a significant degree, clearly false. However, this does not mean that we should discard Legal Positivism as an ideal worth pursuing. Indeed, Legal Positivism enables us to identify major inadequacies in existing legal systems where much legislation is badly drafted and many formally good laws are poorly and even unethically administered. Just because of these failures, Positivism, in its democratic forms, remains an inspirational model to which political systems should, as far as is practically possible, approximate. Courts may not but should confine themselves to the accurate application of general rules, rules which should be clear, precise and empirically applicable expressions of the political will of the people's representatives. Legislatures should take on full responsibility for the progressive development of the law and not leave such matters to the haphazard and unaccountable growth of the common law with its inchoate notions of justice and fairness as they are filtered through the judicial mind. This is neither the "simple Positivism" attributed by Shiner to John Austin, nor the more complex Positivism to be found in the works of Hart, MacCormick and Raz.[6] Rather it represents that aspect of the Positivist tradition which sets out a political vision as to how states should be governed in accordance with laws created by citizens to serve human values. For the sake of a distinguishing label, I call this approach "Ethical Positivism", a label which serves to indicate both the moral basis for the Positivist ideal and the ethical commitments required for its instantiation.[7]

More specifically, in this essay I support the position that the decline of positivist orthodoxy has immense dangers for our democratic culture. This decline is

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3 For adjudication as interpretation see Donald Davidson on "radical interpretation": Davidson, D, *Inquiries into Truth and Interpretation* (1984) at 141.

4 In Australia this often takes the form of a belated recognition of the truisms of American Legal Realism that judges can always decide cases as they like if they so choose, with a revival of the predemocratic style of common law reasoning repopularised by Lord Denning. See Mason CJ: "The Role of the Judge at the Turn of the Century", the 5th Annual AIJA Oration in Judicial Administration, Melbourne, 5 November 1993.

5 See Hutchinson, A, *Dwelling on the Threshold: Critical Essays in Modern Legal Thought* (1988).

6 Shiner, R, *Norm and Nature* (1992); Austin, J, *The Province of Jurisprudence Determined*, introduction by H L A Hart (1955), Hart, H L A, *The Concept of Law* (1961), MacCormick, D N, *Legal Reasoning and Legal Theory* (1978) and Raz, J, *The Concept of a Legal System* (2nd edn, 1980).

7 The alternative term "normative positivism" is ambiguous as between the thesis that law is a system of norms and the view that positivism is an expression of normative commitment.

reflected in an increasing acceptance that Positivism has been dethroned from its assumed supremacy as the lawyers' theory of law, to the point where the problem for jurisprudence today is thought to be about finding a viable alternative to Positivism. Many judges have ceased even to pretend that they are not making law, albeit within the flexible confines of traditional legal principle. Critical arguments to the effect that courts have made false claims to objectivity and neutrality are now captured by court apologists who take on board the critics' view that law and politics cannot be separated and turn the political tables by using this to legitimate the now overt legislative activity of courts.[8]

Some of these critical arguments against the Positivist model relate purely to the complexities of interpretation,[9] others extend to a revival of the idea of the common law as an expression of community values, perhaps embodying principles which are constitutionally superior to the enactments of once sovereign legislatures.[10] Most commonly, the view is put forward that judiciaries are better placed than legislatures to formulate a list of fundamental rights which they can then use to invalidate otherwise authoritative legislation.[11] Together these views amount to an open invitation to the rule of lawyers, the increase of the corporate impact of the legal profession, particularly in its judicial mode, and involve the proposal that in one way or another we move beyond the political institutions which have emerged from a long struggle for democratisation.[12]

All this is partly the fault of Positivists themselves, who have made dubious claims about their theory as an accurate empirical description of how modern legal systems actually work. What we have lost in the process is a vision of the Positivist model of law as an aspirational ideal which we *ought* to

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8 Paradoxically, this Realist trend is reinforced by recent quasi-natural law theories that argue the essentially moral nature of the concept of law: See Detmold, M, *The Unity of Law and Morality: A Refutation of Legal Positivism* (1984) and Beyleveld, D and Brownsword, R, *Law as a Moral Judgment* (1986). This form of natural law moves shakily from the analytic truth that moral judges, like all moral agents, must morally approve of their actions, including their judgments, to the conclusion that the moral judge must morally endorse the substance of her or his legal decisions. This ignores the possibility that it is the moral duty of judges to suppress their own moral views as to the propriety of the substance of the rules they are appointed to administer.

9 See Kennedy, D, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36 *J Leg Ed* 518.

10 Allan, T R S, *Law, Liberty and Justice* (1993). Note the imputation of such noble ideals as equality to the ethically mixed and often politically partisan tradition of the common law by Deane and Toohey JJ in *Leeth v The Commonwealth* (1992) 66 ALJR 529 at 541–42. See also Toohey, J, "A Government of Laws, not of Men?" Conference on Constitutional Change in the 1990s, 5 October 1992, in (1992) 27/10 *Aust L News* 7–11.

11 This may be because they are believed to be more detached from political faction, perhaps because they are concerned with articulating individual rights rather than determining social policy; see Dworkin, R, "Political Judges and the Rule of Law" (1978) 64 *Proceedings of the British Academy* 116.

12 See Dworkin, R, *A Bill of Rights for Britain* (1990) 23. In the UK context Dworkin argues that incorporating the European Convention on Human Rights into the law of the UK will mean that "Law and lawyers might then begin to play a different, more valuable role in society than they may now even aim to have ... might think in terms of principle and less in terms of narrow precedent" and so be "the conscience, not just the servant, of government and industry".

implement. The Positivist insistence that law is one thing and morality quite another has been misunderstood as an amoral, even an immoral thesis,[13] and this has detracted attention from the underlying moral rationale for Legal Positivism, namely that it is the task of the sovereign people and their representatives to articulate specific choices from within the options made conceivable through current community values and social practices, choices which, to be politically effective, must be expressed in the form of rules applied by independent judiciaries, a system which enables a formally just system of government, and effective organisation and democratic control of social and economic life in a way which has at least the prospect of being fair and guarantees at least an element of freedom with respect to the conduct which is not covered by the enacted rules.

To defend these strongly worded political and constitutional views is far beyond the scope of a single essay. It would require a defence of the intelligibility and plausibility of the view that rules *can* constrain decision-making.[14] It would require the demonstration that there is a line between interpretation and legislation.[15] It would require establishing working distinctions between politics and law.[16] Here I confine myself to developing and illustrating some points about fundamental rights in order to argue that commitment to human rights can be detached both from the narrow moral values with which they are normally associated and from the juridical device of court-administered entrenched rights which is generally considered necessary for their implementation. I argue that debate about the desirability of entrenched rights is skewed by certain common but false assumptions as to the political and theoretical affiliations of some of its key concepts. Because, in current political ideology, "rights" are viewed as antithetical to the humane values of happiness and empathy,[17] and, in current legal theory, human rights are taken to be in conflict with strict Legal Positivism, the Bill of Rights debate is perceived as being a matter of rights versus utility, implicating a vision of an entrenched system of rights as a form of operationalised Natural Law; in contradistinction to parliamentary sovereignty which is associated with majoritarian utilitarianism and the Positivist theory of law.[18]

I cut across these lines of combat and suggest that, on any defensible analysis, rights are entirely enmeshed within value conceptions, including those central to utilitarian axiology and that there are strong rights-based reasons for opposing court-administered Bills of Rights,[19] some of which emanate from an essentially Positivist model of law. These reasons apply *a fortiori* to implied constitutional rights and the use of background common law principles as ways of introducing fundamental rights as legally superior even to unambiguous and democratically endorsed legislation.

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13 See Fuller, L, "Positivism and Fidelity to Law" (1958) 71 *Harv LR* 630.
14 Schauer, F, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making* (1991).
15 See Marmor, A, *Interpretation and Legal Theory* (1992).
16 See Greenawalt, K, *Law and Objectivity* (1992).
17 See Sypnowitch, C, *The Concept of Socialist Law* (1990).
18 See Campbell, T, *The Left and Rights* (1983) 18–51.
19 See Griffiths, J A G, "The Political Constitution" (1979) 42 *Mod LR* 1.

This is particularly so if we wish to base rights less on the liberal moral values of individual autonomy and negative liberty, important as these may be, and more on a wider concern for the more humane values of happiness, caring and affirmative freedom. Human rights have been largely captured by an often unrealistic old-fashioned liberal model of the prerequisites of rational autonomous agents at the expense of a commitment to the elimination of suffering and the fulfilment of human desires of less exalted but more pressing types.[20] Court-based approaches to the definition of human rights exacerbate this imbalance.

2. *The Articulation of Human Rights*

In this part I draw on the example of the High Court's recent decisions regarding implied constitutional rights, to argue that the articulation and defence of human rights ought to be a central task of any democratic process which regards the equal right of all to participate in political decision-making as fundamental. The fact that the method for expressing and securing rights is itself stated in terms of a fundamental right is no accident, indeed it is one of the central arguments for my conclusion.[21]

The arguments which I put forward may be put under four adjectival headings: (i) epistemological, (ii) democratic (iii) ideological and (iv) positivistic. These represent four types of argument against implied or explicit court-articulated fundamental rights. The example I take by way of illustration is *Australian Capital Television Pty Ltd v The Commonwealth* (1992)[22] in which the plaintiff challenged Part IIID of the *Broadcasting Act* 1942 (Cth) introduced into the Act by the *Political Broadcasts and Political Disclosures Act* 1991. Part IIID prohibits political advertising on radio or television during an election period but allows for politically oriented radio programs and the allocation of free television time for political parties. It was held by the High Court that

> Pt IIID was invalid in its entirety because of its severe impairment of the freedoms previously enjoyed by citizens to discuss public and political affairs and to criticise federal institutions — freedoms embodied by constitutional implication in an implied guarantee of freedom of communication as to public and political discussion.[23]

We are dealing here with alleged implications within a federal constitution rather than the interpretation of an overt Bill of Rights but the structural features of the two cases are essentially similar with respect to the analysis of what is going on in the dynamics of such a decision. In both cases authoritative constitutional words are being interpreted in the context of the alleged invalidity of an exercise of legislative power. Maybe it is more controversial to find a Bill of Rights within a constitution from which the drafters consciously excluded a Bill of Rights, but we may let that pass for the moment. Many of

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20 See Gewirth, A, *Reason and Morality* (1978).

21 Waldron makes the point that the idea of civic participation is at the heart of the modern conception of rights and aptly comments that even if rights are trumps this does not decide which rights are trumps: above n2 at 33, 38, 51.

22 *Australian Capital Television*, above n1.

23 Ibid.

the arguments apply with even greater force to the more extreme argument, recently propounded by one member of the High Court, to the effect that implied human rights may be derived from the common law "freedoms" which were assumed to have normative supremacy at the time of the Constitution was approved.[24]

A. The Epistemological Argument

The confidence with which human rights enthusiasts approve the adoption of court-centred fundamental rights is based on unsupportable assumptions about the distinctive epistemology of human rights. Only the assumed uncontroversial nature of content of human rights enables us to hold that courts are able to identify, in a non-partisan way, certain fundamental rights which may then be superimposed on normal political decision-making so as to keep the latter within its proper bounds. The justification for the courts being involved in this way is that they have the requisite skills for fact finding and are used to applying given rules in a manner which is as impartial enough to command our respect. All this rests on unsupportable ideas about the nature and justification of rights, namely that human rights may be captured in relatively pellucid and simple rules. The prime task in securing human rights is thus viewed, not as knowing what these rights are, but in seeing that they are observed and remedies for their contravention implemented. Thus, it is assumed that we all know what torture is, and we all agree that torture is never justified; the remaining — and demanding — task is to find out when torture happens and provide mechanisms for its prevention.

This model of human rights as an intuited or agreed set of absolute prohibitions — which we may call the torture model — has important uses in the exposure of human rights abuses by such agencies as Amnesty International, and is of considerable importance in the realm of international relations, but it has little relevance to the pursuit of human rights in countries such as Australia. Once we move on from prohibitions on the grosser barbarities to the articulation of policies within a basically humane system we soon discover that the content and form of even the least controversial rights is a matter of some difficulty and no agreed methodology. Does the right to life exclude capital punishment? Does it require the best available emergency medical care at no cost to the indigent? Does it give a right of action against a department of state that fails to prevent deadly child abuse? Indeed, as soon as we try to lift our standards from crude extremes, even the definition of "torture" becomes problematic in relation to aggressive methods of interrogation and disgusting prison conditions.

Further, there is no simple way in which such rights as are agreed have the form of absolute prohibitions on certain types of wrongful conduct. With highly indeterminate formulations, exceptions are always allowed, especially in situations of conflicts with other rights. Absolutist formulations are fine in political rhetoric but they are always qualified in any formulations accepted by governments. In either case, in practice there will be many exceptions. So the vaunted absoluteness of human rights is no special protection until the

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24 Toohey J, above n10.

specifics have been spelt out and difficult choices made. Nor, unless we endorse an extreme libertarian ideology, are the correlative duties confined to negative ones of non-interference and inaction, so there is no agreement on the form of rights either.[25]

In fact, our consensus on human rights goes little further than a common cherishing of certain very important human interests which we value highly, and a commitment to some form of human equality and a highly unspecific notion of what is fair. These broad ideals are almost meaningless until they are worked out in detail in relation to different areas of activity and the endless competing priorities are brought into some form of working relationship. These values are inevitably socially acquired and articulated and we can only choose within the options our cultural context enables us to express. It follows that participation in the process of articulation and choice should be one of the most prized ideals of the human rights tradition, not simply the spectator sport that it becomes when these crucial choices are left to litigants, lawyers and courts.

Ostensibly *Australian Capital Television* does not appear to be in the business of making political judgments based on the moral intuitions of the judges. Rather, what appears to be going on is the working out of the presuppositions of the idea of "representative government", the explicit datum of the Constitution from which the relevant implied fundamental right is to be deduced. The determination of these presuppositions may be regarded as a factual matter within the normal provenance of judicial activity. Is the questionable legislation destructive of something that is causally necessary for representative government?

The court approaches these issues in two stages, first arguing that there is an implied right of freedom of political communication, and then going on to the view that Part IIID violates that right in an unacceptable manner. In the first leg of the argument Mason CJ contends:

> The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act. Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion.[26]

In other words, freedom of communication is indispensable to representative government.

This argument is unexceptionable if it is simply an assertion that some communication is a prerequisite of political representation but it does not establish some specific set of rights (dubbed "freedom of communication") that is indispensable in this regard. Indeed, it may be plausible to say that the more communication there is the more representative the system will be, so that in a

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25 Consider Menlowe, M and McCall Smith, A, *The Duty to Rescue* (1993).
26 *Australian Capital Television*, above n1 at 703.

fully representative system there will be maximal communication. Mason CJ says:

> Absent such freedom of communication, representative government would fail to achieve its purpose of government of the people through their elected representatives; government would cease to be responsive to the need and wishes of the people and, in that sense, to be *truly* representative.[27]

However, what he refers to is not actual or maximal communication but "freedom" of communication, that is, some notion of normative order bearing on the governance of communication.

It is at this point that the assumption is made that the Court simply "knows" what this normative freedom of communication amounts to. The fundamental right is in this sense "intuited", or, more accurately, taken as uncontroversially clear and beyond question. The "intuited" moral judgment comes when the Court simply discounts the corrupting influence of money in the election process, a corruption which does affect the equal competition of ideas which could be regarded as what freedom of communication is meant to be all about. The majority of the Court "knows" that what is involved in Part IIID is a limitation of freedom of communication rather than an enhancement of it. The issue is dogmatically assumed to be freedom of communication versus a competing public interests, such as political corruption.[28] The same confidence in the ability of the Court to know what freedom of speech involves is demonstrated by its quick dismissal of the possibility that giving representatives special and cost-free access to the media enhances rather than reduces "freedom of communication".

Given that the Court has this intuitive confidence in its judgment of what is involved in the fundamental right of freedom of communication, namely something like the existing rules relating to communication, the second stage of the argument for the invalidity of Part IIID is relatively easy. If a law in any way further restricting communication is a violation of the right to freedom of political communication then it follows that outlawing political advertising even for a restricted period is a violation of freedom of communication. The only question then is whether there are any sufficiently good reasons for permitting such a violation. The majority opinions then centre on whether corruption of the political process or undue influence are sufficient grounds for going along with what is taken to be a clear incursion on the right to political communication.

The argument looks very different if we construe it as a debate about what constitutes freedom of communication. The majority on the Court avoid the debate about whether freedom of communication might be enhanced by the legislation. Yet corruption may be a matter which is internal to the processes of communication. If it is communication that is corrupted, by being available only to those with large sums of money, then it is not a matter of freedom of communication versus corruption, but of articulating an acceptable set of free

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27 Id at 696, 703 (italics added).

28 Id at 705. The contrary view was put to the Senate Select Committee on Political Broadcasts and Political Disclosures November 1991 (1993) at 4.6.5 by Dr Ian Ward and Dr Ian Cook, both political scientists from the University of Queensland.

communication rights. However, even after allowing that the legislation may have bearing on access to the media and so to the problems of democratic politics in an age of expensive and restricted media outlets, Mason CJ blandly states that the common practice of regulating political advertising in nearly all other comparable democracies "does not refute the proposition that Part IIID impairs the freedom of discussion of political and public affairs and freedom to criticise federal institutions in the respects previously mentioned".[29] This displays a blithe confidence that the Court "knows" what freedom of communication involves and that, in particular, it is not a matter of providing access to the media. If the argument is made that Part IIID would reduce the dependence of political parties on large contributors, this may be seen as tantamount to saying that it will *increase* freedom of communication in that what is available to electors will be less controlled by wealth. The fact that wealth and property dominate modern communications may be seen as a corruption of the political process precisely because it diminishes the sort of freedom of communication that "truly" representative government requires.

Nor do the other majority opinions show any awareness that the argument that television advertising trivialises political debate[30] is an argument about the proper content of freedom of communication rights, something which needs to be determined after an examination of the rationales for freedom of communication in the political context — rationales to which they are happy to appeal when arguing for the existence of an implied right of communication but then ignore when passing over what constitutes that right.[31]

So the pivotal role of the Court's assumption that it knows what freedom of communication is may be appreciated by noting the way in which this enables it to avoid addressing the question of whether or not the provisions of Part IIID enhance or diminish the democratic system. My point here is not that the answer is obvious, but that it is not. If the question had been directly addressed then the speculative and political nature of the issues would have been so evident as to disqualify the court from having an authoritative opinion on the matter. As it is the Chief Justice is able to accept the political and evaluative arguments of the Senate Standing Committee which considered the matter, but dismiss them as irrelevant. Had the court undertaken such a study itself, it would have been clearly involved in a political process more suited to the legislative branch of state. It would certainly have been evident that no answer could be read off from any uncontroversial formulation of a right to freedom of communication. The issue comes down to a matter of whether the legislation will make the Australian system more or less representative. This must be a highly speculative matter of political science and political philosophy which is very dependent on what particular conception of representative government is involved and what are the economic realities of effective communication. While the dissenting judgments do not themselves directly address the conception of freedom of communication, they do show much more awareness of the political nature of the issues raised by the challenge to the legislation.[32]

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29 *Australian Capital Television*, above n1 at 700.
30 Id at 703.
31 Id at 696.
32 Brennan J, id at 724, and Dawson J, id at 703.

In the event the High Court made itself look rather foolish in being quite so bold in its claim that a system which is basically similar to that used in the UK, from whose Parliament the Australian constitution may arguably derive its legitimacy and whose courts they cite in favour of the existence of a right to freedom of expression,[33] is so evidently contrary to freedom of communication as to warrant invalidating a piece of legislation that emanated from a lengthy and detailed democratic process.[34] It is certainly widely implausible to claim that the High Court's particular statement of what freedom of communication involves is *necessarily* implied by the Constitution. The case therefore nicely illustrates the way in which, when articulating the content and form of fundamental rights, courts permit their own unargued assumptions to fill the epistemogical vacuum surrounding the discourse of human rights.

B. The Democratic Argument

Perhaps the most powerful argument for having court-based fundamental rights is that democracy itself is neither self-justifying nor self-correcting. Democracy as a system of government cannot itself be justified by democratic means, without circularity. It follows that democracies are not entitled to choose to abandon democratic institutions. Further, even if democratic process is accepted as the sole basis for political legitimacy, this legitimacy depends on the system actually being democratic. The majorities that count are the majorities within properly constituted democratic regimes. It is evident, therefore, that there is reason to look for some institutional procedure to provide external oversight for electoral rules and procedures and to limit the capacity for even properly constituted democracies to resile from democratic norms.[35]

Moreover, actual democracies, in seeking to give institutional form to the justificatory idea of equal political power, have to operate according to some less than unanimous decision-procedures which inevitably place the interests of minorities at risk. It can therefore be argued that it is actually democratic (in that it furthers the objective of equal power) to limit what majorities may do in relation to the interests of those individuals who are not of their number. Hence the idea of fundamental rights as a device to protect those interests, interests which not even majorities may thwart. Again, as part of democratic aspiration, it seems natural to look to courts to prevent majorities violating such rights. However, while these powerful considerations do point up important roles for the *idea* of fundamental rights as moral limits on unprincipled majorities, it is by no means clear that they legitimate a role for courts in actually developing the content rather than merely applying such right-centred rules as are deemed appropriate to protect the vulnerable interests in question.

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33 The case cited is *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 315.

34 Thus, the Joint Standing Committee on Electoral Matters, June 1989, Political Broadcasts and Political Disclosures Bill 1991, Senate Select Committee on Political Broadcasts and Political Disclosures, November 1991.

35 These definitional limits of "democracy" are explored in Chapman, J, and Wertheimer, R eds, *Majorities and Minorities* (1990). See Dworkin, above n12 at 13: "Democracy is not the same thing as majority rule".

Indeed, it is apparent that the solution of giving such power to a small number of unelected and unrepresentative persons drawn from the membership of a not always admired profession, may turn out to be much more inimical to these rights than the undoubted problem with which we started. Given selfish or foolish majorities, neither courts nor parliaments seem attractive mechanisms. If we are sure that we all know that rights are to be enforced, it is evidently proper to give courts the task of determining when such rights have been violated. But there are strong arguments for giving neither courts or parliaments the power to determine the content of these rights. The former are not democratically accountable at all and the latter only imperfectly. Giving either branch of state the power to determine the content of rights which trump majority decisions raises the eternal political dilemma: who is to control the controllers?

In these circumstances the determination of fundamental rights by referendum has some advantages, although this in itself does not solve the problem of who establishes the electoral ground rules for referenda, nor does it overcome the problem of minority rights. Moreover such referenda generally involve a decision for or against brief and unspecific rights which effectively places a great deal of unaccountable power in the hands of the interpreters who have the task of applying these indeterminate rights to specific circumstances.[36] It is more appropriate, therefore, to give the task of rendering fundamental rights more specific to the elected representatives of the people who retain thereby at least some control over the all important task of positivising priority rights. This removes from the courts the power to reject any legislation which can be viewed as an attempt to instantiate fundamental rights and retains the power to determine the content of fundamental rights as part of those political rights which are inseparable from democratic citizenship. Any viable justificatory theory of democracy centres on the idea of equality in the exercise of political power. Scarcely any aspect of political power is more important than the determination of what is to count as those priority interests which are to overrule and out-prioritise all other considerations. To hand this role over to a non-representative body is to hand over such a major aspect of political authority as to undermine the initial basis which is used to justify that move. To despair of the capacity of majorities to recognise rights for minorities is to despair of democracy itself. Indeed, if the populace does not retain an idea of and commitment to fundamental rights, courts are in no position to sustain the vitality and force of this essential element of democracy. Democracy was not achieved by judicial activism and is unlikely to be sustained by it. If the people and their representatives do not have a lively sense of human rights, and a strong sense of responsibility towards the values they represent, then fundamental constitutional rights, implied or otherwise, will be ineffective. And so, while it is true that democratic decision-making presupposes democratic process and majority sensitivity to the rights of minorities, it is mistaken to look to the maintenance of democratic culture and process outside of majoritarian electoral process.

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36 On referenda, see de Walker, G, *Initiative and Referendum: The People's Law* (1987).

In *Australian Capital Television* the unelected judges decided what is an appropriate ordering of communication during election periods. They did so through an application of their conception of freedom of communication and its particular significance for representative government. In so doing they took on the role of protecting democracy against a violation enacted by elected representatives. In the judgment, judicial suspicion of politicians is clear. Mason CJ:

> The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication, unless curtailed will bring about corruption and distortion of the political process.[37]

More particularly, the system of distributing free television time on the basis of previous elections was seen to favour the political status quo and hence the politicians who had enacted the legislation. All this fits the "representation reinforcing" thesis of John Hart Ely which interprets the Bill of Rights as giving the US Supreme Court the task of sustaining the preconditions of fair elections.[38] Certainly, the High Court takes this as the paradigmatic area for the inquisition of legislative acts: "The Court must scrutinise with scrupulous care restrictions affecting free communication in the conduct of elections for political office for it is in this area that the guarantee fulfils its primary purpose".[39]

Now, of course, the High Court's suspicions may be justified in that the proposed reform would have benefited incumbent representatives (but not therefore always a particular political party). But, given that television time is a very scarce commodity and given the relevance of representative authority to the allocation of such a scarce resource, to say nothing of the highly restricted de facto access which holds at present, it is not clear what alternative system of allocation is appropriate. As Dawson J (dissenting) points out, the "free access to the airwaves by all who wish to put a point of view during an election period is an impracticality, and, if there is to be free time, then there must be some method by which it is granted".[40] Indeed, only by discounting the disproportionate influence of wealth is it possible to consider that the enacted reforms did not provide an appropriate move towards a "more even playing field". If so, this demonstrates that the Court is taking a very particular and controversial line on a matter of how freedom of communication is to be spelt out. Further, there is no reason to believe that in so doing they were following the electors' view of fair political process as against that of their representatives.

In any case, it is part of my argument that it is corrupting to the political process that such matters are taken out of the political arena and settled by judges. Dawson J (dissenting) points out that the constitution makers explicitly rejected the American model (a point also emphasised by Mason CJ) and that this "choice was deliberate and based on a faith in the democratic process to protect Australian citizens against unwarranted incursions upon the freedoms they enjoy".[41] Dawson J does not deny that freedom of expression is as fundamental to a free society in Australia as it is in the United States, but rests

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37 *Australian Capital Television*, above n1 at 696.
38 See Ely, J, *Democracy and Distrust* (1980).
39 *Australian Capital Television*, above n1 at 705.
40 Id at 725–6.
41 Id at 722.

his position on the constitution's commitment to an alternative way of protecting rights: "The fact, however, remains that in this country the guarantee of fundamental freedoms does not lie in any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values".[42] This seems not only an accurate account of what the constitution implies but represents a political direction which is more thoroughly democratic than the alternatives. Dawson J again:

> To say as much is not for one moment to express disagreement with the view expressed by Murphy J that freedom of movement and freedom of communication are indispensable to any free society. It is merely to differ as to the institutions in which the founding fathers placed their faith for the protection of those freedoms.[43]

As it was Parliament rather than the High Court which enacted universal adult suffrage so it is to Parliament that we should look for dealing with the immense dangers facing democracy from the commercially dominated media which now have an extraordinary power over public opinion. It is a matter for considerable regret that an initial (and no doubt imperfect) attempt to deal with this matter has met with such negative response under the guise of the protection of democratic rights.

C. *The Ideological Argument*

Australian Capital Television demonstrates one way in which courts can claim to be impartial in relation to fundamental rights. Judges do not benefit or lose from changes in electoral process in a way that politicians may do so. More generally courts may also be seen as detached from political conflict in a way which renders them able to take at least a relatively unbiased view of conflicts between majorities and minorities.[44] However, while such impartiality is a reason for entrusting courts with the application of specific rules to particular factual circumstances, it is not a sufficient basis for entrusting them with what is in effect legislative power, particularly when such judicial legislation is immune from review by legislatures.

The familiar arguments on this matter derive from the fact that any individual or group of individuals have their own value viewpoints which means that they cannot be politically neutral when handed a specifically political task, such as legislation. It is no accusation of improper bias to say that courts, along with any other institutional collection of individuals, cannot be impartial in relation to the choice rather than the application of rules. It is not necessary to invoke any extreme Realist argument as to the impossibility of any neutrality even in the interpretation and application of the clearest and most specific rules, in order to question unelected legislative power. Legal Positivism does not require endorsing the myth that law is neutral as between social values.[45]

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42 Ibid.
43 Id at 723–4.
44 See Dworkin, above n12 at 13.
45 See Sadurski, W, *Moral Pluralism and Legal Neutrality* (1990).

While this argument against implied constitutional rights does not depend on establishing that there are any specific value preferences involved in the exercise of judicial legislative power, it is arguable that the class, gender and age characteristics of court members are helpful in predicting and understanding their judgments on such matters. Certainly there are reasons for believing that court-based articulations of fundamental rights will tend to be both conservative and biased towards a negative idea of human rights, while a political process is more open to a more progressive and positive approach.[46]

In *Australian Capital Television* the conservative tendency is illustrated in that the assumption is made that *existing* laws and practices represent a bundle of free speech rights which are the measure of what is justified in this sphere. It is the fact that the Act *alters* the existing rights of Australian citizens that makes it suspect and a prima facie violation of the right to freedom of communication. This is simply a status quo argument:

> Pt IIID was invalid in its entirety because of its severe impairment of the freedoms *previously* enjoyed by citizens to discuss public and political affairs and to criticise federal institutions.[47]

Further, this has the ring of truth only if freedom of communication is equated with the absence of legal prohibitions on any form of communication, the right of communication correlating with a duty on government not to prohibit any form of speech. But fundamental rights are capable of being viewed as positive rights in the sense of correlating with the duty of government (or other) to take positive steps to further communication by, for instance, the provision of free time on television. Such positive rights are not those with which courts deal routinely and reflect a creative community-oriented ideology which is not dominant within the legal profession. Indeed, although the plaintiff's submission that the provision of free time is a violation of their property rights is not explicitly addressed by the court, it is possible that the Court's composition made it receptive to such views, as it is in general to US free speech jurisprudence which is similarly affected by the rights of media owners to control their own property.

Certainly the Court exhibits no awareness of ideological bias in detaching the definition of freedom of communication from the consequences of existing rules on the quantity, quality and distribution of the capacity to communicate within the community. The centrality of the absence of prohibitions is evident in the court's disinterest in consequential arguments:

> the prohibition is no less antagonistic to and inconsistent with the freedom of political communication which is implicit in the Constitution's doctrine of representative government simply because the parliament or those in government genuinely apprehend that some persons or groups may make more, or the more effective use, of the freedom than others involved in the political process.[48]

In other words it is formal, negative freedom that counts when fundamental rights are at stake.

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46 See Griffith, J A G, *The Politics of the Judiciary* (4th edn, 1991).
47 *Australian Capital Television*, above n1 at 695 (italics added).
48 Id at 719.

D. The Argument from Positivist Values

If we view Legal Positivism as more of a prescriptive than a descriptive theory it may be characterised as the view that we are better governed through a system of explicit, precise and comprehensive rules which can be applied without recourse to the moral and political views of the adjudicators. The familiar benefits which are said to flow from this version of the Rule of Law are a serendipitous bundle: freedom for individuals and groups who can plan their conduct in the light of known legal consequences; formal equity in that differential treatment is according to some rule rather than official whim, with the prospect that if the rule is a good one then there will be substantive equity as well; and governmental effectiveness in that, with clear and specific binding rules, there is an increased prospect of altering conduct in an intended direction.

Less frequently noted are the democratic benefits of approximation to the Positivist ideal. In its democratic form Positivism holds that the people or their elected representatives are the sole or at least the superior source of law. The Positivist ideal of specific, impartially applicable rules enhances democracy by giving a focus to decisions which are sufficiently detailed to have some practical effect. In other words choosing rules gives real and effective choices to the people or their representatives. Electing officials who are given wide discretionary power over individual matters involves a measure of accountability insofar as re-election is a matter of consequence to those officials, but far greater democratic control is obtained by requiring such officials to govern in accordance with rules which are subject to the outcome of democratic process. This control is, of course, even more important in the case of unelected officials, such as government bureaucrats and judges, who are not constrained by electoral discipline.

This last point is crucial in *Australian Capital Television*, if only in relation to the conduct of non-judicial officials, in that the absence of clear criteria for the allocation of 10 per cent of free television time is given as a reason for rejecting the legislation. The Court notes disapprovingly that the allocation of 10 per cent of the free time depended on "the exercise of discretion by the Tribunal".[49] This means that it is not possible to anticipate how this discretion will be exercised.

However, essentially similar criticism may be made over allowing an interpretive discretion to courts that enables them by a process of very loose and inevitably political reasoning to make decisions which strike down legislation which is clear and precise. On the Positivist model the High Court is on strong grounds when it objects to what the Americans call "unconstitutional vagueness", but the very same considerations count against court-centred Bill of Rights of court-engendered implied constitutional rights.[50]

The values which lie behind the desire for human rights can be captured within specific and neutrally applicable rules selected from existing social practices. Human rights can be positivised. Indeed, given that the crucial decisions are decisions about just what these values import, they must be positivised

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49 Id at 707.

50 For the morality involved in interpreting vague rights, see Perry, M, *The Constitution, the Courts and Human Rights* (1982).

if they are to be effective, and if they are not to violate these values themselves, particularly those of freedom, equality and effective response to fundamental human needs. If we are given to such rhetorical talk, we might say that it is a human right to be governed by democratically chosen rules which approximate to the Positivist ideals of clarity, specificity and consistency. There are fundamental human values and some of these need protection in laws of specific content.

But this does not mean enacting Bills of Rights whose specific formulations become the object of legal interpretation as if this could take the place of political debate. It does mean identifying certain key valued interests which should be protected and furthered by duty-imposing rules which are adapted to particular social and economic circumstances. Thus, the *Political Broadcasting and Political Disclosures Act* 1991 (Cth) can be seen as an effort to instantiate a human right by democratising the election process so as to render more attainable political equality in a specific type of social circumstance. The assumption by the High Court of an arguable discretionary power to disallow such legislation is an affront to Positivist ideals and a move away from the Rule of Law.

Of course, courts are able, albeit unsystematically, to positivise abstract rights through the standard processes of case law development, as happens routinely in those jurisdictions with entrenched rights. However, the more this happens the more the Courts take on the role of legislators, and, as the scope of these rights becomes interpreted in an expansive manner, there is scarcely a political decision that may not have to be re-argued in an ostensibly legal framework. Further, by drawing the courts into a more overtly political role we will in the long run reduce their capacity to fulfil their prime role of administering rules chosen for them in an impartial and non-political manner.

3. *Concluding Worries and Possible Solutions*

This essay concentrates on important aspects of disquiet concerning the trend towards Bills of Rights and implied constitutional rights as a focus for political choice. However, it needs to be stressed that this is not to denigrate the importance of the idea of human rights and the significant value commitments they represent. Indeed one of the more convincing reasons for being in favour of court-centred fundamental rights is that this may be a way of affirming the importance of these values. There is no doubt that the veneration for fundamental rights is to an extent tied in with the fact that they are seen as removed from the banalities and trade-offs of routine politics. It can be argued, therefore, that encouraging the Australian High Court to develop an implied Bill of Rights may have immense symbolic significance and help to regenerate a sense of the nature and significance of human rights in our society.[51]

On the other hand, the message that such an institutional arrangement gives is an essentially undemocratic one, not because majority decision-making is beyond reproach, but because it despairs of majorities being capable of thinking and voting in human rights terms, recognising the equal worth of all citizens,

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51 The symbolic point is made in Dworkin, above n12 at 56f.

appreciating the need for attending to the basic needs of everyone and appreciating the importance of protecting the happiness as well as the autonomy of individuals. The symbolic impact of removing the articulation of human rights from the elected representatives of the people may be even more damaging than the symbolic advantages of setting up a countervailing political institution to oversee human rights.

Further, if we despair of politics then courts will not save us. A danger of entrenched Bills of Rights is that ordinary politics is given over to hard nosed majoritarianism and unadulterated utilitarianism. It must remain part of any acceptable political culture that the democratic process in all its aspects is receptive of arguments that certain interests require the sort of protection which leads us to enshrine them in positive rights; that is, interests which are protected by specific mandatory duties on others to protect and further the interests in question without rendering these interests vulnerable to the calculation of utility (or any other calculation for that matter) in particular circumstances. The idea that only judges can be trusted to formulate and uphold rights is a facile and dangerous contention.[52]

The upshot of this discussion is the importance of finding an institutional way of emphasising and facilitating the democratic expression of human rights which does not involve major judicial input, an institutionalisation which preserves the idea of fundamental rights but reclaims it for democracy. There are a number of options and these cannot be explored here. Unentrenched Bills of Rights can help in focussing attention on human rights in that legislatures may be called upon to reconsider their enactments if they seem to the courts to be in conflict with the current Bill or Charter.[53] This approach however, still gives the judiciary the unfortunate task of reading what they can into highly unspecific rights. If, to avoid this, Bills of Rights are made very detailed, then they become generally indistinguishable from ordinary legislation.

A less dramatic alternative is to use the approved statement of rights in the context of a Parliamentary committee which reviews all legislation in the light of the human rights perspective, something which goes neatly together with a review of draft legislation in relation to international treaty obligations emanating from the many human rights conventions to which countries are signatories.[54] To this can be added further functions for such a statement of rights, in particular their use as a guide to statutory interpretation and common law development, provided that this is subject to legislative review.

Without canvassing the pros and cons of these possibilities, I simply note that it is possible to find ways of institutionalising human rights considerations without making the courts the prime locus of their substantive articulation.

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52 Chambers, S, "Talking about Rights: Discourse Ethics and the Protection of Rights" (1993) 1 *Political Philosophy* 229 at 247: "People who doubt that inclusive rationalized debate is the means of strengthening our rights tradition must either doubt the capacities of human rationality or doubt that there are good reasons for justifying rights."

53 As in the *New Zealand Bill of Rights Act* 1990.

54 For one suggestion, see Kinley, D, *The European Convention on Human Rights: Compliance without Incorporation* (1993); also Lester, A, *Democracy and Individual Rights* (1968).

A regard for humane values, and even a commitment to the ideal of autonomy which underlies much of the human rights conception, point definitively to the need for keeping the power of defining the content of fundamental rights within the mainstream of democratic politics. It is important that this be done, if only because it may serve to inhibit moves into what may be seen as a human rights vacuum within states that lack Bills of Rights on the American model, a vacuum which is more a matter of international comparison than actual neglect of human rights. Indeed, a main worry relating to the current Australian development is that genuinely democratically led human rights developments may be struck down by the High Court on the basis of its own unlegitimated ideology. This can only bring the ideal of human rights into disrepute to the ultimate detriment of the humane values and human interests that they ought to serve.