Rights, Review and Reasons for Restraint

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The extent to which judicial review enforcing constitutional rights is legitimate and desirable is an issue of constant importance in the rights arena, affecting the recognition, interpretation and application of express and implied constitutional guarantees. This article examines five of the leading objections to constitutional judicial review, relating to judicial capability, 'political questions', public confidence, being antidemocratic, and excessive openness and uncertainty. Given the force of some (but not all) of these points, there are significant reasons for judicial restraint in approaching constitutional rights.

There are many things governments simply should not do. No sane, moral person doubts this. Indeed, there is substantial international agreement about what minimum individual and group rights governments should respect.[1] This apparent consensus is undermined by disagreement over the content and effect of such rights, and over whether and to what extent they should be enforceable by judicial review of the validity of legislation. It is the latter issue which is the subject of this article.[2]

The institutional question of the extent to which it is legitimate or desirable for courts to give effect to constitutional rights is the subject of never-ending debate. The foundational case in the dispute is *Marbury v Madison*,[3] in which the US Supreme Court asserted its right to invalidate legislation inconsistent with the American Constitution. Although a range of arguments can be made about whether it was intended or is appropriate that the High Court follow this lead,[4] judges have accepted as 'axiomatic' that judicial review is part of the Australian system.[5] Some aspects of the debate arise for all forms of constitutional enforcement, but it is the enforcement of rights which causes the greatest controversy.

Acceptance of judicial review does not make the issue moot. Moreover, the judicial review debate logically is separate from, although closely linked to,

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1 See eg, Universal Declaration of Human Rights 1948; International Covenant on Civil and Political Rights 1966; International Covenant on Economic, Social and Cultural Rights 1966.

2 This article is derived from a doctoral thesis, submitted in 1998, entitled *'Implied Rights' in Constitutional Adjudication by the High Court of Australia since 1983*. Thanks are due to my doctoral supervisors, Professor John Finnis and Sir Anthony Mason. The views expressed, and any errors, are my own.

3 (1803) 1 Cranch 137.

4 See eg, Geoff Lindell, 'The Justiciability of Political Questions: Recent Developments', in HP Lee & George Winterton (eds), *Australian Constitutional Perspectives* (1992) at 223–229, and references therein.

5 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (hereinafter *Communist Party* case) at 262 (Fullagar J).

arguments about which constitutional rights should be recognised, if, indeed, any should be recognised at all. Even if one takes the position of supporting judicially-enforceable constitutional rights, or of respecting a decision to entrench such rights, the issues discussed here still require consideration. Views as to the appropriateness of judicial enforcement of constitutional rights do and should affect judicial readiness to recognise new implied rights, to define rights broadly, or to find a law in breach of a guarantee. They also influence the rigour with which purported justifications for the restriction of non-absolute rights are reviewed. The arguments on the issue are thus of great and ubiquitous importance in the rights arena.

In this article I will first note the leading justifications for judicial review enforcing constitutional rights. My primary focus, then, is on the main, overlapping jurisprudential objections to such review, which are as follows:

- that such judicial review involves the courts in issues with which they are not well-equipped to deal;
- that it involves the resolution of 'political questions';
- that such review would undermine public confidence in the judiciary;
- that it is anti-democratic;
- that it takes the courts into an inappropriate sphere of significantly unguided value judgments (an argument which raises, in turn, the role and utility of the notion of 'community values').

Of these, the first three have limited force, but the latter two in particular give rise to reasons for judicial restraint in the enforcement of constitutional rights. It should be noted that the important practical and political question of whether judicial enforcement of constitutional rights is effective to bring about social change is beyond the scope of this paper.[6]

One preliminary point must first be dispensed with. To assert that there may be reasons for restraint when judges imply, interpret or apply constitutional rights is not to suggest that judges should defer to the Parliament's assessment of *constitutionality*. The arguments in this paper are not directed to the acceptance of some constitutional variant of the American *Chevron* doctrine[7] — a doctrine which the High Court has declined to adopt[8] — whereby if a regulatory statute is ambiguous, the courts may show deference to the construction adopted by the administering government agency.

If judicial review is accepted, then constitutionality is ultimately for the courts to assess. Judges, however, have significant areas of choice in recognising, interpreting and applying constitutional rights. In facing these choices, there are imperatives (of variable force) to take a cautious approach. Constitutional rights restrict governmental power of action. The default position, generally, is governmental power. The reasons for restraint might be characterised as involving

6 Note Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

7 *Chevron USA Inc v Natural Resources Defence Council Inc* 467 US 837 (1984).

8 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [40]–[48] (Gleeson CJ, Gummow, Kirby & Hayne JJ).

deference to the 'political branches'. What this means is not deference to those branches' assessment of constitutionality, but deference to their general power to regulate based on their assessment of the appropriate balance between competing social interests.

1. *Justifications for Judicial Review*

A. *The Main Arguments*

The most prominent justification offered for judicial enforcement of constitutional rights is that democratic majorities cannot be trusted to respect the rights of minorities or individuals.[9] To put it another way, some matters are regarded as too important to be subject to everyday popular 'whims'. Yet if some issues are regarded as too important to be left to the democratic process, such as those relating to individual autonomy, then it must be asked why *any* significant issue should be entrusted to the people. It is not self-evident that those with minority views or practices in relation to tax or property are less worthy of protection than minorities on religious freedom or criminal procedure. The response to this question will depend on the philosophical model used to justify the particular rights involved. For instance, one interesting type of answer supports rights relating to the democratic procedure itself.[10]

One version of this justification is that the people and politicians cannot be trusted, at least on certain issues, because of their basic self-interest. The civic republican model, with its distrust of direct popular preferences, embraces this line of thought.[11] It has also been asserted that judicial review has an inspirational, symbolic or educative effect on the populace,[12] although some counter that elite, legalistic resolution of controversial matters atrophies public debate.[13] A linked justification is that democracy has produced substantively inadequate results on certain matters; social justice, for example.[14] It can be argued that some matters (for example, those in the 'private' realm) are simply not the concern of governments. Such views openly seek to entrench a particular political theory. For all these perspectives, the difficulty again arises of reconciling such distrust of the people, or such disappointment with results, with the fundamental democratic premise that the people are worthy of trust.[15]

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9 See eg, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980), ch 6; Justice WJ Brennan, 'Why Have a Bill of Rights?' (1989) 9 *OJLS* 425 at 432–434.

10 See Ely, id at ch 4 & 5.

11 See eg, Cass Sunstein 'Beyond the Republican Revival' (1988) 97 *Yale LJ* 1539 at 1539, 1548–1539.

12 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962), at 26; compare Learned Hand, *The Bill of Rights* (1958) at 70–71.

13 Allan Hutchinson & Patrick Monahan, 'Democracy and the Rule of Law', in Allan Hutchinson & Patrick Monahan, *The Rule of Law: Ideal or Ideology* (1987) at 117–119.

14 Hillary Charlesworth, 'The Australian Reluctance About Rights' (1993) 31 *Osgoode Hall LJ* 195 at 218, 228–231.

15 Note Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *OJLS* 18 at 34–38.

Another justification for judicial review enforcing constitutional rights is that neither the populace, nor perhaps the legislature or executive, is capable of consistently applying and sustaining a basic agreed set of values or principles.[16] The strongest version of this argument centres on the idea that constitutional rights represent a popular agreement to respect certain fundamental principles in a manner which takes precedence over any later wish to deviate from them,[17] at least unless that wish is itself expressed in overriding constitutional form. The judges might then be seen as simply giving effect to the overriding decision of the people to constrain legislatures.[18]

In this context a distinction is sometimes drawn between 'enduring' basic community values and mere community 'attitudes' on particular issues, a distinction discussed below.[19] Waldron has attacked this 'pre-commitment' model, arguing that it only has worth if there are distinct periods of rationality and irrationality, such as when a quitting smoker asks you to hide the cigarettes.[20] In relation to rights, he asserts, there is merely ongoing rational disagreement. One might wonder whether the smoker is really avoiding later *irrationality*, or is simply seeking to bind him/herself to a present desire to achieve a goal regardless of later temptation. In any case, it is certainly arguable that some democratic decisions are more reflective and principled than others, even if there is no clear differentiation between them.

An institutional element of this justification is that one needs leisure, training and insulation to consistently apply fundamental principles.[21] Any implication that constitutional rights can be applied in a completely neutral manner is flawed.[22] And there is no reason to think that judges are more moral or wise than the rest of us.[23] However, judges generally are trained and adept at analysing conflicting arguments and searching for consistent and principled solutions. Some argue that government is about constant conflict between competing interests.[24] On this view, requiring principled resolutions of such conflicts is naive, irrelevant and inappropriate. Yet the democratic acceptance of some set of principles or rights may represent a popular direction to override the operation of realpolitik.

A further institutional justification offered for judicial review is that the courts' necessary focus on individual cases gives them opportunity to assess and ameliorate the detrimental effects of general policies on individuals.[25] This

16 Bickel, above n12 at 27; Hand, above n12 at 11–12.

17 Bickel, above n12 at 23–33; WJ Brennan, above n9 at 434.

18 Discussed further below, Heading 5 of this article: 'The Democratic Objection'.

19 See Heading 6 of this article: 'Legitimacy, Values and Preferences'.

20 Above n15 at 47–48.

21 Bickel, above n12 at 25–26; Hand, above n12 at 12–13.

22 See further below, Heading 6 of this article: 'Legitimacy, Values and Preferences'.

23 Note *Cruzan v Director, Missouri Department of Health* 497 US 261 (1990) at 293 (Scalia J); *Airedale NHS Trust v Bland* [1993] AC 789 at 887–888 (Lord Mustill).

24 See JAG Griffith, 'The Political Constitution' (1979) 42 *MLR* 1.

25 Bickel, above n12 at 26; J Whyte 'Legality and Legitimacy: The Problem of Judicial Review of Legislation' (1987) 12 *Queen's LJ* 1 at 9–10; note also Ronald Dworkin, *Taking Rights Seriously* (1978), ch 4.

argument is less forceful if the relevant remedy involves wholesale invalidation of provisions, as it usually does in Australia, rather than the granting of personal relief. Moreover, it is a human truth that we may be inconsistently and disproportionately affected by individual cases, as compared to general perspectives.[26] The individual focus of courts is not, therefore, an unmitigated good in deciding constitutional rights questions.

For many of these arguments the key perceived benefit of judicial review is that judges are insulated from the people, and thus not subject to the same close and intense popular pressure as politicians.[27] For these arguments, then, being non-democratic is actually the great virtue of judicial review.

It is also implicit in the justifications that the judiciary, unlike the other branches of government, has no conflict of interest when construing and enforcing constitutional limitations.[28] Yet even when delimiting federal power there is the potential for judicial self-aggrandisement by drawing the lines in such a way as to ensure a regular need for adjudication.[29] When enforcing constitutional rights, courts undertake assessments similar to those made by legislatures.[30] And the wider the judicial interpretation given to a right, the wider the range of government measures which may be permitted or not according to judicial approval. Thus the judges have it in their capacity to increase their own power and importance and are not immune from the potential temptation of institutional self-interest. Of course, another view of self-interest might lead judges to seek to reduce the size and controversy of their workload.

B. The Federalism Comparison

Judicial enforcement of the constitutional division of powers is well-accepted in Australia. Is there any relevant difference between judicial enforcement of constitutional rights and of federal divisions?

For matters relating to federalism the courts' role is to delineate power along a spectrum of possible Commonwealth power. The states will still generally have power over any matter held to be beyond Commonwealth competence. In enforcing constitutional rights (at least insofar as they apply to both levels of government) the courts create gaps in the legislative spectrum, something Windeyer J felt they should be slow to do.[31] Presumably his concern was that such

26 See *Miliangos v Frank (Textiles) Ltd* [1976] AC 443 at 481 (Lord Simon of Glaisdale); Primo Levi, *The Drowned and the Saved* (1988) at 38–40.

27 Hand, above n12 at 12; Bickel, above n12 at 25–26; Michael J Perry, 'The Authority of Text, Tradition, and Reason: A Theory of Constitutional 'Interpretation'' (1985) 58 *Southern California LR* 551 at 573; Ronald Dworkin, *A Matter of Principle* (1985) at 24–25; Joseph Raz, *The Morality of Freedom* (1986) at 260; AM Gleeson, 'Legal Oil and Political Vinegar' (1999) 10 *PL Rev* 108 at 112.

28 See *The Federalist*, number 78; Hand, above n12 at 11–15.

29 Note *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 192 (Stephen J).

30 Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *MULR* 1 at 8–9, 52–55.

31 *SOS (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529 at 574–575.

gaps might lead to real social needs going unaddressed. This concern is not without weight. On the other hand, some 'justifiable' infringement of the restrictions is possible. In any case, the very purpose of constitutional rights is to create areas beyond governmental power.

In the United States modern practice has been the inverse of the Australian tradition: the Supreme Court has been relaxed in confining federal power but vigorous in protecting constitutional rights. In *Garcia v San Antonio Metropolitan Transit Authority* the majority pointed to the federal political process as operating to protect state interests, particularly through the representation of states in the Senate.[32] Senators are *federal* politicians, however.[33] Furthermore, there has been a 'breathtaking expansion of the powers of Congress' in the US,[34] which suggests, inter alia, that the political process has had limited effectiveness in confining central powers.

Nevertheless, in one significant respect the institutional structure is more likely to protect state interests than individual rights. State Premiers are national political figures in Australia. State governments are invariably led by experienced and able politicians, and are relatively well-funded and resourced. They have constitutional and political legitimacy and authority. Even when a particular state is in a minority on an issue, the state and territory governments tend to act together to protect their powers and position. This was seen in the unified political stands taken to oppose federal intervention in relation to the Franklin Dam (1982–83) and euthanasia (1996–97).

The situation for constitutional rights is quite different. Some interest group or other might be expected to advocate respect for any right, but such political protection is ad hoc and unlikely to possess the resources or authority available to the states. There is no guarantee that any major political party will seek to ensure respect for an unpopular interest or activity, as illustrated by the recent general political agreement on stricter law and order policies, or on detaining applicants for refugee status.

The very existence of state governments serves as a substantial structural protection of states' rights; there is no equivalent for human rights. At least in this respect, therefore, judicial review to protect constitutional (human) rights is in fact more justified than review to enforce federal limits.

2. *Capability*

The first type of objection to judicial review enforcing constitutional rights relates to the institutional capability of courts to resolve constitutional rights disputes. First, it has been suggested that common law judges are not equipped by training or experience to resolve such matters.[35] Yet the Canadian Supreme Court quickly

32 469 US 528 (1985), 550–556; compare *United States v Lopez* 514 US 549 (1995).

33 *Garcia*, id at 564–565 (Powell J).

34 *Garcia*, id at 581 (O'Connor J); *New York v United States* 505 US 144 (1992), 157–159.

35 See Gerard Brennan, 'Judicial Qualities of a Different Kind' (1986) 60 *Law Institute Journal (Vic)* 654 at 655.

adapted to the new challenges presented to it by the introduction of the constitutional Charter of Rights and Freedoms in 1982.[36] Any conservative reticence about applying rights is likely to be overcome as judges become acquainted with the task.[37]

Some matters covered by rights are not in areas of judicial expertise. The justifiability of laws infringing constitutional rights may depend on the existence, causes, nature and effects of social, economic, scientific or other phenomena. Yet the requirement for decision on such matters is not limited to constitutional rights. In *Todorovic v Waller* in 1981, for example, the High Court made an extraordinary, and necessarily somewhat arbitrary, actuarial decision on the 'discount rate' applying to damages awards.[38]

Nevertheless, the lack of expertise may certainly be a reason for caution and deference.[39] Thus in Canada the Supreme Court has taken a more vigorous approach to judicial review in areas where judges have a comparative advantage, particularly in the peculiarly legal areas of criminal and evidence law.[40] The vast majority of Charter cases have related to these areas.[41] Sir Gerard Brennan has stated that were Australia to adopt a Bill of Rights the courts would have to receive new types of evidence and argument, relating to political, sociological and ethical issues.[42] Given that Australia already has a significant, if limited, range of constitutional rights, this imperative already exists.[43] Indeed, such evidence may also be needed when arguments are presented for review or development of the common law.[44] The procedural challenge presented by the need to assess such issues can be addressed, at least in part,[45] by a relaxation of the restrictions on the types of evidence and argument receivable, as has occurred in Canada[46] and the United States (with the notion of the 'Brandeis brief').

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36 See eg, discussion by Justice Beverley McLachlin, 'Southey Memorial Lecture: The Canadian Charter and the Democratic Process' (1991) 18 *MULR* 350.

37 Dworkin, *A Matter of Principle,* above n27 at 30–31.

38 *Todorovic v Waller* (1981) 150 CLR 402.

39 Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality', above n30 at 55–58.

40 *Irwin Toys Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927 at 994; *McKinney v University of Guelph* [1990] 3 SCR 229 at 304–305.

41 FL Morton, PH Russell & T Riddell, 'The *Canadian Charter of Rights and Freedoms*: A Descriptive Analysis of the First Decade, 1982–92' (1995) 5 *National Journal of Constitutional Law* 1 at 12–13.

42 Gerard Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response', in Phillip Alston (ed), *Towards an Australian Bill of Rights* (1995) at 181–182.

43 See eg, Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) at 471–482.

44 For an interesting recent case where the need for such evidence was discussed, see *R v Young* (1999) 46 NSWLR 681, especially at [68]–[69], [110]–[122] (Spigelman CJ), [194]–[204], [215] (Beazley JA, dissenting).

45 Note MH McHugh, 'The Judicial Method' (1999) 73 *ALJ* 37 at 44.

46 FL Morton & I Brodie, 'The Use of Extrinsic Evidence in *Charter* Litigation before the Supreme Court of Canada' (1993) 3 *National Journal of Constitutional Law* 1; note also discussion by Justice Bertha Wilson, 'Decision-Making in the Supreme Court' (1986) 36 *Uni Toronto LJ* 227 at 241–244.

The most important objection in this area is that constitutional rights matters are polycentric. The notion of legal polycentricity, developed by Fuller,[47] is best understood as referring to matters which are marked by the numerous, complex and intertwined nature of the issues, of the repercussions, and of the interests and people affected. For example, any decision requiring the allocation of economic resources is significantly polycentric,[48] as every competing claim on government resources is a relevant factor. Polycentricity is obviously a matter of degree. In Fuller's view polycentric disputes are inappropriate for judicial resolution. First, not all the potentially affected parties may be identifiable or able to be brought before the court.[49] Secondly, there may be too many possible permutations of results for the parties and the judges to be able to supply reasons for making any particular decision.[50]

All judicial decisions are polycentric to the extent that they have precedential value and thus cover interests and matters not directly before the court.[51] Constitutional rights are no different in this respect. That a rights decision may involve the invalidation of an Act of Parliament, affecting wide interests, is a feature common to all constitutional cases. Moreover, there are procedural tools available to mitigate the problem. The Canadian Supreme Court has become more willing to allow the intervention of affected parties.[52] The US Supreme Court has long been generous in allowing written submissions from interested parties as amici curiae.[53] There have been some indications that the High Court itself might liberalise its approach to intervention and amici,[54] although whether a new approach crystallises remains to be seen.[55]

Constitutional rights issues are not inherently polycentric. The fact that guarantees are usually stated in an open-textured manner, requiring considerable further judicial definition, does not necessarily make them such.[56] Assigning practical meaning and effect to constitutional rights will usually only take place as part of a long, case-by-case evolution. The application of constitutional rights does require the balancing of competing community and individual interests, but such balancing is also required in common law decision-making. That the process may ultimately depend to a significant extent on subjective choices does not make the issue complex and multi-faceted, nor resistant to principled argument. The weight

47 'The Forms and Limits of Adjudication' (1978) 92 *Harvard LR* 353 at 394–405; also P Weiler, 'Two Models of Judicial Decision-Making' (1968) 46 *Canadian Bar Rev* 406 at 420–426.

48 Fuller, id at 400.

49 Id at 394–395.

50 Id at 402–403.

51 Note Cass Sunstein, *One Case at a Time* (1999) at 19–20.

52 Morton & Brodie, above n47 at 10.

53 Supreme Court Rules, r 37.

54 See eg, *Levy v Victoria* (1997) 189 CLR 579; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. Note Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide LR* 159; AF Mason, 'Interveners and Amici Curiae in the High Court: A Comment' (1998) 20 *Adelaide LR* 173.

55 Compare *Attorney-General v Breckler* (1999) 197 CLR 83.

56 The arguments in this and the following paragraph overlap with, and draw on, the issues discussed below under Heading 6: 'Legitimacy, Values and Preferences'.

attached to a constitutional right will tend to become settled over time. Further, there are often only a limited number of competing interests that must be balanced against each other in any particular case. For example, in *Street v Queensland Bar Association* the High Court had to consider the protected interest of non-discrimination on the basis of state of residence (guaranteed by s117 of the Constitution) and the competing claimed interest of ensuring that barristers were in a position to fulfil their responsibilities adequately in Queensland.[57] In the *Political Advertising* case the Commonwealth pointed to three main interests competing with the protected interest of free political communication (namely avoiding the corrupting pressure of parties having to raise substantial funds, creating a more level playing field, and avoiding the trivialisation of politics), but the number was still limited.[58]

On the other hand, the apparently restricted number of directly competing interests does not necessarily mean that there are only a limited number of interests potentially affected in a significant way by the court's decision. Constitutional rights have a tendency to be open-textured, containing imperatives or principles which provide a greater range of interpretative choices than more directive, closed provisions. A guarantee of free expression, or even a guarantee of free political communication, provides little guidance to a judge as to its reach, effects or interaction with other legitimate social and legal imperatives. This characteristic means that a court's resolution of interpretative questions — especially at early stages of judicial exegesis and application — may have ramifications for people, interests and issues well-beyond those immediately before the court. For instance, a decision on whether a guarantee of free expression extends to commercial communication will effect the interests of wide classes of persons.

Such a broad impact may be associated with any significant decision by a court of final appeal; thus decisions over the extent to which the Commonwealth can regulate, or authorise the creation of, corporations under s51(xx) of the Constitution also will have important effects across the Australian community. For this reason this characteristic is not a fatal objection to judicial review enforcing constitutional rights. The issue is, however, more likely to occur for open-textured provisions. For decisions potentially involving significant interpretative steps there is even greater cause to allow voices beyond those of the immediate parties to be heard, so that wider affected interests and possible ramifications are considered, and so that a fuller range of possible constructions are presented. And for such decisions a court has cause for greater than usual caution about answering more than is necessary to resolve the case before it.

Some constitutional rights issues will be significantly polycentric. The choice of electoral system may be an example.[59] So, too, with an effective right to legal counsel, which involves the allocation of economic resources. But neither

57 (1989) 168 CLR 461 at 492–493 (Mason CJ).

58 *Australian Capital Television Pty Ltd v Commonwealth [No. 2]* (1992) 177 CLR 106 at 144 (Mason CJ).

59 Note Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *FLR* 37 at 58.

polycentricity in particular, nor capability in general, is a valid per se objection to judicial review of constitutional rights. However, they may be factors supporting judicial restraint in particular cases, and they may require extensions of traditional procedures relating to evidence and to the representation of wider interests.

3. *'Political Questions'*

Constitutional rights issues are often said to involve 'political questions'.[60] A theme of the public criticism of the High Court's activism in the 1990s was that the Court had been wrongly involving itself in political questions. The 'political' label has also been used by the Court itself. The word 'political' bears many relevant shades of meaning, however. These meanings must be clarified before the strength of any such objection can be understood.

First, 'political' can mean relating to the exercise of power. Dixon J invoked this notion when he labelled the Constitution 'a political instrument'.[61] The Court necessarily makes such political judgments in two ways: it exercises power itself in making any adjudication, and its constitutional decisions determine when other governmental institutions can exercise power.

Secondly, the word may cover the pursuit of particular policies, values, preferences or ideologies. To the extent that some judicial choices are unavoidable, and perhaps even required by the legislature,[62] the Court must also decide political questions in the sense of favouring some values, preferences or policies over others.[63] Judges sometimes decline to adopt a particular constitutional construction, or decline to act in a certain way, because to do so necessitates making some further choice/s.[64] Questions of degree and restraint no doubt arise here but, once strict legalism/interpretivism is rejected, a necessity for further choice cannot be a sufficient objection to adopting a particular construction.[65]

Thirdly, 'political' may refer to the nature of the decision-making process.[66] The judicial process is reasoned, non-partisan, involves the participation of interested parties, and aims for consistency. Political decision-making is often not

60 See eg, Griffith, 'The Political Constitution', above n24 at 14, 16; Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response', above n42 at 178, 181.

61 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82; See also Justice PN Bhagwati, 'The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint' (1992) 18 *Commonwealth Law Bulletin* 1262 at 1265.

62 See eg, *Taikato v The Queen* (1996) 186 CLR 454 at 465–456 (Brennan CJ, Toohey, McHugh & Gummow JJ).

63 See generally, above n24 at 269; see also Robert Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana LJ* 1 at 12.

64 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (hereinafter *Engineers'* case) at 142, 151; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473 (Mason CJ, Brennan, Deane, Dawson & Toohey JJ); *Kable v DPP (NSW)* (1996) 189 CLR 51 at 133–134 (Gummow J).

65 See further Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *FLRev* 323 at 324–328.

66 See eg, Rosalyn Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 *ICLQ* 58 at 74.

reasoned, consistent or impartial, but based on compromise, deal-making and expediency. Courts should not be political in this sense. There is no simple dichotomy here, however.[67] Talk of the political process may suggest polycentricity of issues or balancing of interests,[68] yet these aspects may both be seen to some extent in the judicial process. The exercise of unconfined discretions may be contrary to traditional notions of judicial power, but drawing the line between what is and is not a sufficiently detailed prescription of legal criteria is difficult and somewhat arbitrary.[69] In any case, criteria to guide exercises of discretion can evolve over time on a case-by-case basis.[70]

One other aspect of this usage is that a claim before the courts must be capable of legal formulation and not simply be an argument in social, economic, moral or other such terms.[71] Yet constitutional rights matters, of their very nature, *can* be framed in legal terms.

Fourthly, the word may relate to taking part in political activity, meaning the partisan pursuit and exercise of power. Thus the High Court has referred to the executive and legislative branches, to which such activities relate, as the 'political branches' of government.[72] Courts must not, of course, be seen to be partisan or influenced by party politics.

Fifthly, a matter may be political in the sense that it has been, or is likely to be, the subject of consideration by the political branches. This definition is a corollary of the first and fourth, in that it flows from the actual or potential exercise of power by the legislature or executive. All questions involving the validity of legislation have, by definition, already been addressed within the political process. And any issue may potentially fall into this realm. It therefore cannot be a ground for exclusion from judicial consideration.[73] Similarly, that the parties may be influenced or motivated by political objectives is of no relevance to the legal merits of a case.[74]

Finally, the term 'political question' may be applied to matters seen as appropriately dealt with by the political branches, not the courts.[75] This sense is

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67 Note Lindell, above n4 at 190.

68 See usage in *Castlemaine Tooheys* (1990) 169 CLR 436 at 473; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17–19 (Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ).

69 See Windeyer J's attempt to distinguish a 'public interest' test from 'reasonableness' notions: *R v TPT; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 400–401.

70 *R v Joske; Ex parte SDAEA* (1976) 135 CLR 194 at 216 (Mason & Murphy JJ).

71 *South Australia v Victoria* (1911) 12 CLR 661 at 675 (Griffith CJ), 708 (O'Connor J), 715 (Isaacs J); *Nuclear Tests (Australia v France)* [1974] ICJ Reports 253 at 366 (joint dissenting opinion); *Re Citizen Limbo* (1989) 92 ALR 81 at 85 (Brennan J). Note also *Commonwealth v Tasmania* (1983) 158 CLR 1 (hereinafter *Tasmanian Dam* case) at 58 (whole Court); *Clunies Ross v Commonwealth* (1984) 155 CLR 193 at 204.

72 *Wilson* (1996) 189 CLR 1 at 10.

73 *INS v Chadha* 462 US 919 (1983), 942–943.

74 Note *Nuclear Tests (Australia v France)* [1974] ICJ Reports 253 at 366; *Nicaragua v Honduras (Jurisdiction and Admissibility)* [1988] ICJ Reports 69 at 91.

75 See eg, *McGinty v Western Australia* (1996) 186 CLR 140 at 236, 250 (McHugh J).

inherent in the attacks on judicial activism, but such usage represents a conclusion not a reason. Whether or not a matter is appropriate for judicial resolution is rarely, if ever, self-evident. The 'political question' label is used by the US Supreme Court in relation to its justiciability doctrine. However, the Supreme Court has set out the grounds on which the conclusion might be reached,[76] such as that there is 'a lack of judicially discoverable and manageable standards for resolving' the question, or that it cannot be decided 'without an initial policy determination of a kind clearly for nonjudicial discretion'. These concerns may arise in relation to certain constitutional guarantees in some cases. American constitutional jurisprudence illustrates that the concerns certainly do not exclude rights review per se.

There are thus at least six different usages of the term 'political question', only one of which (the fourth) is wholly antipathetic to the judicial process. To label an issue a 'political question', without further explanation, is therefore no valid objection to judicial review of constitutional rights. Some of the considerations which arise under the different meanings may constitute reasons for judicial restraint or withdrawal, but these grounds must be articulated and supported in each particular instance.

4. Public Confidence

A regular refrain of those objecting to judicial enforcement of constitutional rights is that it raises problems of legitimacy. This notion is complex and multi-faceted. Reflecting one aspect of the concept, both the High Court[77] and US Supreme Court[78] have asserted that the legitimacy of judicial review depends in part on retaining the confidence of the public in the judicial process, especially in relation to the judiciary's independence and impartiality.

There are three main possible bases for this view. First, it may rest on the belief that for state institutions to be legitimate they must be accepted and supported by the ultimate sovereign power, which can be seen as the people. However, it is questionable whether each particular institution in the governmental system — as opposed to the system as a whole — needs ongoing popular approval for normative legitimacy.

Secondly, maintaining public support may be a political matter of self-protection. Connected with this may be a desire to maintain the political 'capital'[79] of the judiciary to enable it to make strong and controversial decisions when necessary. These aims are more practical and political than normative (which is not to suggest that they are not relevant considerations for judges).

Thirdly, the rule of law might be threatened. A loss of public confidence in the judiciary might damage respect for the legal system, leading to increased

76 *Baker v Carr* 369 US 186 (1962), 217.

77 See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 197 (McHugh J); *Wilson* (1996) 189 CLR 1 at 12, 15 (majority), 22 (Gaudron J), 44–46 (Kirby J).

78 See *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992), 864–869; *Mistretta v United States* 488 US 361 (1989), 407.

79 Gummow J's word: *Grollo v Palmer* (1995) 184 CLR 348 at 392.

disobedience of the law, a diminishment of the public's willingness to take disputes to the courts, and a general reduction in the legal system's ability to resolve disputes peacefully.

The second and third concerns are not insignificant, but they have limited practical relevance. No doubt, if judges were seen to be deciding questions in an idiosyncratic, results-driven or partisan fashion, or to be inappropriately removing issues from the spheres of political and public influence, then there might be a loss of public confidence.[80] The value-laden and controversial nature of some constitutional rights decisions might be seen as making these issues especially prone to this concern.

One of the greatest tests of public acceptance of judicial enforcement of constitutional rights came when the US Supreme Court initiated desegregation of schools in *Brown v Board of Education of Topeka* in 1954.[81] There was fierce resistance and savage criticism. A majority of federal Senators and Congressmen from the South supported a resolution lambasting the judges for having exercised their 'naked judicial power and substituted their personal political and social ideas for the established law of the land', and commending states which had undertaken to resist the decision by any lawful means.[82] One Senator advocated defiance of the decision,[83] and at least one Governor's actions came very close to open rejection.[84] Yet through all this the rule of law survived. General lawlessness did not result. The principle of the decision itself in the end was widely, if grudgingly, accepted.[85]

A more recent example is the US Supreme Court's resolution of the 2000 presidential election in *Bush v Gore*.[86] It remains to be seen what damage, if any, the Supreme Court will suffer as a result of its divided, problematic decision. Nevertheless, it is notable that its determination of one of the most political questions of all (in many senses) — the occupancy of the presidency — was accepted by all of the relevant actors, with some rancour, but without real question as to whether it should be obeyed.

As for political capital, the controversy over the line of substantive due process cases in the United States, beginning with *Lochner v New York*,[87] no doubt caused some damage to the Supreme Court's strength, and led to its substantial abdication of a role in protecting economic rights.[88] Yet *Brown* was decided only 17 years after the *Lochner* approach was abandoned. Although the controversy caused the

80 Hand, above n12 at 71–73.

81 347 US 483 (1954).

82 *Congressional Record*, 12 March 1956, 4460–4461 (Senate), 4515–4516 (House).

83 Harvie Wilkinson, *From* Brown *to* Bakke — *The Supreme Court and School Integration: 1954–78* (1979) at 72–76.

84 See *Cooper v Aaron* 358 US 1 (1958).

85 Harvie Wilkinson, above n83 at 78.

86 531 US __ (2000).

87 198 US 45 (1905); discussed Jeremy Kirk, 'The Trouble with *Lochner*' (1999) 2(3) *Constitutional Law and Policy Review* 50.

88 Robert G McCloskey, 'Economic Due Process and the Supreme Court: An Exhumation and Reburial' [1962] *Supreme Court Review* 34 at 43, 61–62.

Court to redirect its activist energies, these energies, if dormant for a time, were by no means dissipated. The *Lochner* line of cases also indicates, again, that the rule of law can survive substantial controversy.

Brown illustrates that any limit to public acceptance of constitutional judicial activism is likely to be very broad. Of course, the limit may vary with time and place. Americans may be more familiar with activist review than Australians.[89] It was, however, *Brown* which really began the rights-focused phase of such activism in the United States. Further, a number of Australian cases have been decided within political storms.[90] Again, both the rule of law and the High Court's influence have survived apparently without damage.

It is sometimes suggested that constitutional rights lead the judiciary to become politicised.[91] In part this concern relates to public criticism following decisions on controversial matters, but it also relates to the suggestion that judges may be appointed by reference to their views on particular rights issues,[92] as is sometimes said to have occurred in the US in relation to abortion. In a democracy it is not unreasonable that policy views be one factor in judicial appointments. High Court judges are undoubtedly selected by the Commonwealth with some regard to their views on federalism. There is no more reason that a rights focus should lead to the appointment of incompetent judges than a centralist focus might.

5. *The Democratic Objection*

A. The Basic Argument

The content of the concept of democracy has been much disputed. Indeed, arguments about democracy, rights, state powers and judicial review are intimately linked: all involve theorising about the state and the nature of its relationship with the citizenry.[93] There is no real doubt, however, about the core meaning of democracy: rule or government by the people.[94] It has long been accepted that in its general form the term indicates decisions by majority agreement.

Justifications provided for democracy have been many and various. A common version is that normative sovereignty or ultimate authority rests in the people, such that no-one is entitled to govern without the acceptance of a majority of the people. Underlying or parallel to this view are other justifications. These include liberal, social contract or rights-based views in which sovereign and autonomous individuals are taken to concede some power to the state to ensure self-protection. There is the view that democracy is the form of government least likely to lead to tyranny, or that it is the most likely to achieve truth, justice and/or fairness in

89 Brennan, 'Judicial Qualities of a Different Kind', Brennan, above n35 at 655.

90 See eg, *Bank of NSW v Commonwealth* (1948) 76 CLR 1 (hereinafter *Bank Nationalisation* case); *Communist Party* (1951) 83 CLR 1; *Tasmanian Dam* (1983) 158 CLR 1.

91 See eg, Gerard Brennan, 'Courts, Democracy and the Law' (1991) 65 *ALJ* 32 at 38.

92 Harry Gibbs, 'The Constitutional Protection of Human Rights' (1982) 9 *Monash LR* 1 at 8.

93 Waldron, above n15 at 31–38.

94 See eg, *Oxford English Dictionary*; David Held, *Models of Democracy* (1987) at 2.

government through the broad participation of citizens. Another type of justification is that people develop intellectually and socially through political participation; or simply that people enjoy such participation. A pragmatic or cynical version is that the perception of participation, even if illusory, facilitates maintenance of the rule of law.

Regardless of the exact foundation, it is not generally questioned in the modern Western world that democracy is the appropriate basic form of government. Thus, for whatever reason, being democratic matters.

The purest form of democracy is direct democracy, in which the people themselves make governmental decisions. Such a system is not feasible, and perhaps not desirable, on a large scale. In representative democracy the people choose representatives to make governmental decisions. In Australia the people choose just the members of the legislatures. The executive branches arise from, and are accountable to, the parliaments. The only branch of government with a direct democratic mandate is the legislature, although in practice the popular choice is made in light of both legislative and executive policy proposals.

The judiciary is not elected, but appointed by the executive. Of course, vast power in a modern democracy is exercised by appointed officials: bureaucrats, defence chiefs, statutory office-holders, and so forth. Any exercise of power by such officials is necessarily less democratic than an action by the legislature, or by an elected Minister, simply by reason of the closeness of the link to, and mandate to govern from, the people. Being democratic is a matter of degree: 'a political system is democratic to the extent that the decision-makers are under effective popular control'.[95]

In Australia, the judges are three stages removed from the people, whereas the legislature is one. Furthermore judges, unlike other appointed officials, are substantially unaccountable in a democratic sense.[96] Ordinarily, the people have the ultimate power to reverse an appointment or overturn a decision. By voting for different members of Parliament the people can remove the executive, which in turn can remove most appointees or change most decisions. Yet one of the essential elements of judicial office is the inability to be removed other than in exceptional circumstances.[97] And to overturn constitutional decisions requires a special and extraordinarily difficult process of constitutional amendment.[98]

Judicial invalidation of legislation is therefore, of itself, antidemocratic. This conclusion should not be surprising given the distrust of democracy inherent in the leading justifications for judicial review. The conclusion is institutional. It is not dependent on the nature of the particular norms a court might be enforcing, and thus it applies even to enforcement of democratic rights. It is a relative statement, based on the closeness of the link to the people and the ability of the people to hold officials to account. It is not answered, therefore, by any suggestion that judges

95 HB Mayo, *Introduction to Democratic Theory* (1960) at 60.

96 A point implicitly conceded, extrajudicially, by Gleeson: above n27 at 109, 111.

97 Section 72, Australian Constitution.

98 Section 128, Australian Constitution.

have some democratic mandate because they are appointed by elected politicians.[99] If the appointed Defence Chiefs had power to overrule the legislature or executive, no-one would doubt that exercise of the power would be antidemocratic. Moreover, judges, unlike generals, cannot be removed by ordinary democratic processes.

Some judges have noted that governmental actions do not always reflect the wishes of a popular majority.[100] Such is the nature of representative democracy. Yet the people have their ultimate power of reversal. Elite judicial speculation is not a plausible or persuasive 'vehicle for upholding the majority will'.[101] That the operation of democracy is limited or flawed (if such inconstant majoritarianism is a flaw) may, perhaps, justify corrective action to the system; it does nothing to change the character of judicial review.

Some Australian judges have expressly or implicitly acknowledged the anti-democratic nature of judicial review. Isaacs J emphasised the caution necessary in deciding whether to override 'what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare'.[102] Dixon J arguably reflected similar concerns in choosing to make 'every reasonable intendment' in favour of the validity of legislation.[103] Murphy J argued for a presumption of constitutionality of legislation as 'an attribute of the respect which the judiciary, the unelected branch of government, accords to the acts of the elected representatives of the people',[104]although he did question whether the presumption should apply in relation to constitutional guarantees.[105]

The democratic concern is an underlying theme in many of the judgments on implied rights. Dawson J repeatedly asserted that the framers chose to trust the 'democratic process' — as opposed to the judiciary — to protect individual rights.[106] The concern was presumably a reason for Brennan J's readiness to concede parliaments a 'margin of appreciation' when deciding whether constitutional immunities have been breached.[107] It may be discernible in Toohey J's concession in *McGinty v Western Australia* that 'much must be left to the

99 CompareLindell, above, n4 at 228.

100 Michael McHugh, 'The Law-making Function of the Judicial Process' (1988) 62 *ALJ* 116 at 123; Sir Anthony Mason, 'A Bill of Rights for Australia?' (1989) 5 *Australian Bar Review* 79 at 81; John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public LR* 158 at 172–174.

101 Compare Toohey id at 173.

102 *FCT v Munro* (1926) 38 CLR 153 at 180 (Isaccs J); approved *Shell Company of Australia Limited v FCT* (1930) 44 CLR 530 (PC) at 545; *R v Quinn* (1977) 138 CLR 1 at 8 (Jacobs J for the majority); *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227 at 253 (Murphy J).

103 *Attorney-General (Vict) v Commonwealth* (1945) 71 CLR 237 at 267 (Dixon J).

104 *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 528 (Murphy J); see generally Henry Burmester, 'The Presumption of Constitutionality' (1983) 13 *FLRev* 277.

105 *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227 at 252 (Murphy J).

106 *Political Advertising* (1992) 177 CLR 106 at 182–186; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 361–363; *Kruger v Commonwealth* (1997) 190 CLR 1 at 61.

107 *Political Advertising* (1992) 177 CLR 106 at 158–162; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 325; *Leask v Commonwealth* (1996) 187 CLR 579 at 595.

political judgment of the legislature' with respect to implied requirements relating to voting.[108] Similarly, McHugh J stated that the Court should be 'slow to substitute its views for that of the Parliaments as to what representative democracy requires'.[109] The link between democracy and deference was made plain in *Kruger v Commonwealth* by Gummow J: '[r]ecognition is required of ... the importance of the democratic process and the wisdom of judicial restraint'.[110]

To assert that judicial review is antidemocratic does not lead to the conclusion that it cannot be supported in a democracy. That significant power in a democracy is being exercised undemocratically is a cause for restraint and caution. However, democracy, though crucially important, is by no means the only value to be pursued in worthwhile societies. Other fundamental goals should include pursuit of the rule of law, respect for the humanity of individuals, a desire to uphold and sustain certain basic principles (which may themselves have been democratically pre-accepted). Democratic compromise is involved in the substantial delegation of power to bureaucrats and Defence Chiefs. We accept this for reasons of practicality and efficiency. Equally, we should certainly be prepared to accept judicial review in pursuit of such fundamental goals as those just mentioned, tied to the sorts of justifications set out at the beginning of this article.[111]

The key point here is that we should openly acknowledge that constitutional judicial review involves the exercise of significant power, that it *is* antidemocratic, that this does matter, and that there is thus cause for judicial caution and restraint in the exercise of the power. The exact strength of the point depends on one's view of the weight of the various competing imperatives and values.[112]

B. Alternative Democratic Models

Some theorists attempt to sidestep the democratic objection by arguing for particular models of democracy in which guaranteed rights and judicial review are inherent. Yet when democracy is understood as fundamentally about government by the people, the elite judicial overriding of decisions of the people's representatives cannot be justified in purely democratic terms. Of course, practical models of democracy are necessarily dilute. A system can have some undemocratic elements and remain a democracy. It is fallacious, however, to suggest that some such aspect is democratic simply because its presence is *consistent* with what we are prepared to classify as a democracy. That the Defence Chiefs exercise substantial independent authority may be consistent with democracy, but it is not a democratic aspect of our system.

Ronald Dworkin is one leading theorist who has sought to justify judicial review by presenting a particular democratic model.[113] The 'defining aim' of

108 *McGinty* (1996) 186 CLR 140 at 212.

109 Id at 250.

110 (1997) 190 CLR 1 at 156.

111 See above, Heading 1 of this article: 'Justifications for Judicial Review'.

112 See further below, Heading 7 of this article: 'The Judicial Review Question'.

113 Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 *Alberta LR* 324; Ronald Dworkin, *Freedom's Law* (1996) at 15–35.

democracy in his model is that political institutions treat individuals with equal concern and respect.[114] Within his 'true' communal or constitutional conception of democracy certain principles and limitations are inherent. Government measures violating these principles or limitations are not democratic, thus judicial review overriding such measures is not antidemocratic: 'democracy and constitutional constraint are not antagonists but partners in principle'.[115]

Yet there is an important difference between making a case for constraints on government — whether by reference to democratic theories or otherwise — and establishing that it should be the courts which enforce the constraints. It is widely accepted that there should be some limits on governments, even if the content of the constraints is highly disputed. The issue here is which institution should have the ultimate say on whether the limits have been breached: the legislature, the executive, the judiciary, or some other body. Dworkin does appear to set out to justify judicial review.[116] Thus he asserts that if employing a non-majoritarian procedure represents a better means towards the ends of his communal conception of democracy, then there is no need for 'moral regret'.[117] However, Dworkin later appears to concede that his arguments go to justify the constraints themselves, not particular institutional arrangements for enforcement.[118]

His arguments are directed to showing that certain substantive American and Canadian constitutional limitations can be characterised as going to the structure of democracy rather than being straight disabling provisions. Thus, it is said, enforcement of these structural limitations enhances, not detracts from, democracy.[119] The fact that he provides little argument as to why judicial enforcement of structural provisions is democratic illustrates that his arguments do not respond to the institutional objection that judicial review is necessarily antidemocratic in some sense, even when enforcing constitutional guarantees.

Dworkin argues that there is no 'moral cost' incurred in democratic terms when judges overrule the legislature to enforce (certain) basic norms. Although the precise cost will depend on the philosophical justification adopted for democracy, a moral cost there must be. Indeed, this is implicit in his own view. He accepts that 'there would be a loss in self-government' if courts could override any law seen as unjust or unwise.[120] If this cost results from a general power of review, then some damage must also flow from a partial power. He dismisses the diminution of the power of any individual effected by constitutional restraints as insignificant.[121] Yet any one citizen's power in a large democracy is necessarily insignificant in this sense. If democracy matters nonetheless, as he indicates it does, then this argument is no answer.

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114 Id, Dworkin, *Freedom's Law* at 17.

115 Dworkin, 'Equality, Democracy, and Constitution', above n113, at 346.

116 Id at 325.

117 Dworkin, *Freedom's Law*, above n113 at 17.

118 Id at 33–35.

119 Dworkin, 'Equality, Democracy, and Constitution', above n113 at 326; in relation to his particular focus on the American and Canadian position, see at 330 and 337.

120 Dworkin, *Freedom's Law*, above n111 at 32.

121 Id at 21.

It may be that Dworkin means to argue that there is no *net* moral cost involved in judicial review in his conception of democracy. This conclusion may be right, but this does not establish that there is *no* cost worthy of being taken into account. And other people, with different conceptions of democracy or different weightings of the competing interests and values, may attribute greater significance to that cost than he does.

Moreover, there is an element of circularity in Dworkin's argument. One of his three base democratic principles is that individual citizens must be both encouraged and free to decide moral issues independently. The justification for the principle is that without it democracy would become a 'monolithic tyranny'.[122] Yet the unacceptability of this prospect rests on a liberal view of society and individuals. His proposal of liberal restraints on this basis is therefore circular: governments must not be permitted to make undesirable illiberal laws because otherwise they may make undesirable illiberal laws.

Another type of democratic justification for judicial review arises from liberal social contract theory, which suggests that civil society was formed only for the very purpose of protecting individual autonomy and security. Given such a basis, it is argued, certain types of infringement of individual liberty cannot be seen as within the powers granted by the governed to the government.[123] Again, the liberal conclusion is built on a liberal premise, namely, that government exists in order to protect some 'private' sphere of autonomy. Furthermore, the institutional implications of these theories are far from clear. Even if limits on governments can be justified by the nature of a social contract, this does not establish why it should be the courts which decide whether those limits have been breached. Such social contract theories have been employed to justify models of government from Nozick's minimalist state[124] to Hobbe's absolutist leviathan.[125] This fundamental indeterminacy as to institutional implications results from the nature of the argument, which seeks to reconstruct history in the image of the preferred political theory.

In one sense such arguments about conceptions of democracy are somewhat semantical. Inevitably, an element of the debate is that protagonists wish to gain the democratic high ground for themselves. Most participants would accept that adopting democratic processes is not the only aim or virtue to be sought in civil society. And there is undoubtedly a wide range of defensible democratic models. Nevertheless, the argument made here is this:

- at its core democracy is a process of government;
- judicial review involves a less democratic institution overriding a more democratic one;
- judicial review is, in this way, antidemocratic;

122 Dworkin, 'Equality, Democracy, and Constitution', above n113 at 335–337, 340–342.

123 TRS Allan, 'The Limits of Parliamentary Sovereignty' [1985] *PL* 614 at 615–623, especially fn 34; Whyte, above n25 at 8–9; David Feldman, 'Democracy, the Rule of Law and Judicial Review' (1990) 19 *FLRev* 1 at 2–3, 10–11.

124 Robert Nozick, *Anarchy, State and Utopia* (1974).

125 Thomas Hobbes, *Leviathan* (1968).

- being democratic matters, and this is widely accepted;
- there is therefore *some* cost when judicial review is employed to override legislation, and this cost is worthy of consideration.

C. *Giving Effect to the Will of the People*

The most common democratic justification offered for judicial review is that judges are simply giving effect to the will of the people as expressed in the Constitution.[126] A sophisticated variant is put by Bruce Ackerman. He asserts that the democratic difficulty is not that judicial review is 'countermajoritarian', as usually understood; rather, the objection is 'intertemporal', arising from judges applying past majority decisions in the Constitution to override present majority decisions in legislation.[127]

Ackerman seeks to answer this problem with a two-track model of politics. The people's involvement in 'normal' politics is characterised by self-interest, apathy and ignorance. In contrast, 'constitutional' politics is marked by appeals to the common good, a mobilisation of citizen concern, and special institutional forms of public decision-making.[128] In normal politics it cannot be assumed that the legislature or executive really speak for the majority of the people on each measure.[129] The constitutional higher track represents more truly the voice of the people. When a court gives effect to constitutional principles it is, therefore, acting democratically.[130]

Insofar as judicial application of the Constitution involves giving effect to what has been democratically accepted, then clearly the democratic objection to judicial review is, at the least, mitigated. The key problem with this type of approach is the implicit premise that constitutional interpretation is mechanical and objective. Judges necessarily do more in judicial review than give effect to the clear instructions of the people. Some element of judicial choice is unavoidable.[131]

It may reasonably be countered that the people can be taken to have licensed a certain margin of judicial choice. Any such licensing was democratic, and thus some democratic mandate might still be said to be conferred on judicial review. However, any such mandate does not solve the countermajoritarian difficulty. The people could confer total power on the Defence Chiefs or on a monarch. That a decision is made democratically does not ensure that its results are themselves democratic.

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126 See eg, Alexander Hamilton, *The Federalist*, number 78; this view is implicit in *Marbury v Madison*, 1 Cranch 137 (1803) at 176–180; Edwin Meese, 'Toward a Jurisprudence of Original Intent' (1988) 11 *Harvard Journal of Law and Public Policy* 5 at 10; Toohey, above n100 at 171–174.

127 Bruce Ackerman, 'Discovering the Constitution' (1984) 93 *Yale LJ* 1013 at 1046.

128 Id at 1022, 1034.

129 Id at 1025–1027.

130 Id at 1046–1051.

131 See McHugh, 'The Judicial Method', above n45 at 42, 44–45, 48; Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism', above n65 at 324–328.

D. Addressing the Intertemporal Difficulty

Though Ackerman's type of model does not answer the democratic countermajoritarian objection, the additional intertemporal difficulty that he raises is a normative problem for constitutional judicial review. It is more answerable than the countermajoritarian point, however, particularly by invoking a two-level model of decision-making somewhat along the lines suggested by Ackerman.

Clearly some popular democratic expressions are deeper and more principled than others. Yet Ackerman's classification hinges on an unclear distinction between different types of political decision (principled versus self-interested). Surprisingly, he requires no special procedures for 'constitutional politics'.[132] A more satisfactory distinction and response is along the following lines.

Constitutional rules are different in kind from other types of law in that they are meta-rules: rules about rule-making. Different sections of society cannot reasonably be expected to respect and participate in a governmental system unless the constitutional rules are fair and created by a fair process. Respect is unlikely to be established in practice, and normative criticism would be open, if the ground rules for the system are simply imposed by one distinct group which happens to dominate at the time.

For this reason it is, in practice, widely and rightly recognised that for such rules to be accepted as legitimate they must be approved by a higher than normal level of community consensus. This imperative for consensus primarily relates to the political spectrum, but may cross other community divisions depending on the nature of the society: eg regional; cultural or historical; tribal/ethnic; native/immigrant peoples. The imperative frequently is satisfied by requiring more than a simple parliamentary majority for constitutional matters, or by seeking the direct approval of the people through referenda.[133]

As evidence for the proposition, in South Africa in the mid-1990s the African National Congress was widely applauded when it sought to include the other main political groupings in the constitutional-creation process, despite itself nearly having the requisite two-third majority in Parliament. Conversely, the fact that the dominant party in Malaysia has used its power to entrench itself has been seen to undermine the legitimacy of that system.[134]

The higher degree of consensus (and accompanying democratic endorsement) which generally supports constitutional norms imparts a degree of moral authority that legitimates the fact that they override subsequent ordinary political decisions.[135] Once the ground rules have been agreed upon, it is reasonable (at least to a point) that they remain in place unless and until some similar consensus

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132 Ackerman, above n127 at 1051–1057, 1062–1063, 1069.

133 As in Australia: s128, *Constitution.*

134 AJ Harding, 'The Constitutional Amendment Process in Malaysia' *Paper for British Institute of International and Comparative Law conference on 'The Creation and Amendment of Constitutional Norms'* (Windsor, UK, 8–11 April 1997).

is obtained to change them. This is not because actual ongoing consensus can be assumed, but simply because it is practically necessary to have *some* ground rules, and the agreed set has the virtue of having passed the special consensus hurdle at least at some time. Of course, it must be recognised that the moral authority of the original acceptance does diminish over time.[136]

Nevertheless, the intertemporal difficulty is substantially addressed by the requirement for a higher degree of community consensus for constitutional rules. Needless to say, the original consensus must be satisfactory. If major community groupings had been excluded from the process, as in apartheid South Africa, then moral authority would not be conferred. Further, the criteria for amendment must not be so difficult to fulfil as to make the constitution immutable.

This model, like Ackerman's, posits two levels of decision-making. These are distinguished here by the extra consensus requirement for constitutional decisions which, in turn, generally requires some distinctive process of approval. This procedural requirement contrasts with Ackerman's uncertain distinction between his two levels of decision-making. With this type of response the intertemporal difficulty — though not the countermajoritarian objection — can substantially be overcome.

6. *Legitimacy, Values and Preferences*

A. *Differences in Kind, Degree and Effect*

That judicial review is antidemocratic in the sense described is an objection which applies to enforcement of all constitutional norms. A further legitimacy concern is more specific: it relates to whether there is a significant difference in kind, degree or effect between the types of judgments required in relation to constitutional rights compared to other categories of matter.

The possible difference in *kind* arises from the suggestion that constitutional rights involve areas of great public concern and controversy.[137] If this view is correct, it might be objected that in a democracy such controversial questions should be resolved by political, not legal, processes.

Matters pertaining to life, privacy, sexual conduct, personal and familial relations, and religious practice are at the heart of people's lives and are a concern central to many religious and ethical systems. Issues of this kind certainly come before the courts under the American Bill of Rights, for instance. Yet such controversy is not limited to constitutional rights cases. These moral issues may come before the courts in the form of common law, statutory interpretation or administrative law arguments.[138] Moreover, less central moral issues may also be

135 Contra David Wood, 'Judicial Invalidation of Legislation and Democratic Principles', in Charles Sampford & Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) at 171–175; see further Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism', above n65 at 346–348.

136 Id, Kirk.

137 Mason, 'A Bill of Rights for Australia?', above n100 at 81; Dworkin, *Freedom's Law*, above n113 at 2.

the focus of public anxiety. The cases which have created the most heat in recent Australian history were two involving native title.[139] These are common law, if quasi-constitutional, land law cases.

Often constitutional rights address issues of limited public concern. Many free speech, criminal process and even political rights issues may be of great concern to some but are not the subject of widespread and passionate debate. There were no demonstrations on the streets about s299(1)(d)(ii) of the *Industrial Relations Act 1988* (Cth) either before or after it was invalidated for unjustifiably restricting free political communication.[140] Some constitutional rights, whether broad or narrow, may touch on issues of great controversy, but they do not invariably do so, and thus are not clearly different in this respect from other legal issues.

A more difficult question is whether there is a difference in the *degree* of judicial choices and value judgments involved in deciding constitutional rights matters as opposed to other types of matter.[141]

It is now almost universally recognised within legal circles that judges make law: they develop the common law, and face genuinely open choices in statutory and constitutional interpretation.[142] In making the law judges necessarily make or rely on value judgments or preferences at a series of levels. These may relate to such issues as the role of courts in society (eg, the appropriateness of judicial law reform); the inter-relationship of courts (eg, the extent of respect shown for prior decisions of various courts); the importance of such goals as consistency, certainty and simplicity; the choice of interpretative rules and method; the justice or desirability of a particular principle.

Judges are not wholly at large when making choices. In the common law method of adjudication — the method also applied, in essence, to ordinary constitutional interpretation[143] — there are two key general constraints.[144]

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138 See eg, *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218; *Airedale NHS Trust v Bland* [1993] AC 789; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705 (HL).

139 *Mabo v Queensland [No. 2]* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1.

140 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

141 As has been suggested: Mason, 'A Bill of Rights for Australia?', above n100 at 81–82; Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia', in Greg Craven (ed), *Australian Federation: Towards the Second Century* (1992) at 162–163; JJ Doyle, 'Constitutional Law: "At the Eye of the Storm"' (1993) 23 *UWALR* 15 at 27.

142 See eg, *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 650–652 and references therein (Murphy J); McHugh, 'The Law-making Function of the Judicial Process', above n100.

143 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 490 (Barwick CJ).

144 See eg, *Trigwell* (1979) 142 CLR 617 at 633–634 (Mason J), 650–653 (Murphy J); *Dietrich v The Queen* (1992) 177 CLR 292 at 318–321 (Brennan J); *Breen v Williams* (1996) 186 CLR 71 at 99 (Dawson & Toohey JJ), 115 (Gaudron & McHugh JJ); *Wik Peoples v Queensland* (1996) 187 CLR 1 at 179–184 (Gummow J) at 219 (Kirby J). More specific constraints also have importance. For instance, the courts now eschew the creation of new common law criminal offences: see the interesting discussion in *Nulyarimma v Thompson* (1999) 165 ALR 621 at [166]–[186] (Merkel J).

First, the development or statement of principle is incremental. It takes place on a case-by-case basis where, generally, the new step taken in each matter is a small one. Although there is no clear dividing line here, to act otherwise — regularly taking large steps, or making detailed prescriptive decisions — is seen to be acting in a legislative manner. The basis of this constraint is the view that it is illegitimate for the courts to unduly infringe the legislative sphere and that, in any case, the institutional limits of the judicial process make Parliament the more appropriate law reformer. This basis is itself underpinned by notions of separation of powers and representative democracy.

Secondly, new decisions or principles generally must be logically or analogically related to, and consistent with, existing principles. The basis of this requirement is that consistency and certainty are themselves important values in a legal system. Put another way, it is a fundamental principle of justice that like cases be treated alike. Of course, these values may be outweighed where past decisions or principles are seen to cause an injustice, thus compelling the adoption of a new direction.

Judicial interpretation and enforcement of constitutional rights must be understood in this context. Constitutional guarantees often take a very open-textured form. Some constitutional rights are of relatively limited and determinate effect, such as the direction that all trials on indictment shall be by jury.[145] This is not so for other guarantees. To indicate, for instance, that there shall be guaranteed protection for political communication, or general legal equality, is essentially just a statement of a value: that some interest, activity or principle is worthy of protection from undue government interference. The statement requires considerable elaboration of content, along with a judgment in each case whether any restriction is justifiable because imposed in pursuit of other legitimate and overriding purposes. Both these stages involve the balancing of various interests, ends and values.[146]

Implied rights may be even more indeterminate than express rights because of the lack of a direct statement of the guarantee, although the fact that implied rights must be tied to particular implicit imperatives may sometimes actually narrow the reach of the guarantee. For instance, the implied freedom of political communication has been accepted to be limited to *political* communication because of its implied foundation in representative democracy.[147] The implied nature of such limitations may raise issues of interpretational legitimacy to a

145 Section 80, *Constitution*.

146 See Kirk, *'Implied Rights' in Constitutional Adjudication by the High Court of Australia since 1983*, above n2, ch 2.2.

147 *Theophanous* (1994) 182 CLR 104 at 123–125 (Mason CJ, Toohey & Gaudron JJ); *Lange v ABC* (1997) 189 CLR 520 at 559–562.

greater extent than arise with express provisions.[148] In any event, the core concern is much the same for express and implied constitutional guarantees: the necessity of judicial choice.

The need for such broad choices and balances does not necessarily take the application of constitutional rights outside the realm of the ordinary judicial method. The constraints of incrementalism and consistency can apply here. The content of the right will be clarified case-by-case as it is gradually established what types of matter the right covers. Some indication of the relative importance of the protected interest will evolve. The weight to be allocated to a particular competing government interest may have to be decided on each occasion, but even here some sense of the prioritisation of types of interest may emerge. After some time, whenever new cases arise there are likely to be existing logically or analogically related decisions. These will supply a developed framework of analysis for dealing with issues arising. That the waters initially are uncharted is a start-up problem which can be overcome, and which arises whenever courts embark on a new legal course.[149] Perhaps the archetypal example of this judicial divination of principle is the detailed analytical structure that has developed around the stark American First Amendment direction that 'Congress shall make no law ... abridging the freedom of speech, or of the press'. As noted above,[150] it may be that more caution, and a greater preparedness to allow other voices to be heard, should be adopted by a court in the early stages of interpretation and application of a guarantee, or when significant interpretational steps are being considered.

Balancing of competing community and individual interests is not unique to constitutional rights. It is not just 'the stuff of politics',[151] but occurs in every decision involving development of the common law.[152] For example, in adjudicating on the potential for recovery in tort for economic loss, courts have had great difficulty in balancing such factors as the principle of imposing responsibility for damage caused, and the undesirability of creating potentially vast and indeterminate liability for defendants.[153] Even in applying established law, courts

148 See discussion in Jeremy Kirk, 'Constitutional Implications (I): Nature, Legitimacy, Classification, Examples' (2000) 24 *MULR* 645 [Part II: Theory, Legitimacy and Implication Tests].

149 Discussed eg, Fuller, above n47 at 375–378; Higgins, above n66, 66–71; *R v Joske; Ex parte SDAEA* (1976) 135 CLR 194 at 216 (Mason & Murphy JJ); *Airedale NHS Trust v Bland* [1993] AC 789 at 880 (Lord Browne-Wilkinson).

150 See above Heading 2 in this article: 'Capability'.

151 Compare Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response', above n42 at 181.

152 Benjamin Nathan Cardozo, *The Nature of the Judicial Process* (1921) at 112–115. Clearly illustrated in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 255 (Brennan J), 264–265 (McHugh J).

153 Discussed eg, *Bryan v Maloney* (1995) 182 CLR 609 at 618–619 (Mason CJ, Deane & Gaudron JJ).

may have to balance competing interests. For example, the interests of protecting the administration of justice[154] and confidentiality of government information[155] have been balanced on a case-by-case basis with the interest in protecting free and open expression.

It is true that for constitutional rights such balancing must be undertaken at the justification stage (assessing legitimate infringement) in most cases, whereas arguably most ordinary cases are settled by applying existing legal principle.[156] One method available which seeks to reduce this uncertainty, applied by the US Supreme Court, is to create categories of analysis whereby different types of infringement require different degrees of justification.[157] The result is that for some types of infringement the legislature's assessment of the justifiability of the balance struck between competing social interests is more readily accepted by the court. This changing standard of review is also applied — in a somewhat less-defined, more flexible form — when a variable margin of appreciation is employed in conjunction with a proportionality-type test of infringement.[158] The difference between the two approaches is substantially one of degree. As with most characterisation questions, judges do retain significant latitude in categorising a law within either type of approach. Moreover, the categories (or quasi-categories) themselves reflect judicial choices and will evolve in response to new challenges and issues. And, in any case, for both approaches the courts *do* engage in balancing analysis at the justification stage, even if they more readily accept the legislature's view when certain types of infringement are involved.

Of course, even when judges follow established principles in ordinary cases this reflects judicial choices relating to the appropriate role of the courts, the importance of certainty and consistency, the weight of precedent, and so forth. Further, when appellate judges apply settled law they implicitly re-assert the choices of past judges. That the balancing involved in constitutional rights is unusually overt is not necessarily a fault. On the other hand, there is an important distinction (of degree) between relying on general and established judicial choices to respect precedent, or such like, and making particular, uncertain legal choices on a case-by-case basis.

In the end, taking account of all these arguments back and forth, there *is* a significant difference between the degree of judicial choice involved in interpreting and applying constitutional rights, and that involved in ordinary

154 See eg, *Attorney-General v Times Newspapers Limited* [1974] AC 273.

155 See eg, *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50–53 (Mason J).

156 McHugh, 'The Judicial Method', above n45 at 40; though compare Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985) at 2–5.

157 In relation to First Amendment caselaw see eg, Frederick Schauer, 'Categories and the First Amendment: A Play in Three Acts' (1981) 34 *Vanderbilt LR* 265; Adrienne Stone, 'The Limits of Constitutional Text and Structure' (1999) 23 *MULR* 668, especially at 687–691. In relation to the Equal Protection Clause, note Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *MULR*, forthcoming, at 'III.B: The Reach of the Guarantee'.

158 See Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality', above n30 at 53–63.

statutory and constitutional interpretation. Constitutional guarantees frequently represent very bare statements of principle, with little determinate guidance as to actual effect. Other types of constitutional provisions tend to indicate effects with greater clarity. For example, the Australian provision that taxation laws must deal only with the imposition of taxation in section 55 is relatively mechanical, even if the exact effect of the terms may need clarification in some borderline cases. The exact meaning of the grants of Commonwealth power in section 51 may also be unclear in some cases: just what falls within 'interstate trade', does 'external affairs' cover all treaty enforcement, to what extent can the Parliament dictate results under the industrial conciliation and arbitration power, and so on. Judges thus face many choices here.

Nevertheless, it is essentially a question of drawing a line on a spectrum of possible reach, and in drawing this line it is not necessary (though possible) to engage in the substantially open process of assessing and balancing competing community and individual interests. That process is exactly what is required when courts apply express or implied constitutional rights. The difference is not that decisions on preferences or values are not required for most ordinary constitutional interpretation. Rather, it is that because the text tends to provide a higher degree of guidance within ordinary interpretation, decisions on values and preferences are not required to the same extent as for constitutional rights decisions, and generally are not of the same order.

This difference in degree of judicial choice is significant because of the third possible divergence here: the difference in *effect*. Constitutional adjudications always potentially involve overriding the legislature or executive. The option of seeking a constitutional amendment to overturn a decision is expensive, impractical and generally unproductive. In practice, adjudications represent the final say on an issue, subject only to re-argument. The judicial approach involved in applying constitutional rights may reflect the process involved in developing the common law but the overriding status of constitutional decisions makes them of quite different significance. This difference in the effect exists for all constitutional decisions, but the difference in the degree of judicial choices involved sets constitutional rights decisions apart. Constitutional rights decisions are unique because they are both overriding and so distinctively open.

Why, exactly, is this objectionable? First, for unelected officials to impose their choices as the effective final say on critical issues in society cuts against fundamental principles of democracy. This objection thus harks back to the previous concern that constitutional judicial review is itself antidemocratic. This democratic objection is mitigated by the original democratic mandate given (in Australia) to the constitutional text. However, where that text offers little guidance to the application of constitutional rights, the mitigating effect of that mandate is substantially eroded.

Secondly, if the resolution of rights questions depends more than usual on the values and preferences of particular judges deciding cases at particular times, this indeterminacy sits uneasily with the axiom that a legal system should strive to be principled, consistent and certain.

B. Sources of Values and Preferences

The force of these objections might be reduced if it could be shown that the judicial choices involved were guided or directed by a clear and legitimate source of values and preferences. It is widely accepted that in making legal choices judges should not rely just on their personal 'predilections' or 'idiosyncrasies'.[159] Two sources of values and preferences have been prominently touted as answering the judicial need. A third possible source, natural law, has neither been relied on by the High Court nor generally perceived in Australia as a contender for the role.[160]

The first suggestion is that sufficient relevant values can be found just from within the established legal order. Herbert Wechsler, in his famous article 'Toward Neutral Principles of Constitutional Law', is sometimes seen as supporting this proposition. He argued that judicial decision-making must be 'genuinely principled', founded on grounds of 'adequate neutrality and generality' which transcend the immediate result.[161] This view really just reaffirms the common law method, with its requirement of incremental and largely consistent decision-making. Wechsler does not claim that value-neutrality is possible in enforcing constitutional rights.[162] Neutral principles refers to the process of decision-making, not to sources of values.

Bork sought to extend Wechsler's approach. He argued that courts should be neutral in applying, deriving and defining constitutional rights.[163] He acknowledged that such rights represented value choices, but argued that in a democracy the only legitimate source of authority for judges to override the legislature comes from the people. Judges should, therefore, limit themselves to implementing the value choices of the people, as ascertained from the constitutional text and history and 'their fair implications'.[164] Bork's view is flawed, being a strict 'interpretivist' one. He sets up a false dichotomy. He states that either the Constitution manifests value judgments, in which case there is no need for judges to do so, or it does not, in which case there is no mandate for judges to protect certain values.[165] Constitutional guarantees *do* reflect societal values or preferences, but they are rarely self-executing or of determinate effect. Insofar as they are intended to have some effect, further choices may be both unavoidable and implicitly required.

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159 See eg, Cardozo, above n152 at 108; Owen Dixon, *Jesting Pilate* (1965) at 165; Ely, above n9 at 44–48; Anthony Mason, 'Rights, Values, and Legal Institutions', public lecture at the Australian National University, 13 August 1996 at 13; Dworkin, *Freedom's Law*, above n113 at 10–11; *Eastman v The Queen* (2000) 172 ALR 39 at [131] (McHugh J).

160 See Toohey, above n100, 167–168; note also John Finnis, 'Natural Law and Legal Reasoning', in Robert George (ed), *Natural Law Theory: Contemporary Essays* (1992) at 151.

161 Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harvard LR* 1 at 15.

162 Id at 15, 19, 25.

163 Above n63 at 7.

164 Id at 2–3.

165 Id at 5–6.

Another version of this type of answer suggests reference be made to 'immanent legal values' in the common law.[166] It is sometimes argued that the evolutionary common law method, as applied to constitutions, can produce determinate right answers. This is how Dworkin is often understood,[167] although he does actually recognise significant and inevitable room for subjective choice and disagreement in practice.[168] Whilst his theory has been much criticised,[169] this is not the place to repeat such analysis. One important aspect of his view is that judges should, and do, rely on principles/rights in judicial decisions, not on collective goals or policies. The distinction rests on the degree of individuation of the relevant political aim.[170] Australia's political and social tradition has long been less individualistic than that of the United States. McHugh J and Doyle CJ have both suggested, extra-judicially, that Dworkin's philosophy is too narrowly individualistic for Australian judicial tastes.[171]

Dworkin is right to argue that judges are constrained to some extent by established principle and the need for substantial consistency. He is therefore right to reject the view that a judge, confronted with a hard case, will simply exhaust the available legal materials then make a completely unguided personal choice.[172] Yet, as Dworkin concedes, there will also be some inevitable degree of subjectivity in assessing what legal principles emerge from or 'fit' the legal materials themselves.[173]

McHugh J has recently argued extra-judicially that many relevant fundamental values are to be found from within the legal system, including such values as freedom of the individual, equality before the law, good faith and fairness.[174] The point is important, yet these values themselves are substantially open. This is illustrated by consideration of how the common law — genuinely committed to fairness and equality as it was — traditionally treated women, Australian Aborigines (in relation to land) and homosexuals. The same consideration illustrates that the common law may not be consistent with modern expectations, preferences and aspirations.

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166 See Martin Krygier & Arthur Glass, 'Shaky Premises: Values, Attitudes and the Law' (1995) 17 *Sydney LR* 351.

167 McHugh, 'The Law-making Function of the Judicial Process', above n100 at 29.

168 Dworkin, *Taking Rights Seriously*, above n25 at 117–118, 123; *Freedom's Law*, above n113 at 11.

169 See Neal MacCormick, *Legal Reasoning and Legal Theory* (1978), ch 9; Finnis, above n160 at 143–145.

170 Dworkin, *Taking Rights Seriously*, above n25 at 91.

171 McHugh, 'The Law-making Function of the Judicial Process', above n100 at 29–30; JJ Doyle, 'Judicial Law Making — Is Honesty the Best Policy?' (1995) 17 *Adelaide LR* 161 at 171. Compare the arguably Dworkinian overtones in *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 534 (Deane, Dawson & Gaudron JJ).

172 See Dworkin, *Taking Rights Seriously*, above n25 at 86–87.

173 Id at 339–342; Dworkin, *A Matter of Principle*, above n27 at 255–256; note also B Horrigan, 'Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning', in Charles Sampford & Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) at 36–37, 77–79.

174 McHugh, 'The Judicial Method', above n45 at 46–47.

The common law system *is* an important source of guidance for judicial choices, both as a resource of general values, preferences and ideals, and as a more specific pointer to decision-making in the form of precedent. But this source does not overcome the substantial indeterminacy of constitutional rights.

McHugh J also noted that 'practical considerations based on a cost/benefit analysis' are a crucial guide in judicial choices.[175] The relevance of such considerations in the constitutional sphere is well established,[176] though some judges place rather less emphasis on them than others.[177] However, the significance of such practical considerations will often, themselves, depend on assessments of value and preference. They do not represent a determinate source of guidance, a point that McHugh J accepts.[178]

The second prominent type of answer in the search for clear guidance is the notion of 'community values' (or, presumably, preferences).[179] The attractiveness of this source is obvious. Whilst it may not be a formally democratic source, it is one tied to the people. It thus may lessen the force of the objection that judges undemocratically impose their choices on the community. There are significant difficulties with the idea, however.

In modern, pluralistic, multicultural, non-establishmentarian, changing societies, such as Australia, it might be doubted that there is any substantial consensus on the many sorts of matters potentially covered by applications of constitutional rights. On the other hand, the notion of community values and preferences is a meaningful one, to some extent. There sometimes are real and perceptible changes in prevailing mores. For instance, modern Australian society undoubtedly is more tolerant and inclusive in general than in previous times, with less inclination to accept discrimination on the basis of a range of personal characteristics.

To the extent such community values or preferences exist, judges may simply regard them as misguided. After all, the judicial enforcement of constitutional rights is built on a partial distrust of democracy. Thus Ely argues that community values are likely to reflect majority views, which cannot be relevant to protecting individual and minority rights from majority oppression.[180]

In response, some judges and commentators distinguish between 'enduring' community values relating to fundamental general principles, and community 'attitudes' on particular issues, which often involve the specific application of

175 Id at 46.

176 See fn 30 in Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism', above n65 at 327; *Eastman v The Queen* (2000) 172 ALR 39 at [148] (McHugh J).

177 In *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, compare [2] (Gleeson CJ), and [94] and [121] (Gummow & Hayne JJ), with [187] (Kirby J); note also [34] (McHugh J).

178 McHugh, 'The Judicial Method', above n45 at 49.

179 See *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 at 42 (Brennan J); Bickel, above n12 at 24–25; Cardozo, above n152 at 108; Anthony Mason, 'The Role of a Constitutional Court in a Federation' (1986) 16 *FLR* 1 at 5.

180 Above n9 at 67.

basic values.[181] The former, not the latter, is said to be an appropriate source. In these terms, majority oppression is likely to manifest a mere attitude. Judges might still disagree with enduring public views, of course. The likely reply is that ultimately the people's views should prevail in a democracy.

The distinction between attitudes and enduring values has some merit, but it is not a clear differentiation. The classification of any particular view is not self-evident and may depend on the level of abstraction or generality employed in characterisation. For instance, it is not obvious whether views that the state is never justified in taking life in punishment, or that homosexual sexual activity should be prohibited, are mere attitudes on particular issues or basic beliefs regarding human life, morality and the state.

A further difficulty with community values, enduring or otherwise, is their ascertainment. Doyle has shown that High Court invocations of community values have often been 'brief and impressionistic'.[182] As Black J observed, a court has no gadget to indicate what values or traditions are rooted in 'the conscience of our people'.[183] McHugh J has asserted that the courts are as much in contact with the 'concrete needs of the community' as the legislature.[184] Yet judges are notoriously drawn from a limited segment of society. Trial judges may regularly be exposed first hand to human weakness, but for appellate judges such exposure is more distant. Furthermore, weaknesses do not equate to values. Politicians, in contrast, depend for their career-survival on being responsive to the community. They tend to be in frequent contact with a range of people from different sections of the community, promoting different visions of society. They encounter human needs through their electorate offices. It is therefore doubtful that judges are as well-placed as politicians to ascertain community needs, priorities and values. In any case, with the very nature of the concept so uncertain, and ascertainment difficult, it is unlikely that stated perceptions of community values are free from the tint of the viewer's spectacles.[185]

Braithwaite has asserted that survey evidence suggests a high degree of public agreement in Australia on enduring values.[186] However, the content of some of these values, such as the rule of law, is significantly contested.[187] And the 'critical problem' in relation to values generally — whether derived from the community, the common law or elsewhere — is how they interact when they inevitably conflict

181 *Dietrich v The Queen* (1992) 177 CLR 292 at 319 (Brennan J); 'Retirement of Chief Justice Sir Gerard Brennan' (1998) 193 CLR v at ix; Dworkin, *Taking Rights Seriously*, above n25 at 125–126; John Braithwaite, 'Community Values and Australian Jurisprudence' (1995) 17 *Syd LR* 351 at 354; Mason, 'Rights, Values, and Legal Institutions', above n159 at 4.

182 Doyle, 'Judicial Law Making — Is Honesty the Best Policy?', above n171 at 211, generally 192–206.

183 *Griswold v Connecticut* 381 US 479 (1965), 519.

184 McHugh, 'The Law-making Function of the Judicial Process', above n100 at 124.

185 Cardozo, above n152 at 110; Ely, above n9 at 59, 67; McHugh, 'The Law-making Function of the Judicial Process', above n100 at 122.

186 Braithwaite, above n181 at 355–360.

187 Krygier & Glass, above n166 at 389.

or compete.[188] The self-confessed 'motherhood' statements[189] in Braithwaite's survey evidence may offer little more than a restatement of the essential issue, setting out the relevant values and considerations. It is possible that further research could clarify public prioritisation of values, but it is doubtful that any detailed calculus could ever be developed. These matters are not mathematical.

There are other potential guides to community values and preferences of some limited utility. Judges have sometimes, not unreasonably, referred to common Australian legislative practice as evidence of a significant degree of consensus when seeking guidance on values, preferences or desirable public policy.[190] This technique is often employed by the European Court of Human Rights and the European Court of Justice,[191] and sometimes by the US Supreme Court.[192] Of course, the very fact that judges look to legislatures as a guide to the issue is revealing of the institutions' comparative strengths in this area. Another possible guide, at least if the 'community' is seen in wide terms, is legislative or judicial practice in comparable nations, or standards accepted in international law.

Community views clearly do act as something of a constraint on the decision-making of judges in a broader sense. Although judges may be strictly unaccountable to the community in democratic terms, they are responsive to it in a range of ways. The constraint is practical, in that if present and future judges cannot be persuaded of the merits of a decision it will have little influence.[193] The constraint is political, in that the refusal of a government to respect a decision in letter or spirit might lead to a confrontation between the branches of government, and might weaken the actual or perceived authority of the courts. It is sociological, in that the common socialisation of judges means that they are likely to 'eschew conclusions grossly at odds with the values of liberal capitalism',[194] though, of course, this itself can be a source of criticism. It is psychological, in that judges are likely to be influenced by the reactions of their peers. That judges are appointed by elected politicians may lead to some reflection, albeit distant, of community moods. More generally, judges will have some sensitivity to public discussion and criticism. Even *potential* vociferous criticism by a minority or sectional interest

188 Mason, 'Rights, Values, and Legal Institutions', above n159 at 23.

189 Braithwaite, above n181 at 362.

190 See *McGinty* (1996) 186 CLR 140 at 202 (Toohey J), 222 (Gaudron J), 287 (Gummow J); *Langer v Commonwealth* (1996) 186 CLR 302 at 342–343 (McHugh J); *Lange v ABC* (1997) 189 CLR 520 at 573 (whole Court). Note also *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 168 ALR 123 at [18]–[28] and [91], contrast [144]; *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625 at [101] and [148]. An important question, of course, is what degree of consensus is required to make this a permissible source: note *R v Young* (1999) 46 NSWLR 681 at [104]–[105] (Spigelman CJ), [211]–[213] (Beazley JA).

191 See *Marckx v Belgium* (1979) 31 Eur Ct HR (Series A) at [41]; *Dudgeon* (1981) 45 Eur Ct HR (Series A) at [60]; *Hauer v Land Rheinland-Pfalz* (44/79) [1979] ECR 3727 at 3746–3747; *Grant v South-West Trains Ltd* (C–249/96) [1998] 1 CMLR 993 at [30–36].

192 See *Betts v Brady* 316 US 455 (1942), 465–472, though contrast *Gideon v Wainwright* 372 US 335 (1963); *Jaffe v Redmond* 518 US 1 (1996), 12.

193 McHugh, 'The Law-making Function of the Judicial Process', above n100 at 122.

194 Mark V Tushnet, 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' (1983) 96 *Harvard LR* 781 at 824.

may weigh in judicial thinking. Judges may also feel, perhaps to an unjustified extent,[195] that judicial institutional integrity and effectiveness depends on ongoing public and political support.

These forms of responsiveness to the community may constitute only a broad, vague constraint,[196] but the limitation is real. The overturning of the *Lochner* substantive due process doctrine in the United States in 1937,[197] after widespread public attack, is a leading illustration of the point.

In summary, neither values and preferences derived from the legal system, nor those derived from the community, represent a substantially determinate source of guidance for judicial choices. For this reason, those objections to judicial enforcement of constitutional rights relating to the nature of the decisions involved remain. This does not mean that these sources should be abandoned. Choices must be made; purely idiosyncratic judgments are not acceptable. These sources possess some degree of utility and legitimacy.

7. *The Judicial Review Question*

There are many other possible objections to the judicial enforcement of constitutional rights, but the five addressed above represent the leading jurisprudential arguments. Of these, the first three objections have limited force. Courts are capable of dealing with constitutional rights issues, although polycentricity and lack of expertise may sometimes be a cause for caution. There is no merit to a simple ascription of the label 'political questions' to these matters. Whilst it may be necessary that the judicial system retain popular confidence, this requirement is but a broad constraint.

Judicial review *is* anti-democratic, however, and this conclusion matters. Constitutional rights may have less institutional political protection than exists for federalism. Yet enforcement of constitutional guarantees is unique because it is both overriding and involves a greater degree of judicial choices than other interpretational or legal issues. There is no clear, determinate and objective source of values and preferences to guide these choices. It can be questioned whether it is desirable to have 'a bevy of Platonic guardians' playing such a powerful role in a democratic society.[198] On the other hand, a range of justifications for judicial review have been offered. These reasons show varying degrees of distrust of the democratic process. However, very few theories of the state would propose that being democratic is the only relevant consideration in creating and maintaining a governmental system.

There is no simple answer to the question of the worth and role of judicial review. Whether judicial enforcement of constitutional rights is seen as justified, and to what extent, depends on one's analysis of the relative dangers of judicial

195 See above, Heading 4 of this article: 'Public Confidence'.

196 Ely, above n9 at 45–48.

197 *West Coast Hotel Company v Parrish* 300 US 379 (1937).

198 Hand, above n12 at 73.

versus legislative tyranny,[199] one's justification for democracy, one's view of the state and its relationship with individuals, one's assessment of the ability of the people and their representatives to sustain and consistently respect a set of basic principles, and one's perspective on what types of issues are of fundamental importance and whether they can be trusted to the people. The answer will also vary with the community involved. What is justified in societies with the history and nature of South Africa, Northern Ireland or East Timor may differ from what is justified in relatively harmonious and peaceful nations. Appropriate solutions may differ again for nations where there has been a history of abuse of governmental power or where elected government has proved ineffective.[200]

What can be said conclusively is this: the objections discussed are reasons for judicial caution in the recognition, interpretation and application of constitutional rights. This is not to say that judges should not apply constitutional rights, or should always read them down. Sometimes these reasons for restraint will be wholly outweighed. In particular, if a clear constitutional mandate has been given for a judicial role in protecting particular rights then, in a constitutional democracy, this should be respected.[201] For this reason, greater caution is generally appropriate when recognising implied rights than when applying express ones, though both may require significant judicial choice. The key point is that the imperatives for caution are, together, of significant weight. These imperatives should always be considered when implying, interpreting or applying constitutional rights.

199 Tushnet, above n194 at 792.

200 Note, re India, Bhagwati, above n61 at 1266–1267.

201 See Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism', above n65 at 346–348 and 358–359.