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Active Citizens and an Active State: Uncovering the 'Positive' Underpinnings of the Australian Constitution

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Abstract

The Australian Constitution was drafted, and the institutions of national government were established, during a period in which the atomism of laissez-faire liberalism was being rejected. Instead, progressive liberals of the era were searching for ways to encourage collective action and social ties, believing that this would, in turn, enhance personal wellbeing. This article contends that a clearer appreciation of the influence of the 'social' turn in liberalism upon Australia's constitutional and institutional development might contribute to a fuller understanding of Australia's distinctive constitutional and public law traditions.

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> …the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lockout. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public.
>
> H B Higgins[1]

1. Henry Bournes Higgins, 'A New Province for Law and Order' (1915) 29 *Harvard Law Review* 13, 14.

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I Introduction

Constitutions are a product of many things, including ideas. Although the 'modesty' of the document has perhaps tended to obscure this point, the *Australian Constitution* is no exception.[2] Like other constitutions, its design was, and its interpretation is, influenced by ideas. During the period in which it was written, and in the decades following Federation, specific ideas about the role of government, and the role of the people themselves, had a significance in the politics of Australia that they had in few other nations at the time.[3] These ideas are about the very nature of government itself. As such, they should be recognised as influential in the shaping of Australian constitutional and institutional design and function.

I suggest that in addition to its political and legal elements, the Australian constitutional framework has what can be described as a 'positive' dimension. Australia's *Constitution* was drafted and first came into operation during a time when progressive or 'social' liberalism[4] was at the peak of its influence. Australian adherents believed in an 'active' and 'expansionist state' with 'socialistic tendencies'.[5] The notion that the state ought to have such a role was balanced by some ideas regarding democracy which were also distinctive for their time.

The version of political liberalism that was influential upon Australian politics while the Constitution was first drafted and then brought to life encompassed a range of beliefs on many questions.[6] Yet, certain key themes are discernible in the politics of the period. These can perhaps be summarised as a belief in a form of positive liberty, or the notion that state intervention was required to promote the wellbeing of individuals and the community. This was accompanied by the understanding that it was the role, indeed the duty, of citizens themselves to ensure that government acted in their best interests.

I do not submit that everyone in Federation-era Australia held such beliefs, nor even that there was broad agreement on every subject amongst those who did. It is also not my intention here try to obscure the obvious flaws in Australia's constitutional tradition, which are in many ways inseparable from the political beliefs that are the subject of this article.[7] Rather, I draw attention to an existing literature that indicates that social liberalism had considerable currency in Australia in the decades before and after Federation. This period coincided with the drafting of the *Constitution*, and the subsequent establishment of the institutions of national government. The claim that Australia's

2. See Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 61, 60; Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143, 144–6.
3. New Zealand is similar in this regard. See, eg, Marilyn Lake, *Progressive New World: How Settler Colonialism and Transpacific Exchange Shaped American Reform* (Harvard University Press, 2019).
4. Marian Sawer, *The Ethical State? Social Liberalism in Australia* (Melbourne University Press, 2003). Sawer noted that in its own period it was referred to as 'new liberalism' but she instead adopted the term 'social liberalism' as it both distinguishes it from neoliberalism and was the more familiar term in Australia: at 3. I am seeking to capture some of what was distinctive about the Australian political culture of the period, so Sawer's terminology is primarily used here.
5. Lake (n 3) 45–6.
6. For an overview, see, eg, Stuart Macintyre, 'Liberalism' in Graeme Davison, John Hirst and Stuart Macintyre (eds), *The Oxford Companion to Australian History* (Oxford University Press, 1998) 388; Marian Sawer, 'Liberalism' in Brian Galligan and Winsome Roberts (eds), *Oxford Companion to Australian Politics* (Oxford University Press, 2007) 320.
7. See Lake (n 3) for analysis of the close links between progressive liberalism, the settler colonial outlook and White Australia Policy, which are referred to in part 3.3. The influence of these notions can be seen in the exclusionary concept of the people that is still explicit in parts of the *Constitution*. See, eg, Arcioni and Stone (n 2) 68; Elisa Arcioni, 'Excluding Indigenous Australians from 'The People': A Reconsideration of Sections 25 and 127 of the *Constitution*' (2012) 40(3) *Federal Law Review* 287; Megan Davis and Dylan Lino, 'Speaking Ill of the Dead: A Comment on S 25 of the Constitution' (2013) 23(4) *Public Law Review* 231.

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institutional development was influenced by social liberalism has previously been made by Marian Sawer.[8] This raises a large question regarding how these positive notions of the state and its role might have interacted with, and informed, the specific conceptions of democracy that are at work within the Australian constitutional framework. Further, to what extent might *the Constitution* be viewed as designed to provide a structure for a state with the capacity to advance 'the well-being of its members'?[9]

It is not the object of this article to attempt to fully answer these questions. The aim is rather to begin the task of recovering this dimension of Australian constitutional tradition — not with a view to definitively fixing its bounds or exploring all potential implications, but rather to encourage renewed attention to its importance.[10] This might in turn contribute to a more complete understanding of the 'somewhat distinctive'[11] character of the *Australian Constitution*.

In furtherance of the aim of developing a clearer account of the influence of ideas regarding the role of the state in Australia around the time of Federation, one Australian policy innovation in particular has been selected for consideration. This is the system of conciliation and arbitration established soon after Federation, pursuant to s 51(xxxv) of the Constitution. The system embodied a singular intervention by the state in what classical liberalism regarded as the private right of contract. While Australia retains a 'unique'[12] system of industrial relations, it no longer turns on the lynchpin of compulsory conciliation and arbitration. But until the 1980s, at least, the institution was 'a distinguishing, and basic feature of Australian national life'.[13] It was central to social and economic policy.[14] It encouraged the growth of trade unions, a key element of civil society. It ensured that labour was able to play a substantial role in the setting of wages and conditions. Arguably, it may have even helped to keep material inequality in check.[15] For each of these reasons, it provides a good starting point for demonstrating the positive dimension of the *Australian Constitution.*

This article proceeds as follows. Part 2 explains the archetypes of positive and negative constitutionalism. It challenges the typical explanation of the *Australian Constitution* as being simply a hybrid of political and legal constitutionalism. Part 3 sets out some of the political ideas that were current in late 19th century Australia. This part contains an explanation of a wider intellectual movement known as social liberalism, which helps to provide some context for the Australian politics of the period. Part 4 sets out some background to the inclusion of section 51(xxxv) in the *Australian Constitution*. This part illustrates that the ideas described in Part 3 were not only one influence upon constitutional design, but, perhaps critically, also upon the national politics of the early years of Federation. This period, during which the institutions of national government first took shape, should be seen as just as relevant to an understanding of the ideas that are part of *Australian Constitution* as the decade during which the document was debated and drafted. Part 4 also contextualises the development of the system of conciliation and arbitration, which can be

8. Sawer (n 4).
9. Nicholas Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018) vii. With regard to Australia, see Adrienne Stone and Lael Weis, 'Positive and Negative Constitutionalism and the Limits of Universalism: A Review Essay' (2021) 41(4) *Oxford Journal of Legal Studies* 1249.
10. I am indebted to Rosalind Dixon for help framing the contribution in these terms.
11. Emerton (n 2) 144.
12. Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 7th edition, 2021) 3.
13. N B Nairn, 'The Maritime Strike in New South Wales' (1961) 37(10) *Historical Studies Australia and New Zealand* 1, 1.
14. Stuart Macintyre and Richard Mitchell, 'Introduction' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 1, 2.
15. On the mixed benefits of the system, see Macintyre and Mitchell (n 14) 13–15.

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regarded as part of a wider understanding of the role of legislation and institutions in structuring and controlling power. This is not limited only to the power of the state itself, but also other actors within the political system. Part 5 is the conclusion.

II On Constitutions and Constitutionalism: 'Negative' and 'Positive'

The term constitutionalism is capable of being imbued with more than one meaning. Despite this, it 'continues to be identified closely with, and for many remains synonymous with, classical liberal thought'.[16] This is centred around the need for limited government and the preservation of individual liberty.[17] Classical liberals regarded state interference with private rights and freedoms as threatening to individual liberty. At the heart of many theories of liberal constitutionalism lies a restrictive notion of the power of the state.[18]

This focus on the negative, or in other words the need to prevent infringement of liberty by governments, can obscure the ways in which the state provides the conditions required for positive liberty. If a constitution only protects our civil and political freedoms but does not provide a secure foundation for necessary state action this might leave individuals in conditions that do not allow the full exercise and enjoyment of those freedoms. As David Law has said, while 'post-liberal' rights, such as to education, health and housing are, from a 'liberal perspective', sometimes treated as 'secondary or inferior to liberal rights', they are actually 'first-order needs'.[19] He puts this evocatively:

> Are you going to feed your children freedom of speech? Will you put a roof over their heads with freedom of religion? When a floundering government proves incapable of protecting your family from a raging pandemic, what consolation is the freedom to assemble in large numbers and infect one another?[20]

Certain kinds of rights, particularly economic and social rights, require what was once called 'collective action' (ie, undertaken by the state) for their protection. Ensuring access to, and protection of, such 'post-liberal' rights requires consideration to be given to questions of redistribution and more prosaic concerns that are perhaps not generally associated with thinking about rights, such as taxation systems.[21] For these reasons, in addition to preventing arbitrary action by governments, constitutions must also provide frameworks for it to be both functional and effective.[22] As Nicholas

16. David Law, 'Post-Liberal Constitutionalism and the Right to Effective Government' in Vicki Jackson and Yasmin Dawood (eds), *Constitutionalism and a Right to Effective Government?* (Cambridge University Press, 2022) 73, 73; cf Stone and Weis (n 9) 1256–9.
17. See Barber (n 9) ch 1; Jeremy Waldron, 'Constitutionalism—A Skeptical View' in Thomas Christiano and John Christman, *Contemporary Debates in Political Philosophy* (Blackwell, 2009) 267, 270.
18. See, eg, Carol Harlow and Richard Rawlings, *Law and Administration* (Weidenfeld and Nicolson, 1984) ch 1.
19. Law (n 16) 74–5.
20. Ibid 75.
21. For the contention that social and economic rights are really a 'capstone', only fully achieved when other measures such as properly redistributive taxation systems are established and maintained, see Jeff King, 'The Future of Social Rights: Social Rights as Capstone' in Katharine Young (ed), *The Future of Social Rights* (Cambridge University Press, 2019) 289, 321–2.
22. See Vicki Jackson and Yasmin Dawood (eds), *Constitutionalism and a Right to Effective Government?* (Cambridge University Press, 2022).

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Barber has put this, '[s]tate institutions may need to be limited, but they also need to be effective: able to help bring about the common good'.[23]

A *Positive Constitutionalism*

In classical liberal conceptions, the role of the state is perceived narrowly as restricted to the spheres of 'defence, security, criminal law and public order'.[24] The era in which the sphere of state action could be so narrowly conceived has long passed. Yet, it seems that doubt has always persisted as to whether an active state, which is necessary for the adequate provision of positive or post-liberal rights, is constitutional. If constitutionalism is understood purely in terms of limits or constraints upon the power of government, this can mean that these other, necessary, facets of the role of the state in helping to secure rights and wellbeing are obscured.

Jeremy Waldron has gone so far as to suggest that the concept of constitutionalism has been harnessed towards the de-legitimation of 'the aspirations of government — particularly democratic government'.[25] It is perhaps not a coincidence that narrowly defined liberal constitutionalism has not proven particularly effective at preventing the depreciation of state capacity in many countries, nor rising material inequality.[26] Waldron's critique is aimed at the way in which overemphasising the need to limit government ultimately serves certain political ends — that is, the bringing about (or restoration of) a laissez-faire approach to regulation.

Barber contended that the notion of constitutionalism might be 'rehabilitated' if it proceeded from a sounder account of the state, one which encompassed 'the (moral) reasons we have for wanting the state'.[27] What he describes as the principles of 'positive' constitutionalism 'are directed towards ensuring that the state possesses an institutional structure that has the capacity to effectively enhance the wellbeing of its members'.[28] These include a robust civil society,[29] and an understanding of the rule of law that makes room for state action.[30] A separate, but I think related, set of ideas are those connected with the provision of effective government. These recognise that constitutionalism has 'two faces' — it must be both 'power limiting' and 'power generating'.[31] On this framing, 'constitutionalism is minimally necessary, but not sufficient for effective democratic governance'.[32] The point of agreement here is that limits upon power alone are not enough to produce the conditions in which liberal democracy can function, let alone flourish.

Adrienne Stone and Lael Weis have identified that Barber's articulation of the concept of positive constitutionalism contains both 'stronger' and 'weaker' forms.[33] In terms of the 'weak' form, they understand Barber's claim to be that theorists should 'reorient their inquiries away from negative constitutionalism' and towards 'the view that the animating purpose of constitutions lies in making

23. Barber (n 9) 1.
24. Harlow and Rawlings (n 18) 12.
25. Jeremy Waldron, *Political Theory: Essays on Institutions* (Harvard University Press, rev ed, 2016) 32. See also Barber (n 9) 5.
26. See, eg, Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press, 2018) ch 7 for an examination of the way in which increased focus on human rights has not prevented rising material inequality.
27. Barber (n 9) 10.
28. Ibid.
29. Ibid ch 5.
30. See, eg, ibid 100–4.
31. Yasmin Dawood, 'The Two Faces of Constitutionalism' in Vicki Jackson and Yasmin Dawood (eds), *Constitutionalism and a Right to Effective Government?* (Cambridge University Press, 2022) 47, 51.
32. Ibid 48.
33. Stone and Weis (n 9).

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the state's exercise of political power effective'.[34] They 'are not convinced' that this purpose has been overlooked in many accounts of constitutionalism.[35] While the material they assemble on this point is persuasive, it is still the case that in some traditions the notion that an active state is antithetical to the rule of law itself runs very deep.[36] In terms of Barber's 'strong' form, Stone and Weis considered that this is a claim that, for the state of 'constitutionalism' to be achieved, 'the institutional arrangements for exercise of political power' must be adapted to the 'pursuit of wellbeing'.[37] They distinguished this from Waldron's approach, which they noted is 'a sceptical argument directed at the value of constitutionalism itself'.[38]

The role of constitutions in structuring and enabling effective government has not been the focus of much constitutional law scholarship in recent decades.[39] The need for the government to take collective action to safeguard and advance social and individual wellbeing is likewise something that has faded out of scholarly focus. Indeed, on some views, liberal constitutionalism has never adequately taken this into account.[40] One consequence is that due regard has not been paid to the ways in which the state itself, and its institutions, can make a critical contribution to sustaining civil society and checking outsized material inequality; in other words, to the maintenance of the conditions in which liberal democracy can be sustained. The question of the extent to which the adequate provision of positive rights might in fact help to secure the conditions needed to ensure that government acts within appropriate limits requires further attention. To draw on the examples given by Law, it may not be possible to seek to secure your liberal rights if your energy is, of necessity, directed entirely towards first-order problems.

B *The Australian Constitution — Why 'Positive'?*

It is not the aim of this paper to contribute to normative debates about what is needed to achieve the state of 'constitutionalism' or Barber's specific theory of it. Consideration of such debates is nevertheless useful here, because it helps to illustrate that thinking upon the topic of constitutionalism takes a range of forms. Theories or ideas regarding constitutionalism are not readily separated from those regarding constitutional form itself. Such theories may, for instance, aim to provide ideals or guidance as to the form a constitution should take to best achieve a state of constitutionalism. They may also help to develop a clearer appreciation of forms that constitutions might already take, as well as the manner of their function.

There has been a reflexive tendency to equate the form and function of Australian institutions, including parliaments and courts, with those of the United Kingdom. The constitutional theory of A V Dicey has often been treated as influential upon the way the *Australian Constitution* has been understood. While this is undoubtedly one part of the picture, it should not be allowed to obscure other compelling considerations. One legacy of the influence of Dicey is a tendency to cast constitutionalism into competing archetypes of 'political' and 'legal' constitutionalism.

Political constitutionalism can be defined as a form of constitutionalism within which the legislature has the primary power. The classic model of political constitutionalism is often thought to

34. Ibid 1254.
35. Ibid 1259.
36. See, eg, Harry Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17(1) *Osgoode Hall Law Journal* 1, 1. He observed that 'there seems to persist an attitude that law and administration are indeed opposites'.
37. Stone and Weis (n 9) 1261–2.
38. Ibid 1261.
39. Jackson and Dawood (n 22).
40. See, eg, ibid 1–6; Waldron (n 17) 271–3; Law (n 16) 73.

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be the English constitution in which, traditionally at least, Parliament has been regarded as supreme, with the courts unable to defy its legislative commands.[41] This means that the legislature, or Parliament, is free to enact any laws it chooses, including those that infringe upon rights and liberties. The check in this system is usually presumed to be a political one: within the legislature, contestation and debate is assumed to structure and constrain legislative norms affecting constitutional norms. And if legislatures overreach, this, in theory, can be corrected at the ballot box.

Legal constitutionalism, on the other hand, is a form of constitutionalism in which the courts have more power to constrain the actions of Parliament. The basis for legal constitutionalism is generally understood to be a set of written, judicially enforceable constitutional norms. Legal constitutionalism tends to be associated with better protection for individual rights, but also greater questions about the democratic legitimacy of constitutional rights protection. Judicial enforcement may also be complemented by enforcement by a range of other independent 'guarantor' or 'fourth branch' institutions. But here things can start to get murky. If these institutions have a statutory basis and a public oversight function, they may also be considered to fall under the rubric of political rather than legal constitutionalism.

As Barber has suggested, '[p]olitical and Common Law [or legal] constitutionalists sometimes give the impression that their theories exist in separate, sealed, categories, but a more plausible reading of their work would place them on a spectrum'.[42] In reality, a range of checks and balances derived from both paradigms are necessary. However, checks and balances on power and its use cannot guarantee a healthy polity without something more. For instance, in theories of legal constitutionalism emphasis is often placed primarily upon the protection of individual or liberal rights. Absent adequate focus on how social rights can be *materially* protected, such approaches appear to lack the capacity to address rising economic inequality.[43] Further, social rights are often collective or relational. Protecting the rights of one individual will not, without something further, correct structural abuses of such rights. Structural or institutional interventions are required.

Thinking about political and legal constitutionalism in binary terms poses the risk flagged by Waldron. Since state action might be difficult to control either politically or *specifically by the courts*, it is perceived to be illegitimate, or *un*constitutional. This in turn can lead to the kind of oversight, already referred to, regarding the critical contribution made to constitutional function by an ethical, adequately resourced, and effectively administered state. It also overlooks the contribution made by *legislation itself* in terms of structuring the exercise of power and enabling it to be held to account. This extends to the contribution made by the courts to the function of legislation through the application of the principles of judicial review of administrative action.

The *Australian Constitution* is regarded as a hybrid of legal and political constitutionalism.[44] This is not incorrect, but it does not fully capture its character. An additional complicating factor arising in connection with the use of Dicey as a key point of reference for understanding the *Australian Constitution* is that his theory epitomises the 'negative' constitutionalism described by Barber. Dicey preferred to conceive of the state and its power in limited terms. He seemed dubious of the state taking on what he described as a 'mass of public business', such as 'public education'.[45]

41. See, eg, Lisa Burton Crawford and Jeffrey Goldsworthy, 'Constitutionalism' in in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 355, 358–9.
42. Barber (n 9) 226.
43. See, eg, Moyn (n 26) ch 7; King (n 21) 289.
44. See, eg, Crawford and Goldsworthy (n 41) 358.
45. A V Dicey, 'Dicey's Introduction, Eighth Edition' in J W F Allison (ed), *The Law of the Constitution* (Oxford University Press, 2013) 435. See also Ivor Jennings, 'In Praise of Dicey' (1935) 13 *Public Administration,* 123, 126; Mark Walters, *A V Dicey and the Common Law Constitution: A Legal Turn of Mind* (Cambridge University Press, 2020) 28.

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The more expansive the role of the state became, the more discretion would be needed by the administrative branch of the state, which would contribute, in his perception, to the erosion of the rule of law.[46] This is one reason why Dicey was driven to deny the role of administrative law in the English Constitution.[47] Further, while Dicey theorised about parliamentary supremacy, '[p]arliamentary government does not…necessarily mean democratic government'.[48] In the introduction to the last edition of his work published in his lifetime, he attributed what he perceived to be a 'decline in reverence for the rule of law' to a rising tide of '[d]emocratic sentiment'.[49]

Stone and Weis identified that the *Australian Constitution*, like Canada's, is 'positive' in the sense that both 'permit some state interventions precisely because they advance the form of well-being to which the state is directed'.[50] As Stone has noted, *all* constitutions necessarily have a positive dimension.[51] To understand the specific character of the positive dimension of the *Australian Constitution*, it is useful to have regard to the ideas that influenced its development.[52] These can help to illustrate that there was a broad understanding, during relevant periods of constitutional and institutional development, that something more than formal legal limits on government power was required to enable a state to function effectively.

The framers of the *Australian Constitution* were influenced by the English Constitution, at least as they understood it through their own lens. They were also influenced by the *Constitution of the United States*. Yet, despite their 'superficially old-world appearance', Australian institutions have 'a distinctively local character'[53] and their own unique forms and functions. This should be recognised as only partly, and not wholly, attributable to the federal structure of the *Australian Constitution*. There are facets of Australian history which provide important sources of potential guidance for understanding the shape and nature of the institutions built upon the foundations laid by the *Constitution*. This history perhaps also helps to shed light on aspects of constitutional design, function and interpretation.

The *Constitution* was developed in a political context where ideas regarding state intervention, radical elsewhere at the time, were mainstream enough to see their proponents comprise majorities in the early Australian Parliaments. This greater comfort with the notion of state power had already resulted in experimentation in terms of the most appropriate manner for its control.[54] As Gageler J observed, Ch II of the *Constitution*, which refers to the executive power of the Commonwealth, 'was

46. Ibid 434–9.
47. See, eg, Martin Loughlin, *Public Law and Political Theory* (Cambridge University Press, 1992) 160. It is observed that, in response to 'developments in the role of government', Dicey 'developed a concept of the rule of law…which seemed at odds with extensive use of these governmental powers' in an 'attempt to stem the tide of government growth in a collectivist direction', which was 'effective as Canute's'.
48. Jennings (n 45) 124. See also Walters (n 45) 222 regarding Dicey's views on representative democracy. See further at 58, where Walters noted that while Dicey supported the further expansion of the franchise in 1867, by later in the 19th century his views had shifted, and he did not support extending suffrage to women.
49. Dicey (n 45) 434–8.
50. Ibid.
51. Adrienne Stone, 'More Than a Rulebook: Identity and the *Australian Constitution*' (Lecture, High Court of Australia, 7 November 2022).
52. Ibid.
53. Soloman Encel, 'The Concept of the State in Australian Politics' (1960) 6(1) *The Australian Journal of Politics and History* 62, 76. See also, Ryan Goss, 'What Do Australians Talk About When They Talk About "Parliamentary Sovereignty"?' [2022] (January) *Public Law* 55, for the ways in which Australian parliaments cannot be equated with their Westminster counterpart.
54. See, eg, Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 3. Finn contended that the degree of state action in colonial Australia led to what he described as a 'revolution in the law' in the form of legislation which sought to regulate the liability of colonial governments for the actions of their officials.

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framed against' this 'political and practical background', not only of interventionist government, but also experimentation as to the best means for its control.[55] Attention to this background might be illuminating in a range of ways.

The next part sets out some of the ideas that were current in Australia at the relevant time. This part demonstrates that there was, at least in some influential circles, an embrace of what might now be understood as positive liberty. The concept of positive constitutionalism might provide a useful starting point for a more complete understanding of the Australian constitutional tradition. In the political context of the time, it was recognised that while government action should not be arbitrary, the sole purpose of a constitution was not to limit power.

The positive dimension of the *Australian Constitution* is not derived only from recognition that it was the purpose of a constitution to enable the exercise of power. It was clearly recognised from the time of Federation that legislation, and institutions created by Parliament, were needed to support constitutional function. One feature of the Australian tradition is that it was understood, implicitly, that legislation could play a role in structuring (and limiting) the exercise of power. This extends to not only the power of the state, but also the power of the people themselves. *Fin de siècle* ideas regarding an active state, responsible to active citizens require consideration. Such ideas have likely shaped not only conceptions of the appropriate function of institutions, but also of how the power of government should be both exercised, and limited, within the *Australian Constitution*.

III Ideas About Government in the Federation Era

Australia's constitutional tradition has been described as 'distinctive'.[56] It is possible to also locate notions of Australian 'exceptionalism' in political science literature as well.[57] Certain leitmotifs about the nature of this exceptionalism reoccur. These include the high degree of state intervention in social and economic life[58] and the distinctive nature of Australia's democracy and democratic institutions.[59] This part contains an account of some of the ideas that were current in Australia in the late 19th and early twentieth centuries, which can help to shed light upon these distinctive aspects of the Australian culture of government.

Many key ideas bear resemblance to what can be called 'social' liberalism. This form of liberalism was influential in other parts of the world during this period. There are two reasons why this form of liberalism might have played an outsized role in shaping fundamental notions of the role of government in Australia. The first is that the peak influence of social liberalism upon political thought coincided with a critical phase of constitutional and institutional development. The second is that social, political and economic conditions meant that domestic politics was 'fertile ground'[60] not only for social liberalism to take hold in theory, but also for it to be put it into practice.

55. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, [119] (Gageler J).
56. See Emerton (n 2).
57. See, eg, Keith Dowding, 'Australian Exceptionalism Reconsidered' (2017) 52(2) *Australian Journal of Political Science* 165, 169.
58. See eg Noel Butlin, 'Colonial Socialism in Australia, 1860–1900' in Hugh Aitken (ed), *The State and Economic Growth: Papers of a Conference Held on October 11—13 1956 Under the Auspices of the Committee on Economic Growth* (Social Science Research Council, 1959); John Wanna and Patrick Weller, 'Traditions of Australian Governance' (2003) 81(1) *Public Administration* 63, 69–71; Will Bateman (forthcoming).
59. See, eg, Marian Sawer (ed) *Elections Full, Free and Fair* (Federation Press, 2001).
60. Judith Brett, *The Enigmatic Mr Deakin* (Text Publishing, 2017) 211. See also Stone (n 51).

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A *'Social' Liberalism*

Liberalism underwent a series of evolutions during the 19th century, as theorists from Bentham to Mill attempted to grapple with the challenges thrown up by economic and social disruption. Some began to theorise that true freedom could not be achieved without some form of collective action, or intervention by the state.

In contrast with a laissez-faire notion of liberalism (like the one embraced by Dicey), such conceptions of liberalism were predicated upon notions of liberty that had a much more 'positive' dimension. Instead of merely keeping the peace and preventing interference with private rights, social liberals believed that the state had a role in ensuring that individuals were able to lead fulfilling lives. This went beyond the maximisation of happiness found in the work of Bentham. It had a focus on the 'common good', in which individuals should not simply seek to maximise happiness or pleasure. Rather, they should aim to do what was right for themselves and their communities. This thinking was still concerned with individual liberty, but it encompassed an understanding of the way in which attainment of this was determined by surrounding circumstances, including the social.

Perhaps the leading thinker of this style of liberalism was T H Green. Green is recognised as the 'key figure in reorienting nineteenth century liberalism from utilitarianism to idealism and from a negative to a positive definition of liberty'.[61] He was influential in the development of the movement that is sometimes referred to as 'new liberalism' or 'idealism' in the United Kingdom.[62] Liberal idealists rejected the individualism of utilitarianism, which they perceived as largely hedonistic.[63] The philosophy of Green and other 'idealists' had a moral core located in religion.[64] Green's lectures contain reference to what he described as 'self-realisation' — he considered that a 'reconciliation between will and reason' was necessary for 'moral progress',[65] and 'the condition of a moral life [was] the possession of will and reason'.[66] In turn, 'the value…of the institutions of civil life lies in their operation as giving reality to these capacities', because they enabled the individual to act 'as a member of a social organisation which contributes to the better-being of all the rest'.[67]

Green thought that the role of the state went beyond merely securing the liberty of the individual from 'violent interference', contending that '[t]he real function of government' was 'to maintain conditions of life in which morality shall be possible'.[68] He argued that rights pertained to individuals but were essentially relational — they did not exist 'apart from society'[69] or 'against society'.[70] He claimed that '[t]here can be no right without a consciousness of common interest on the part of members of a society'.[71] It was thus the role of the state to promote the common good, although Green accepted that there were divergent notions of what this might comprise.[72]

61. Sawer (n 4) 3.
62. Loughlin (n 47) 120–1, who described Green as 'the pivotal figure' in the new liberal movement.
63. A D Lindsay, 'Introduction' in T H Green, *Lectures on the Principles of Political Obligation* (Longmans, Green and Co, 1941) vii–xi.
64. Ibid.
65. See, eg, T H Green, *Lectures on the Principles of Political Obligation* (Longmans, Green and Co, 1941) 23–4.
66. Ibid 31.
67. Ibid 32–3.
68. Ibid 39–40.
69. Ibid 45, 48.
70. Ibid 148.
71. Ibid 48.
72. See, eg, ibid 122. See generally ibid 121–40.

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Social liberals believed that the task of ensuring that government remained focussed on the common good and not captured by private interests fell to citizens themselves. Positive liberty was seen as contingent upon active citizenship. In a lecture entitled 'Will, Not Force, Is the Basis of the State', Green wrote that an individual could not just be 'a passive recipient of protection in the exercise of his rights of person and property'. Rather 'to have a higher feeling of political duty, he must take part in the work of the state', for instance, at a minimum, by voting.[73] This thinking therefore contained distinctive notions about 'practical democracy'[74] and state action.

One of its key tenets was 'that "real" freedom could not be realized without collective action on a significant scale'.[75] A further facet of 19th century social liberalism was the emergence of a belief that 'the democratic state could and should play a central role in providing its citizens with equal opportunity for self-development'.[76] For social liberals, it was the role of a liberal government to ensure that all citizens 'had the opportunity for the full development of their potential'.[77] It was perceived that it was the role of the state to facilitate individual flourishing, for instance, by ensuring individuals had access to adequate food, housing and education.[78] This was 'was premised on the interdependence of individuals and the role of the community (with the state as its collective agency) in achieving equal opportunities for all of its members'.[79] There was seen to be an 'interdependence between community development and the development of human potential'.[80]

An 'atomistic view of the individual and the promotion of individual rights at the expense of society' was thus rejected.[81] For social liberals, 'the function of law was to provide the conditions for the development of our capacities and powers towards the moral end of self-realization'.[82] To provide the conditions for self-development or self-realisation, the state was required to take on an expanded role. But one element of this obligation upon the state to provide 'equal opportunity' was that it was, in turn, the 'duty [of individuals themselves] to contribute to community through active citizenship'.[83]

B *'Maximising Democracy'*

Before turning to a consideration of liberalism in Australia during the relevant period, it is helpful to set out some contemporaneous ideas regarding democracy. Much like ideas about the role of government and the desirability of social reform, notions about democracy that were radical elsewhere had also gained a firm foothold in pre-Federation Australia.[84] The field in which this is most immediately apparent is that of democratic innovation. Many democratic reforms were pioneered in Australia, 'the first nation created through the ballot box'.[85]

73. Ibid 130.
74. Lindsay (n 63) xii.
75. Martin Loughlin 'The Functionalist Style in Public Law' (2005) 55(3) *University of Toronto Law Journal* 361, 361.
76. Sawer (n 4) 9.
77. Ibid 23.
78. Ibid 10.
79. Ibid.
80. Marian Sawer, 'The Ethical State: Social Liberalism and the Critique of Contract' (2000) 114 *Australian Historical Studies* 67, 69.
81. Sawer (n 4) 23.
82. Loughlin (n 47) 123.
83. Sawer (n 4) 10.
84. See Partlett (forthcoming).
85. Marian Sawer, 'Pacemakers for the World?' in Marian Sawer (ed), *Elections Full, Free and Fair* (Federation Press, 2001) 1, 1.

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A range of electoral reforms had been trialled in late 19th century Australia. Experimental practices such as electoral rolls, provision of ballot papers by the state and secret ballots were adopted by self-governing colonies as early as the 1850s.[86] By the 1860s, property qualifications had largely been removed from suffrage for lower house elections for colonial parliaments in South Australia, Victoria, New South Wales and Queensland.[87] Women had been granted suffrage in South Australia in 1894, and by the Commonwealth and New South Wales in 1902; by 1909, all other states had followed suit.[88] According to Colin Hughes, a 'commitment to maximising democracy' was present from the time of achievement of self-government in the mid-19th century.[89] This extended to the design of voting systems themselves, including the adoption of groundbreaking methods such as proportional voting.[90] For democratic reformers, this was a critical initiative to limit the risk of majoritarian tyranny and ensure that multiple perspectives were accommodated by the electoral process.[91]

It is important to note that many of these democratic reforms were (and remain) institutional and regulatory in character. This is, of itself, indicative of an acceptance of the state's ability to contribute to reforms, and a belief in its capacity to do so. It also demonstrates a willingness to experiment with legislation as a form of structuring the exercise of power, including the democratic power of the people themselves. The political culture that began to emerge in the latter half of the 19th century was not only 'majoritarian' but also 'bureaucratic'.[92] This understanding of the importance of good and effective administration and regulation did not only extend to democratic process. This approach to voting took place in a context in which governments were both socially and economically interventionist. If the methods selected to realise this distinctive mode of democracy in Australia are looked at in context, they can be seen as part of a wider culture.

C *Liberalism in Pre-Federation Australia: Active State, Active Citizens*

The threads of liberalism in pre-Federation Australia defy ready categorisation.[93] Stuart Macintyre wrote that '[t]he liberalism of the self-governing colonies was shaped by the absence of familiar enemies'.[94] There was no 'established church' or 'hereditary aristocracy'[95] meaning that liberalism 'acquired a new energy'.[96] Further, '[l]ibertarianism is a minority, almost fugitive tradition' in

86. Ibid 7.
87. Ibid 3, Table 1.1.
88. Ibid.
89. Colin Hughes, 'Institutionalising Electoral Integrity' in Marian Sawer (ed) *Elections Full, Free and Fair* (Federation Press, 2001) 142, 144.
90. Sawer (n 85) 21–4. As Sawer noted, innovation in this regard was not limited to proportional voting, but also preferential voting. See also Benjamin Reilly, 'Preferential Voting and its Political Consequences' in Marian Sawer (ed), *Elections Full, Free and Fair* (Federation Press, 2001) 78, 78, where it is noted that the main systems of preferential voting 'were developed or substantially refined in Australia'. See further Judith Homeshaw, 'Inventing Hare-Clark: The Model Arithmetocracy' in Marian Sawer (ed), *Elections Full, Free and Fair* (Federation Press, 2001) 96.
91. See, eg, Catherine Spence, *A Plea for Pure Democracy: Mr Hare's Reform Bill Applied to South Australia* (W C Rigby, 1861); Homeshaw (n 90).
92. Judith Brett, *From Secret Ballot to Democracy Sausage* (Text Publishing, 2019) 2.
93. See, eg, Stuart Macintyre *A Colonial Liberalism: The Lost World of Three Victorian Visionaries* (Oxford University Press, 1991) 10–3. See also Wanna and Weller (n 58) who say that 'Australia possessed a plurality of elite traditions about governance and the nature and role of the state in Australia' which were '[o]ften…neither ideologically coherent nor necessarily consistent': at 63.
94. Macintyre (n 6) 391.
95. Ibid.
96. Macintyre (n 93) 12.

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Australian political history.[97] Liberals in Australia 'embraced a far wider role for the state than in Britain'.[98]

Colonial Australian governments had performed 'activities that were without counterpart in Britain or which were conducted by local government, private enterprise or private and charitable organisations'.[99] Noel Butlin famously explained that there was a 'common pattern of positive government intervention' in a wide range of industries and activities, which was described at the time as 'colonial socialism'.[100] The pre-Federation state in Australia provided infrastructure that was critical to economic development such as railways and telegraph lines.[101] The state also contributed to economic development through tariffs, as well as measures that sought to encourage foreign investment. Consequently 'an active role for the state in development was seen as desirable by both capital and labour'.[102]

Each of these things contributed to conditions which encouraged a form of social liberalism to take a firm hold in the decades prior to Federation. The currency of ideas bearing the character of social liberalism appears to have even predated the work of Green, at least in some circles.[103] Support for such ideas was 'strongest amongst the professional middle classes who parted company with classical liberals in their belief in a more extensive use of state power'.[104] Judith Brett's 'moral middle class' was already a force in Australian politics long before Federation.[105]

Socially liberal notions were nevertheless influential across class divides.[106] Similarly to middle class liberals, 'the leaders of the emergent Labor Party looked to the democratic nation-state as the means for achieving their objectives'.[107] Likewise, they 'assumed that public institutions could provide the framework for a free, prosperous and contented people'.[108] Both sides of Australian politics traditionally embraced many forms of state action in a broad ideological consensus that lasted well into the twentieth century.[109] Still, 'it is instructive to recognize the sense in which

97. Stuart Macintyre, 'Libertarianism' in Graeme Davison, John Hirst and Stuart Macintyre (eds), *The Oxford Companion to Australian History* (Oxford University Press, 1998) 390, 390.
98. Brett (n 60) 211.
99. Finn (n 54) 3.
100. Butlin (n 58) 27.
101. See, eg, Brian Head, 'The Australian Political Economy: Introduction' in Brian Head (ed), *The State and Economy in Australia* (Oxford University Press, 1983) 4.
102. Ibid.
103. Stuart Macintyre's study of liberalism in colonial Victoria would tend to suggest this, see (n 93).
104. Graeme Davison, 'Progressivism' in Graeme Davison, John Hirst and Stuart McIntyre (eds), *The Oxford Companion to Australian History* (Oxford University Press, 1998) 529, 529.
105. Judith Brett, *Australian Liberals and the Moral Middle Class: From Alfred Deakin to John Howard* (Cambridge University Press, 2003) 9.
106. Sawer (n 4) 35; Michael Roe, *Nine Australian Progressives: Vitalism in Bourgeois Social Thought 1890–1960* (University of Queensland Press, 1984) 19.
107. Stuart Macintyre, 'Neither Capital Nor Labour: The Politics of the Establishment of Arbitration' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 178.
108. Ibid. See also, eg, Ray Markey, 'An Antipodean Phenomenon: Comparing the Labo(u)r Party in New Zealand and Australia' (2008) 95 *Labour History* 69, 81, who noted that in comparison with its New Zealand counterpart, the Australian Labor Party 'was predominantly influenced by state socialism' rather than a more radical variant.
109. See, eg, Brett (n 105); Encel (n 53) 66.

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liberalism remained a hegemonic ideology'.[110] Doing so might go some way towards explaining what looked like 'socialisme sans doctrine' to the visiting French scholar Albert Métin.[111]

In contrast to the United States, where institutional development was influenced by theories of natural rights and limited government, in Australia it followed the advent of utilitarianism.[112] Hugh Collins claimed that 'the mental universe of Australian politics is essentially Benthamite' and that Australia becomes comprehensible to outside observers only if they regard it 'as a Benthamite society'.[113] One reason for this, in the view of Collins, was that the state in colonial Australia 'was inevitably a stronger, more intrusive, legitimately interventionist instrument than Victoria's Britain'.[114]

Yet, to regard utilitarianism as the sole influence upon political development in Australia is to overlook the influence of social liberalism.[115] While utilitarian approaches were influential upon the 'electoral and administrative innovation' already described, by the 1890s, what was in the ascendancy was 'an idealistic form of liberalism quite distinct from the materialism of Benthamite utilitarianism'.[116] As part 3.1 outlined, within the social liberal paradigm, '[l]iberty was not merely atomistic pursuit of pleasure and avoidance of pain' as it was within a Benthamite construct, 'but active citizenship and the pursuit of the common good'.[117] Further, the state was not regarded merely as 'a vast public utility at the service of material happiness', but 'rather it had an ethical purpose: to provide equal opportunity for development of human capabilities'.[118]

It is possible to recognise the ways in which the notions about democracy sketched above were connected, at least in the minds of some, to ideas regarding the role of the state. Prominent liberal figures like George Higinbotham, an Attorney-General and later Chief Justice of Victoria, campaigned for reforms such as the state provision of measures designed to deliver social good, such as public education. At a public meeting in 1865 during a deadlock between the upper and lower houses of the Victorian Parliament over a protectionist tariff bill, he argued that:

> …there was a widespread belief that freedom required weak government. The opposite was the case. The people would see that 'the best protection of their liberties will consist in maintaining a very strong Government *and also in making that Government responsible*'.[119]

The tone of this speech helps to demonstrate that the term 'responsible government' had democratic connotations at the time. Governments were to be responsible not only to parliaments but to the people themselves. Innovations regarding the administration of democracy, of the kind already referred to, would help to ensure this.

This meant that the people needed to be *personally equipped* to exercise their democratic duties. Progressive liberal reformers regarded public provision of education as a necessary element of

110. Macintyre (n 107) 186 (emphasis added).
111. Albert Métin, *Socialism without Doctrine*, tr Russell Ward (Alternative Publishing Co-operative Ltd, 1977). See, eg, Markey (n 108) 82.
112. Sawer (n 6) 320.
113. Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114(1) *Daedalus* 147, 148. See also Encel (n 53) 72.
114. Collins (n 113) 151.
115. Sawer (n 6) 321; Sawer (n 4) 3.
116. Sawer (n 6) 321.
117. Ibid.
118. Ibid.
119. Macintyre (n 93) 45, quoting George Higinbotham, *Speech to the Electors at Brighton* (emphasis added).

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universal suffrage and 'democratic citizenship'.[120] The radical notions of democracy already outlined gave rise to expectations in terms of the need for citizens to be capable of *self-government*. Books were published for use in schools to educate students regarding 'the laws they live under and the duties of a citizen'.[121] The term 'self-government' was regarded as having a 'double meaning'.[122] As explained by Higinbotham in another public speech, 'in proportion to a man's self-control is his capacity to be entrusted with political power'.[123]

Some prominent figures had links, albeit indirect ones, to Green himself, having been taught by adherents to his philosophy before arriving in Australia.[124] They included the Reverend Charles Strong. His progressive beliefs led him to break with the Presbyterian Church in Victoria, where he established the 'Australian Church'. This was 'a free religious fellowship' which 'became a hub for social-liberal and feminist ideas'.[125] Amongst the associates of Strong were key figures in the politics of the time, including Higinbotham, but also Alfred Deakin, H B Higgins and the suffragists and social welfare activists Isabella and Vida Goldstein. Another with such a link was Francis Anderson, the first Challis professor of philosophy at the University of Sydney, and the leading 'social-liberal philosopher in Australia'.[126] Anderson 'followed Green in practising as well as preaching active citizenship while holding his chair'.[127] Amongst the many students taught by Anderson in his more than three decades at the University was H V Evatt, making him, in Sawer's estimation, 'a third-generation disciple of Green'.[128]

Whilst still a student, Evatt wrote a prizewinning essay on liberalism in Australia.[129] In this, he 'described how the very concept of positive liberty and the ethical state came to displace the older contractarian forms of liberalism'.[130] He observed that 'liberty without real equality was still a noble-sounding name, but often meant squalid results' adding:

> Liberalism has grown to see that democracy is founded not merely on the private interest of the individual, but also on the function of the individual as a member of the community; and so the common good is based on the common will.[131]

Preoccupation with the model citizen ideal encouraged some progressive liberals to pursue policies aimed at regulating personal behaviour, such as temperance.[132] As Macintyre explained '[i]n their willingness to interfere with the liberty of the individual' to prevent the perceived social harms caused by alcohol, 'the colonial liberals moved easily from the welfare of the individual to

120. Sawer (n 4) 35. See, eg, Macintyre (n 93) 138–9 on the background to the *Education Act 1872* (Vic).
121. See, eg, Catherine Helen Spence, *The Laws We Live Under: With Some Chapters on Elementary Political Economy and the Duties of Citizens* (Government Printing Office of South Australia, 1881) 7.
122. Macintyre (n 93) 27, quoting George Higinbotham.
123. Ibid.
124. Sawer (n 4) 37.
125. Ibid.
126. Ibid 38–39; See also Roe (n 106) 7.
127. Sawer (n 4) 45.
128. Ibid 65. Indeed, Evatt cited Green in his essay: see eg, H V Evatt, *Liberalism in Australia: An Historical Sketch of Australian Politics down to the year 1915* (Law Book Co, 1918), 73.
129. Evatt (n 128).
130. Sawer (n 4) 65.
131. Evatt (n 128) 73–4.
132. Macintyre (n 93) 194–5.

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the welfare of society'.[133] By the 1880s, this strand of reformist zeal was 'shading into wowserism'.[134]

Anxieties about 'purity' had a racist aspect, which helped to encourage support for not only the White Australia Policy, but also the destructive assimilationist practices adopted in the latter 19th century.[135] Marilyn Lake has described 'political equality' and 'racial exclusion' as 'twin ideals'.[136] The historian Stuart Macintyre wrote that the progressive liberalism of figures like Deakin sought to both 'nurture a particular kind of social solidarity' while also 'safeguard[ing] the racial purity of the nation by the racially restrictive White Australia policy'.[137] Progressive nation building was constructed on a foundation of the 'total denial of Indigenous history'.[138] 'Equal opportunity' was a goal of social liberalism, but its pursuit was limited and distorted by a profoundly discriminatory outlook. Lake observed that '[t]he capacity for and right to exercise self-government were conceptualized in racialized settler colonial terms'.[139] The *Constitution* bears the marks of this legacy, for instance, in the exclusionary conception of 'the people' which continues to be reflected in its terms.[140]

IV Section 51(xxxv): A Constitutional Foothold for Social Liberalism?

Liberalism is said to be the 'pervasive influence' upon the *Constitution*.[141] Macintyre thought this was 'expressed in the claim of John Quick and R R Garran that "embodies the best achievements of political progress, and realises the latest attainable ideals of liberty"'.[142] Most of those present at the constitutional conventions 'regarded themselves as liberals'.[143] The *Constitution* they drafted has been described as 'extraordinarily liberal and democratic'.[144]

The term 'liberal' is obviously a capacious one. What does it really mean in the setting of the *Australian Constitution*? What did it mean at the time the *Constitution* was drafted? Very likely different things to different people. It is not possible to locate a definitive answer in the actual text of

133. Ibid 195.
134. Ibid.
135. See, eg, Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) chs 6–7; Lake (n 3); Roe (n 106) 19. Leading liberals such as Alfred Deakin were key advocates for policies that caused the destruction of Indigenous families and communities, the removal of people from traditional lands and the loss of language and culture: Lake (n 3) 14–5; Brett (n 60) 121–2.
136. Lake (n 3) 12.
137. Stuart Macintyre, 'Alfred Deakin' in Graeme Davison, John Hirst and Stuart McIntyre (eds), *The Oxford Companion to Australian History* (Oxford University Press, 1998) 175, 175–6.
138. Mark McKenna, 'The History Anxiety' in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia* (Part II) (Cambridge University Press, 2013) 561, 565.
139. See Lake (n 3) 14, as well as more generally for an account of the settler colonial outlook of progressivism in Australia, within which, paradoxically, 'political equality and racial exclusion' were 'twin ideals':at 12. See also Roe (n 106) 13, on the 'ambiguities and tensions' within 19th century progressivism, including 'the liberal-authoritarian duality'. See also at 19 on the link with White Australia Policy; and Emerton (n 2) 155–6, who contends that the democratic provisions of the Constitution were based on an assumption of 'racial unity', and that '[p]eople of colour were seen as a threat to both economic and political democracy'.
140. See, eg, Arcioni and Stone (n 2) 68; Arcioni (n 7); Davis and Lino (n 7).
141. Macintyre (n 6) 392.
142. Ibid, quoting the preface to the 1901 edition of John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth*.
143. Ibid 392.
144. Helen Irving, 'Democratic Experiments with Constitution-making' in Marian Sawer (ed) *Elections Full, Free and Fair* (Federation Press, 2001) 115, 116.

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the *Constitution*, which was left sparse. On one view, though, even this drafting choice was itself influenced by a progressive view that the future should not be overly bound to the past.[145]

Writing specifically about the influence of social liberalism in Australia, Sawer said it was necessary to look for it 'in the design of institutions… rather than in libraries'.[146] She considered that, owing to what she called 'path dependency',[147] the 'institutional legacy of social liberalism remained', even after it was no longer in political vogue.[148] For Sawer, the influence of social liberalism was particularly visible in the institution of conciliation and arbitration. As explained below, this was uniquely socially liberal in its design and purpose. It was also 'an institution and a process that would prove very important to the societal and industrial balances struck thereafter in the Australian Commonwealth'.[149]

The federal system of conciliation and arbitration had its basis in section 51(xxxv) of the *Constitution*. The addition of this provision to the *Constitution* was 'to prove central in shaping the Australian nation in the twentieth century'.[150] Owing to a series of policy decisions made by governments,[151] it has now fallen into desuetude, but it was once 'one of the most contentious and litigated clauses in the *Constitution*'.[152] As *New South Wales v Commonwealth* ('*Work Choices Case*')[153] confirmed, while the Constitution gave the Commonwealth Parliament this power, it did not require it to use it.[154]

The actual development and entrenchment of a system of conciliation and arbitration was a result of the politics of the early Federation period. Accordingly, the discussion in this section is not limited to the inclusion of s 51(xxxv) in the *Constitution*, which only tells one part of the story. It also considers the use of this power in the early years of Federation to entrench a novel institutional response to an important social and economic question. In the process of developing this account, this part also touches upon the faith social liberals placed in legislation and the connection between this and the way that notions of democracy were given effect. This helps to reveal that the late 19th century ideas regarding the role of the people and the state had an influence reaching beyond just the development of the system of conciliation and arbitration, which is itself a primary example of these ideas being put into action.

There is a great deal of literature on conciliation and arbitration, the way it functioned and was reformed over the decades and any contribution it might have made socially and economically to the

145. See, eg, Patrick Keane, 'In Celebration of the Constitution', speech to the National Archives Commission (12 June 2008), where it is suggested that the decision to leave the Constitution relatively free of constraints upon legislative power was influenced, at least in part, by 'an acceptance of the view' that future, unforeseeable, crises were best left to the 'collective wisdom of the people of that [future] time': at 3.

146. Sawer (n 4) 31.

147. This is a term with its own literature in economics and political science.

148. Sawer (n 4) 48.

149. *New South Wales v Commonwealth* (2006) 229 CLR 1, 217 [520] (Kirby J) ('*Work Choices Case*').

150. Irving (n 135) 51.

151. The Hawke/Keating government oversaw a transition away from the arbitration system towards enterprise bargaining. The Liberal Party began to advocate for individual bargaining: see, eg, Andrew Frazer, 'Parliament and the Industrial Power' in G Lindell and R Bennett (eds), *Parliament: The Vision in Hindsight* (The Federation Press, 2001) 93, 139–41. This culminated in the radical reshaping of the system by the Howard Government's *Work Choices Act 2005* (Cth), which was based on the corporations power, s 51(xx). The validity of this legislation was comprehensively upheld by a majority of the High Court in *Work Choices Case* (n 149).

152. Frazer (n 151) 93.

153. *Work Choices Case* (n 149).

154. See, eg, *Re Pacific Coal Pty Ltd; Ex Parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 359–60 (Gleeson CJ); accepted and followed by *Work Choices Case* (n 149) 130–1 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

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development of the Australian nation. Nevertheless, Macintyre observed that '[a] full history of its rise and fall, supporters and opponents, remains to be written'.[155] It is now approaching two decades since the *Work Choices Case*. This found that a radical legislative alteration of the Commonwealth industrial relations system, based upon s 51(xx), the 'corporations' power, was valid. In effect, the reach of the Commonwealth Parliament into this field of policy was no longer restricted to the more limited terms of s 51(xxxv).[156] The role and contribution of the system of conciliation and arbitration requires a contemporary reappraisal, particularly given the technological and economic shifts that have now undermined a decades-long neoliberal consensus.[157] The full history that Macintyre called for is long overdue. What follows must be read in light of its absence.

A *Background to the Inclusion of s 51(xxxv) in the* Constitution

There are some notable differences between the list of powers contained in section 51 of the Australian *Constitution* and that found in Article 1 of the *United States Constitution*. Some of these might be explained by the technological, economic and social change that occurred throughout the century that separates the drafting of both documents. For instance, section 51 refers specifically to 19th century innovations such as railways and '[p]ostal, telegraphic, telephonic and other like services'.[158] The Commonwealth Parliament was given those powers thought to be required for national government. But the positive conception of the role of the state described in part 3 is also reflected in s 51.

The impression of this becomes stronger when regard is had to provisions such as s 51(xxiii), which states that the Commonwealth Parliament shall have power with respect to 'invalid and old-age pensions', a novel concept in the 1890s. It is intensified by s 51(xxxv), which refers to:

> Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

While the introduction of an aged pension in 1909 put Australia 'at the cutting edge of some aspects of social insurance',[159] the focus here is on s 51(xxxv), which was the product of a unique confluence of circumstances.

Stone has observed that one of the assumptions upon which the 'small brown bird' narrative of the *Australian Constitution* rests is to do with the moment of its founding.[160] The standard account is that Federation was a 'practical moment of unification', driven by purely pragmatic forces rather than any kind of watershed moment or wider idealistic fervour.[161] This familiar narrative overlooks not only the ideas that were in circulation,[162] but also just how turbulent a time the 1890s really were in Australia.

155. Stuart Macintyre, 'Arbitration' in Graeme Davison, John Hirst and Stuart McIntyre (eds), *The Oxford Companion to Australian History* (Oxford University Press, 1998) 30, 32.
156. Note that prior to this the Commonwealth had already used s 51(xxix), the external affairs power as the basis for some legislation. See, eg, *Industrial Relations Reform Act 1993* (Cth); *Victoria v Commonwealth* (1996) 187 CLR 416.
157. See, eg, Rosalind Dixon, 'Fair Market Constitutionalism: From Neo-liberal to Democratic Liberal Economic Governance' (2023) 43(2) *Oxford Journal of Legal Studies* 221.
158. Sections 51(xxxiv) and (v), respectively.
159. Daniel Mulino, *Safety Net: The Future of Welfare in Australia* (La Trobe University Press and Black Inc, 2022) 39. See also Bateman (n 58).
160. Stone (n 51).
161. Ibid.
162. Ibid.

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The *Constitution* was written amidst social and economic turmoil. A long boom ended abruptly, leaving a devastating economic depression in its wake.[163] According to Butlin 'the entire Australian banking system cracked' and unemployment rose sharply.[164] The response of governments was not to withdraw state intervention, but to tailor it towards economic stabilisation and reconstruction. Butlin characterised these economic circumstances as an important but understudied driver of Federation itself, writing '[t]he Commonwealth Constitution was framed in crisis conditions'.[165] The extent to which these conditions, and the social challenges they gave rise to, might have influenced conceptions of the powers required by the national government is a question that is itself worthy of attention. Deakin's biographer noted that the depression brought 'old world poverty and suffering', meaning that he and his fellow progressive liberals were 'looking for new directions' in response to it.[166]

The early part of the decade was also marked by widespread strikes. These began in August 1890 in the maritime industry, quickly spreading to other critical industries such as coal mining, spanning Victoria and New South Wales.[167] Major disruptions resulted, including in the cities, where essential utilities workers, among them those who provided Melbourne with its 'power and illumination', joined boycotts.[168] The following year saw further strikes, this time in the wool industry.[169] The industrial unrest was suppressed with harsh, even violent, law and order measures.[170] The unions were defeated, and left weakened. These setbacks led to a determination on the labour side to try different tactics, inspiring the political movement that would become the Australian Labor Party.[171]

In keeping with the contemporary preparedness to experiment with novel, state-led initiatives to address social problems, arbitration was one response put forward to the challenges presented by such bitter industrial disputes. For instance, it was among the recommendations of a New South Wales Royal Commission into the maritime strike.[172] Prior to 1901, various attempts were made in South Australia, Victoria, Queensland and New South Wales to implement industrial arbitration regimes, but these met with limited success.[173] While the *Constitution* was being debated, colonial

163. See, eg, Stuart Macintyre, *A Concise History of Australia* (Cambridge University Press, 5th ed, 2020) 139.
164. Butlin (n 58) 76–7.
165. Ibid 77.
166. Brett (n 60) 211.
167. See, eg, Stuart Macintyre, 'Labour, Capital and Arbitration' in Brian Head (ed), *The State and Economy in Australia* (Oxford University Press, 1983) 98, 100; Macintyre (n 162) 132.
168. Macintyre (n 163) 132.
169. See, eg, Stuart Svenson, *The Shearers War* (University of Queensland Press, 1989).
170. Macintyre (n 163) 132. The leaders of the shearers strike were convicted of conspiracy and sentenced to imprisonment: Svenson (n 169) ch 6.
171. See, eg, Bede Nairn, *Civilising Capitalism: The Labor Movement in New South Wales, 1870–1900* (Australian National University Press, 1973) 39; Stuart Macintyre, *Winners and Losers: The Pursuit of Social Justice in Australian History* (Allen & Unwin, 1985) 50.
172. See Mark Bray and Malcolm Rimmer, 'Voluntarism or Compulsion? Public Inquiries into Industrial Relations in New South Wales and Great Britain, 1890–1894' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 50, 51.
173. See Richard Mitchell and Esther Stern, 'The Compulsory Arbitration Model of Industrial Dispute Settlement: An Outline of Legal Developments' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 104 which sets out a chronology of the legislative developments in both Australia and New Zealand during the period. These proto-type regimes lacked features that were to become crucial to the post-Federation systems, such as compulsion: Stuart Macintyre, 'Arbitration in Action' in Joe Isaac and Stuart Macintyre (eds), *The New Province of Law and Order: 100 Years of Australian Conciliation and Arbitration* (Cambridge University Press, 2004) 55, 56.

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parliaments were engaged in the design of what was an entirely new institution. Systems with what came to be recognised as the 'essential elements' of the 'classical Australasian form of compulsory arbitration' were first legislated in New Zealand in 1894, and then in Australian states from 1900 onwards.[174] At the time s 51(xxxv) was included in the *Constitution*, this mode of dealing with industrial disputes was in nascent form.

The inclusion of this provision in the Constitution was 'unusually hard-fought' — it was the only proposal that had to be debated on three separate occasions.[175] The primary advocates for it were Charles Cameron Kingston and Higgins, two of the more radical liberals present at the conventions. Neither were ever members of the Labor Party, coming from the professional rather than working class.[176] Politically, 'while they classified themselves from time to time as socialists, they were very aware of the liberal genealogy of their ideas'.[177] Prior to the first convention in 1891, Kingston had written a draft constitution, which had included an unqualified power for the national parliament over 'trade unions and organisations of employers, and tribunals for the settlement of industrial disputes'.[178] A power to address industrial disputes was once again proposed unsuccessfully in 1897 by Higgins and Kingston.[179] It was not until 1898 that the provision was approved by a narrow majority.[180]

The debates regarding this provision, prima facie at least, tended to be more focussed on the question of whether it was appropriate for the national parliament to possess power in this area, rather than whether or not conciliation and arbitration was a desirable response of *any* level of government to the problems posed by industrial disputes.[181] Indeed, this was how Edmund Barton characterised the crux of the dispute over the inclusion of this power, noting that 'we propose to federate in those matters which cannot be carried out by local legislation and administration'.[182]

In terms of the contributions of some, it is hard to assess whether these federalist concerns were their primary motivation for voting against the proposal, or whether it was owing to a preference for a more limited role for the *state itself*. One example is the New South Wales delegate, William McMillan, who in 1898 expressed the view that 'a clear line' had to be drawn between the functions of the respective levels of government. In the same speech, he also said that:

174. Richard Mitchell, 'State Systems of Conciliation and Arbitration: The Legal Origins of the Australasian Model' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 74, 89; See also Mitchell and Stern (n 173).
175. Frazer (n 151) 98. See generally 94–8 for an overview of the debates of this proposal at each convention.
176. Although Higgins' biographer did describe him as a 'friend of labour', and he served as the Attorney-General of Australia in the Watson Government, the first 'labour' government in the world. See John Rickard, *H B Higgins: The Rebel As Judge* (Allen & Unwin, 1984) ch 6.
177. Sawer (n 4) 50.
178. See L F Crisp, *Charles Cameron Kingston: Radical Federationist* (Australian National University, 1984) 32.
179. *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 17 April 1897, 782–94. See proposals put by both Higgins and Kingston at 782 and see also J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972, 152–3.
180. 22 to 19 votes. See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 215.
181. See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 17 April 1897, 782–93 (William McMillan, Sir John Downer, Josiah Symon, Sir Edward Braddon); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 199–201 (Richard O'Connor), 205–6 (George Leake), 213–4 (Edmund Barton), 214–5 (Sir Edward Braddon).
182. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 213–4.

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> I hold-and every year of my political life has made it a more sacred principle to me-that the less the Government do, except in acting as policemen in trade disputes, the better for the community. I do not want to insert in this Constitution a provision which by implication will show a trend of thought of a certain character, to which I need not further refer. I do not want it to be presumed for one moment that we desire to give to the Federal Parliament the right to interfere in trade disputes and in the ordinary business and commerce of the country.[183]

In reiterating his own, previously expressed, opposition to the proposal Sir John Downer said that the question 'goes to the root of the preservation of the entities of the *states* and the *rights of contract possessed by their citizens*'.[184] This statement appears to conflate the issues of the need to preserve the powers of state governments with the need to safeguard individual freedoms. Likewise, Sir Samuel Griffith objected to the initial 1891 proposal on the grounds that it was an interference with 'property and civil rights', matters which should, in his view, be left to the states.[185] George Reid, later the leader of the federal Free Trade Party, said that while he was a supporter of 'the compulsory investigation of trade disputes', the proposal that the federal parliament should have this form of legislative power 'passes my comprehension'.[186] Bernard Wise, on the other hand, raised the concern that such a national power would '[deprive] the workers of local self-government'.[187]

In 1891, the Victorian delegate Duncan Gillies had cautioned that, given the newness of such a response to industrial disputes, 'it would do well to leave it for some little time to the state governments to endeavour to consider the matter among themselves' before any intervention by a federal parliament in such a manner.[188] Andrew Frazer wrote that perhaps, given the systems put in place in New Zealand, South Australia and New South Wales during the intervening years, there was more understanding of the proposal by 1897 than there had been in 1891.[189] He referred to John Quick and Robert Garran's statement that by the time of the Adelaide Convention, 'political thought had developed and public sentiment had ripened' on this particular issue.[190] In the case of some, though, this had only served to increase scepticism.[191]

The debates appear to illustrate that the finer points of how a national system of 'conciliation' and 'arbitration' might function were not entirely clear, even to the supporters of the final provision. Speaking in Melbourne in 1898, Quick had said that '[i]t may be that there would be very little scope in the Federal Constitution for the operation of such a provision', adding:

> At any rate, I think the Convention should show its appreciation of the importance of this question by not shunting it from the Federal Constitution but finding a place for it there, *leaving it to the Federal Parliament* to discover some means of introducing conciliation and arbitration of the kind proposed.[192]

183. Ibid 184.
184. Ibid 187 (emphasis added).
185. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 6 April 1891, 780–5.
186. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 209.
187. Ibid 190.
188. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 6 April 1891, 784.
189. Frazer (n 149) 95–6.
190. J Quick and R Garran, *The Annotated Constitution of Australia* (Angus and Robertson, 1901) 646, quoted by Frazer (n 151).
191. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 190: where the existing South Australian and New South Wales systems are ridiculed by Josiah Symon and Bernard Wise, 200: where Richard O'Connor said that where the 'experiment' had been attempted, it 'has been a disastrous failure'.
192. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 183 (emphasis added).

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In the same passage of debate, McMillan observed that, given the federal question was key, 'I do not think we have to discuss the policy of any of these matters, or to enter into long debates regarding their desirability or otherwise'.[193] The details regarding institutional design and function were thus left to future Commonwealth parliaments for resolution. This decision is in keeping with other aspects of constitutional drafting.

At least one of the reasons for this approach is reflected in the rhetorical question posed by Deakin during the debate over what became s 51(xxxv) in January 1898. In response to comments regarding the lack of perceived success of conciliation and arbitration in colonies that had tried it, he asked:

> What does that lead to? Does it not lead to a recognition of the fact that in all these delicate and intricate social questions there will have to be an abundant series of cautiously-conducted experiments before we can hope to arrive at a final settlement?[194]

Another, related, reason for it was captured by Kingston on the same day. In response to the statement of Richard O'Connor that 'it behoves us to see how [the power] is likely to be exercised', Kingston remarked that '[s]urely it is for the people to say how it shall be exercised'.[195]

B *Leaving Space for Legislation*

Paul Finn observed that legislation had a primacy in Australia which it did not have in other common law countries.[196] Writing in 1908, Bryce said that '[t]he immense increase in the volume of legislation during the last half century is one of the salient features of our time'.[197] This wider trend, which Bryce explained as the result of 'swift changes in economic and social conditions',[198] was another that coincided with institutional foundation and development it Australia. This might be one reason why Australians 'were born to statutes'.[199] But it is not the whole story. The influence of the ideas outlined in part 3 must also be recognised. As Finn also said, something 'rarely perceived by lawyers' was that 'in its aggregate and orientation, our legislation created a "semi-socialist order" in environments sympathetic to individualism'.[200] Once more, we see the echo of 'socialism sans doctrine', which is perhaps better recognised as liberal idealism or social liberalism.

The decision to leave rights out of the Constitution is sometimes presented as one consequence of the age of the document, given that it was drafted before the human rights movement gathered momentum in the latter half of the twentieth century. It was also a deliberate choice. Although the drafters of the Constitution had the example of the United States Constitution before them, they

193. Ibid.
194. Ibid 202.
195. Ibid 200.
196. Paul Finn, 'Public Trusts and Fiduciary Relations' in Charles Sampford, Ken Coghill and Tim Smith (eds), *Fiduciary Duty and the Atmospheric Trust* 31, 35: where Finn writes that, in contrast to other common law countries, in Australia 'the balance between state and the common law has always heavily favoured statute'.
197. James Bryce, 'The Methods and Conditions of Legislation in Our Time' (1908) 8(3) *Columbia Law Review* 157, 157.
198. Ibid.
199. Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *Western Australian Law Review* 7, 8.
200. Ibid, quoting A W Martin, 'Australia and the Hartz 'Fragment' Thesis' (1973) 13(2) *Australian Economic History Review* 131.

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opted to not include a similar Bill of Rights. An attempt to include protections modelled on certain provisions in the United States Constitution, led by Andrew Inglis Clark, was largely unsuccessful.[201]

One reason for this was that, already deeply in thrall to the beliefs that gave rise to the White Australia Policy, those at the Conventions wanted the parliaments of the Commonwealth to be left free to enact legislation that was racially discriminatory.[202] Another is that the drafters are said to have preferred English institutions of government over American ones.[203] As noted, though, their understanding of institutional function was also likely informed by domestic influences. These extend to socially liberal attitudes about the role of government, and the most practical and desirable manner of bringing about social reform.

In an era in which courts elsewhere produced judgments such as *Lochner v New York* (*Lochner*),[204] classically framed liberal rights were regarded by progressive liberals as reactionary mechanisms employed by courts to prevent necessary social reform.[205] They typically protected property interests and private rights which stood in opposition of collective reforming measures. Legislation was instead regarded by progressive liberals as a source of rights. As the expression of popular will, it was regarded as 'the highest form of law'.[206] It was needed to confine and direct the function of the expanded role of the state such liberals imagined. Through it, the power of the state could be harnessed to address social ills.

When viewed through a 'negative' or classically liberal lens, on the other hand, legislation tends to be perceived in a less favourable light. Within this tradition, legislation has remained somehow less legitimate than the 'ordinary' or common law,[207] and emphasis is placed instead on its potential to interfere with, rather than confer, rights. Although this is not wholly attributable to the influence of Dicey, his theory exemplified such an understanding.[208] The tone of his *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*[209] indicates his concern at the turn in liberalism towards collectivism. In a passage containing a footnote referring to Australia's 'socialistic experiments', he observed that state intervention 'especially in the form of legislation', had 'evil effects' which were 'gradual and indirect, and lie out of sight'.[210] To this, he added that 'few are those who realise the undeniable truth that State help kills self-help'.[211]

For Australian social liberals, the reforms needed to bring about their objective of 'equal opportunity' were seen as best achieved through the enactment of legislation. The thinking of the time was reflected in what Irving refers to as 'a new Utopian genre [of fiction] in which social experimentation through legislation creates an ideal society'.[212] Lake wrote that '[f]or Australian

201. See, eg, La Nauze (n 179) 229–32; John Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"' (1996) 42(1) *Australian Journal of Politics and History* 10.
202. See, eg, Williams (n 201) 18; La Nauze (n 179) 231–2.
203. See, eg, Sir Owen Dixon, 'Two Constitutions Compared' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Law Book Co, 1965) 100, 101.
204. *Lochner v New York* 198 US 45 (1905) ('*Lochner*').
205. See, eg, Moyn (n 26) 31.
206. Loughlin (n 47) 60, referring to one of the tenets of what he described as the 'functionalist style' in public law, which he considers was influenced by new liberalism: see ch 6; and also Loughlin (n 75) 362–3.
207. Arthurs (n 36) 8.
208. Ibid 7–8. See also Loughlin (n 47) ch 7 and Harlow and Rawlings (n 18) ch 1.
209. *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (Macmillan and Co, 1914).
210. Ibid 257.
211. Ibid 258.
212. Irving (n 135) 38.

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progressives, it was *legislative enactment*, not simply the espousal of "social ethics" that was necessary to secure social justice'.[213] A Bill of Rights would have been a potential 'check upon legislative experimentation'.[214] Legislation was favoured (over 'ordinary law') by what Martin Loughlin described as the progressive liberal-influenced 'functionalist' style in public law because it was seen the 'embodiment of the democratic will'.[215] This is in keeping with another feature of the *Constitution* which Stone has identified as positive: 'the way the *Constitution* has enabled the Parliament to pursue an inclusive and innovative electoral system'.[216]

C Legislation and Democracy

Australian social liberals, for the most part, placed their faith not in constitutional rights, but in the 'popular and democratic character of the Australian polity'.[217] Patrick Keane once explained that 'the first thing to note about the *Australian Constitution* is that it was deliberately crafted to embody an ideal of responsible government and representative democracy in which each citizen participates equally with all others'.[218] Keane suggested that in opting to leave out a Bill of Rights, the framers took 'a gamble on the political wisdom of future generations', seeking not to 'fetter' the future 'by the supposed wisdom of the past'.[219]

The democratic innovation begun in the 19th century continued into the twentieth. In *Modern Democracies*, published in 1921, James Bryce remarked that, of all the democracies he had studied, Australia was the one 'which has travelled farthest and fastest along the road which leads to the unlimited rule of the multitude'.[220] He further observed that '[o]ne can hardly imagine a representative system of government in and through which the masses can more swiftly and completely exert their sovereignty'.[221] Bryce assessed the 'Australian schemes of government' as more democratic than those of either Canada or the United States.[222]

Among the 'highly democratic' features of the Commonwealth government observed by Bryce were: '[t]riennial elections'; '[p]ayment of members'; '[s]carcely any restrictions on legislative power'; '[c]omplete dependence of the Executive upon the larger House of the Legislature'; '[p]rompt and easy means of altering the Constitution'; and what he termed '[u]niversal suffrage at elections for both Houses of Legislature'.[223] Suffrage was not universal at the time. The *Commonwealth Franchise Act 1902* (Cth) explicitly denied voting rights to Indigenous people as well those who had migrated to Australia from Asia, Africa or the Pacific Islands.[224] What Bryce is apparently referring to is the absence of any property qualifications on voting, including, uniquely,

213. Lake (n 3) 19 (emphasis added).
214. Keane (n 145) 3.
215. Loughlin (n 47) 60; (n 75) 401.
216. Stone (n 51).
217. Ibid. Note that Andrew Inglis Clark could likely be called a progressive liberal, and he did seek to have additional rights protections included in the Constitution. See, eg, Williams (n 201). See also Lake (n 3) ch 4, for the divergence of beliefs on this point between Clark and others such as Higgins.
218. Keane (n 145) 3.
219. Ibid.
220. James Bryce, *Modern Democracies* (The Macmillan Company, 1921) vol 2, 166.
221. Ibid 178.
222. Ibid 179.
223. Ibid 178.
224. *Commonwealth Franchise Act 1902* (Cth) s 4 was entitled 'disqualifications' and provided that '[n]o aboriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution'.

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for the Senate. This style of direct election was not a feature for both houses of the legislature in any other federation or at Westminster.[225] While the provisions of s 128 have not, in the end, provided an easy means of amending the *Constitution*, it too was a remarkably democratic feature of the Constitution, particularly given that it was combined with 'a broad, liberal franchise, and the initiation of the alteration process by a fully elected Parliament'.[226]

On the first day of the Adelaide Convention in 1897, the overarching purpose of federation was stated by Edmund Barton to be 'to enlarge the powers of self-government of the people of Australia'.[227] Read in the context of the political thinking described above, the phrase 'self-government' has both democratic and social liberal overtones.[228] The words 'directly chosen by the people', as found in ss 7 and 24 of the Constitution, are evocative when read in the context of these notions of democracy. They have been interpreted by the High Court to be part of a framework that protects access to the franchise[229] and a freedom of political communication.[230] But the meaning given to these provisions surely derives as much content from the surrounding context as it does from the actual 'text and structure' of the Constitution.[231]

Following Federation, the system of voting was reformed on several occasions until the current mix was arrived at.[232] Perhaps the clearest and most ready example of the continuing institutional embodiment of this culture is found in the Australian electoral system, in which voting is compulsory and the system is overseen by a highly effective administration.[233] As Lisa Hill has observed, the surrender of the freedom to choose whether to turn out to vote[234] is 'conceived to permit the realisation of a range of positive freedoms which are thought to flow from increased participation and a more representative legislature'.[235] Benjamin Jones has said that the attachment to compulsory voting signifies an adherence to 'the civic republican ideal of communitarianism', which he defines as 'an ancient intellectual tradition that values the common good of the community over individual good, and even individual rights'.[236] Voting is regarded as a civic duty, as well as a right.[237] This seems reflective of socially liberal concepts of active citizens and collective wellbeing.

225. Irving (n 144) 117.
226. Ibid.
227. *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, 17 (Sir Edmund Barton).
228. See Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 207–8 for a discussion of this resolution.
229. See *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
230. Commencing with *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.
231. See *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 566–7 (The Court); cf Adrienne Stone, 'The Limits of Constitutional Text and Structure' (1999) 23 *Melbourne University Law Review* 668, 671, 698; Stone (n 51).
232. See, eg W G McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979) 140–4.
233. This is not to suggest that it always functions to enable every elector to readily vote. See, eg, Roxanne Fitzgerald and Liz Trevaskis, 'Lack of interpreters and 'unprecedented' challenges leave some remote NT voters in the lurch this election' *ABC* (online, 21 May 2022) <https://www.abc.net.au/news/2022-05-21/aec-no-interpreters-small-time-window-aboriginal-vote-election/101083240>.
234. The compulsion is not to actually cast a valid vote — it pertains only to attendance and registration at a polling place: see Lisa Hill, 'A great leveller: Compulsory voting' in Marian Sawer (ed), *Elections Full, Free and Fair* (Federation Press, 2001) 129, 130.
235. Ibid 131.
236. Ibid xii.
237. Hill (n 233) 130; Benjamin Jones, 'Elections: Aren't They All The Same?' in Benjamin Jones, Frank Bongiorno and John Uhr (eds), *Elections Matter: Ten Federal Elections Which Shaped Australia* (Monash University Press, 2018) xi, xii.

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While compulsory voting provides a clear example of a distinctive commitment to democracy, in which rights are to be protected by making sure that each person has 'an equal share' in political power,[238] to focus on this alone is to obscure the wider picture considerably. Firstly, because voting is compulsory, efforts are made to ensure it is relatively easy.[239] But in addition, the system has many elements that work together in concert.[240] The United Kingdom and Canada, for instance, each retain 'first past the post' electoral systems, a method abandoned for federal elections over a century ago.[241] In Australia, compulsory voting is combined with preferential voting. W G McMinn stated that '[t]he clearest fact about preferential voting in Australia is that many Australians have come to identify it with democracy', with the consequence that a suggestion made in the 1960s that first past the post voting be reverted to being met with 'a remarkable hostile reception'.[242] He went on to note that preferential voting 'seemed to have become a distinctive feature of Australian Constitutional practice'.[243] Rosalind Dixon and Anika Gauja have written that the systems of mandatory and preferential voting function as 'some of the core structural safeguards of non-populist democracy in Australia'.[244]

Properly functioning institutions were recognised in the pre- and post-Federation era as crucial to the orderly and fair process of democracy, hence the establishment of electoral commissioners, and the close attention to the 'technical detail' of staging elections.[245] This continues to the present day. Following each federal election, a review of its conduct is undertaken by the Commonwealth Parliament's Joint Standing Committee on Electoral Matters.[246] The use of innovative institutional approaches to structure and order the function of democracy can be recognised as a product of the wider political culture of the Federation era. It is also an illustration of the positive dimension of the Australian Constitution.

The power of the active state was always to be exercised within limits. As the joint judgment in *Amalgamated Society of Engineers v Adelaide Steamship Company Limited* ('*Engineers Case*')[247] explained, while these limits included the law, they were not restricted to this.[248] Outside the realm of the law, it fell to the people themselves to correct over-reach 'by ordinary constitutional means' — that is, at the ballot box.[249] This statement from *Engineers* demonstrates a commitment to political constitutionalism.[250] But the political dimensions of the Constitution need to be understood by reference to its positive ones. It is not simply that one check upon power resides with the people themselves. Considerable attention has been given to means by which this power can be *well-exercised*. By the time the Constitution was written, it was understood that it was possible to draw

238. Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329, quoted in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ).
239. See, eg, Hill (n 234) 131–2, where it is observed that '[m]ost of the work involved is undertaken by the state'.
240. See, eg, Rosalind Dixon and Anika Gauja, 'Australia's Non–Populist Democracy?' in Mark Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018) 395.
241. For a history of the adoption of preferential voting, see, eg, Reilly (n 90).
242. Ibid 143.
243. Ibid.
244. Dixon and Gauja (n 240) 396.
245. Charles Seymour and Donald Frary, 'Election in the British Colonies' in *How the World Votes: The Story of Democratic Development in Elections* (C A Nichols Co, 1918) vol 1, 192. See Hughes (n 89) for the specific features of the system.
246. See, eg, Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into the 2022 Federal Election* (Final report, November 2023). The tabled report inquired into 'all aspects of the 2022 election'.
247. (1920) 28 CLR 129.
248. Ibid 151.
249. Ibid 151–2. See also Stephen Gageler, 'Beyond the Text' (2009) 32 *Australian Bar Review* 138, 152.
250. Crawford and Goldsworthy (n 41) 365.

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upon electoral law to mediate the effects of simple majoritarianism. Although these electoral mechanisms and institutions are not referred to in the Constitution itself, they are an important part of its continued function. This is something that perhaps informs the High Court's jurisprudence on safeguards for the franchise and political communication.[251] The wider point to note here is that this approach to institutional design is replicated across a range of contexts.

D *Legislative and Institutional Implementation of Conciliation and Arbitration*

In keeping with this wider pattern, the design and entrenchment of the system of industrial relations was the product of legislative development.[252] In much the same way that reformers turned to legislation and institutional design to help support a widening electoral franchise, they also resorted to these methods an attempt to resolve the thorny issue of conflict between capital and labour. Key figures in the progressive liberal movement, such as Deakin, Higgins and Isaac Isaacs,[253] were not only the architects of Federation, but also of national institutions of government. The politics of each were shaped by social liberalism.[254] In Lake's estimation, Deakin and Higgins were 'key figures in translating the progressive ideas of equality of opportunity and the common good into institutional realities in the new Commonwealth of Australia'.[255]

Deakin, the most influential figure in the early federal parliaments, believed that 'the state could and should become the vehicle for social justice'.[256] His ideas of social justice cannot be seen in isolation from his beliefs regarding race and the White Australia Policy.[257] Higgins was integral to the establishment of the federal system of conciliation and arbitration, as a member of Parliament and subsequently as a judge.[258] He was 'strongly committed to the potential of the law as an instrument for social and political reform'.[259] Isaacs is thought to have been the author of the joint judgment in the *Engineers Case*.[260] In addition to its other profound effects upon constitutional interpretation, this judgment, in practical terms, helped to expand the reach of the Commonwealth system of awards.[261]

At the first federal election, representatives affiliated with Labor, at that stage not yet a united federal political party, won 16 seats in the House of Representatives and eight in the Senate.[262] They quickly formed a national party, which held the balance of power in both Houses of Parliament.[263]

251. See, eg, Stone (n 51).
252. An important part of the story not able to be considered here is the various developments that occurred at state level, which helped to inform and shape the system at the federal level too. See, eg, Mitchell (n 174); Mitchell and Stern (n 173).
253. See L F Crisp, *The Unrelenting Penance of Federalist Isaac Isaacs 1897–1947* (ANU, 1981). Crisp gives an account of Isaacs as one of the primary advocates at the conventions of 1897–1898 for the inclusion of ss 51(xxiii) and 51(xxxv) and the popular election of both houses of the national Parliament. This is intriguing given Isaacs' subsequent judicial career.
254. Sawer (n 4) 35–6, 55–9; see also Davison (n 104) 529.
255. Lake (n 3) 43.
256. Sawer (n 4) 35.
257. See, eg, (n 135).
258. See, eg, Rickard (n 175) 138; David Plowman, *Holding the Line: Compulsory Arbitration and National Employer Co-ordination in Australia* (Cambridge University Press, 1989) 19.
259. See, eg, Lake (n 3) 117.
260. See *Engineers Case* (n 247) 151 (Knox CJ, Isaacs, Rich and Starke JJ).
261. See, eg, Plowman (n 258) 26.
262. Geoffrey Sawer, *Australian Federal Politics and Law 1901–1909* (Melbourne University Press, 1956) 18.
263. Ibid.

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The electoral power of Labor continued to grow, and the first federal Parliaments were characterised by shifting alliances, and fragile governments. There was, nevertheless, broad agreement between Labor and the progressive liberals regarding the role of the state.[264] The great political issue of the day was the degree to which the new national government should intervene in the economy. Capacity to find common ground on this point meant that consensus was able be reached on many legislative measures, although there was no majority government until 1909.[265] In one combination or another, the progressive 'Protectionist' or 'Deakinite' liberals and Labor were able to govern for much of the first decade of Federation. This situation was to continue until ultimately, in 1909, the 'Deakinite' liberals joined the more conservative members of Parliament to form one of several precursors to the modern Australian Liberal Party.[266]

The *Commonwealth Conciliation and Arbitration Act 1904 (*Cth*)* was one product of this coalition between Labor and the Deakinite Liberals. Although cooperation between the progressive liberals and Labor did mean this Act and similar measures were able to be passed, the politics was fractious and alliances often fluid.[267] The legislation was controversial from the beginning. Nevertheless, Macintyre noted that '[t]he protectionists' commitment to the measure [was] clear: where they differed was over its coverage'.[268] Kingston, for instance, resigned from his ministerial post when the initial bill was subject to Cabinet consideration, because he was not able to persuade enough of his fellow ministers that the shipping industry should be subject to it.[269] Attempts to expand the workers and industries covered by the Act, including to various state government employees, brought down more than one government in the early years of Federation.[270]

The Act established the Commonwealth Court of Conciliation and Arbitration, giving it powers to 'prevent and settle industrial disputes'.[271] It banned strikes and lock-outs, and provided that employers could not dismiss employees merely because they were members of a union, or 'entitled to the benefit of an industrial agreement or award'.[272] In effect, in the event of a dispute that went beyond the limits of one state, rather than taking such industrial action, the parties were required to seek resolution through the processes of the Court. The 'distinctive character' of the system was derived from this 'element of compulsion vested in a permanent and independent government tribunal'.[273]

The system was also reliant upon, and legitimated, the role of associations of both workers and employers in the process. One of the stated objects of the Act was '[t]o facilitate and encourage the organization of representative bodies of employers and employees'.[274] As such, it provided a

264. See, eg, Brett (n 105) 20–21.
265. The first majority government was not formed until the 'fusion' of the left and right wings of the parliamentary liberals in 1909. The first government to win a majority at an election was that of Andrew Fisher (Labor) in 1910.
266. Brett (n 105) 20–27, for a discussion of this 'Fusion'. Until this point, Labor and the progressives were more 'natural allies'. The cause of the ultimate break from Labor by this 'third party' of progressive liberals was not 'Labor's policies, nor its attitude to the state', but it's organisational insistence that its members 'subordinate their own views and judgment to the collective will of the party', by signing a pledge, which progressive liberals eschewed owing to their commitment to freedom of conscience.
267. The first decade of Federation saw 8 Ministries. Governments often fractured over questions such as the reach of conciliation and arbitration. See, eg, Geoffrey Sawer (n 262) 37–39; Frazer (n 151) 100–101.
268. Macintyre (n 107) 192.
269. Ibid.
270. See, eg, Geoffrey Sawer (n 262) 37–39; Frazer (n 151) 100–101.
271. *Commonwealth Conciliation and Arbitration Act 1904 (*Cth*)* s 11, Div 2 ('*CCAA Act*').
272. Ibid ss 6, 9.
273. Macintyre (n 173) 56.
274. *CCAA Act* (n 271) s 1(vi). See also ibid 61 and Higgins (n 1) 23.

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scheme for the registration of such bodies.[275] Writing about this innovative system for the *Harvard Law Review*, Higgins observed that it was 'based on unionism', without which 'it is hard to conceive how arbitration could be worked'.[276] This feature of the system is resonant with the approach taken in the electoral sphere to encourage and structure the involvement of citizens in the conduct of politics itself.[277]

Higgins was appointed as the second President of the Court of Arbitration. His radical views made him an unlikely and controversial judge.[278] He used his role to pursue what he regarded as 'social justice'.[279] In his judgments, speeches and papers, he shaped the role of the Court as a 'keeper of the nation's conscience'.[280] His vision for Court was in keeping with social liberal ideals of institutions as 'repositories of the common good' which should help facilitate individual 'self-realization'.[281] State intervention in the fixing of wages was aimed at ensuring that material needs were met, which in turn provided the foundation for the 'higher development of the individual'.[282] In *Ex Parte H V McKay*,[283] better known as the *Harvester Decision*, Higgins J ruled that the words 'fair and reasonable remuneration' as used by the *Excise Tariff Act 1906* (Cth), meant the 'standard appropriate' to meet 'the normal needs of the average employee, regarded as a human being in a civilised community'.[284] This extended to the provision of food, shelter and clothing adequate enough to keep a family in a 'condition of frugal comfort estimated by current human standards'.[285] In assessing what this might amount to in monetary terms, Higgins J called evidence from the wives of the employees of H V McKay.[286]

The *Commonwealth Conciliation and Arbitration Act 1904* (Cth) was part of a package of other Acts, including the *Excise Tariff Act 1906* and the *Australian Industries Preservation Act 1906*, which sought to implement a policy of 'New Protection'. This aimed to use tariffs to foster local industry, but this assistance was tied to price protections for consumers, in the form of an early

275. Part V of the Act covered the registration of organisations of employees and employers.
276. Higgins (n 1) 23.
277. Arbitration is thought to have 'underpinned the rise of a 'laborist' ideology that soon dominated the thinking of most unionists'. This sought to preserve the interests of white male workers. See Bradley Bowden, 'The Rise and Decline of Australian Unionism' (2011) 100 *Labour History* 51, 60. See further Markey (n 108) 82–84 for a discussion of laborism and its links in Australia with the White Australia Policy. See further Diane Kirkby, 'Arbitration and the Fight for Economic Justice' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 334, for a feminist critique of arbitration.
278. See, eg, John Rickard, *H B Higgins: The Rebel As Judge* (Allen & Unwin, 1984) 2, who noted that Higgins 'did not shrink from being a dissenter, even among his fellow radicals'. This made him controversial first as a politician and then as a judge — see in particular ch 8, regarding his time as President.
279. Tim Rowse, 'The Elusive Middle Ground: A Political History' in Joe Isaac and Stuart Macintyre (eds), *The New Province of Law and Order: 100 Years of Australian Conciliation and Arbitration* (Cambridge University Press, 2004) 17, 26.
280. John Rickard, *H B Higgins: The Rebel As Judge* (Allen & Unwin, 1984) 175.
281. See, eg, Loughlin (n 47) 122. See Rickard (n 176) 176–7 for the critique from Mary Gilmore regarding Higgins J's privileging of the interests of male workers.
282. Sawer (n 4) 59; See also Higgins (n 1) 39; Rickard (n 176) 175 on the 'positive role' of the Arbitration Court in 'declaring a standard of living appropriate for Australian society', that had been claimed for it by Higgins J in *Ex Parte H V McKay* (1907) 2 CAR 1, otherwise known as the *Harvester Decision*.
283. *Ex Parte H V McKay* (1907) 2 CAR 1 ('*Harvester Decision*').
284. Ibid 3.
285. Ibid 4.
286. Ibid 5–6; Higgins (n 1) 15. Lake referred to the approach he took as having 'pioneered a form of sociological jurisprudence that anticipated the famous Brandeis Brief: Lake (n 3) 126.

attempt at competition law, as well as wage and condition protections for employees.[287] The architects of the New Protection envisaged that in the new Commonwealth of Australia, working poverty was to be consigned to the past through these forms of creative intervention by the state in the economy.[288]

The policy met with opposition from employer groups, who formed their own national organisations to fight the expansion of the system.[289] They launched constitutional challenges and were initially successful in their endeavours to limit the scope of the Commonwealth's power through this approach.[290] The *Commonwealth Conciliation and Arbitration Act 1904* (Cth) was the only part of the wider policy that remained largely intact. In the pre-*Engineers* era, other key measures did not survive these challenges[291] and '[b]y 1909, the New Protection was in tatters'.[292] This litigation strategy was nevertheless unable to prevent the principles of fair and reasonable wages and conditions as set down by the Commonwealth Court from being applied by Higgins J in his determinations.[293] These principles were also picked up by similar systems established in states including New South Wales and Victoria.[294] Over time, Higgins J's setting of a minimum wage for the least skilled workers became a foundational element of industrial relations in Australia.[295]

Conciliation and arbitration went on 'to have profound effects on the social structure, because of the encouragement it gave to trade union development on a national scale'.[296] The fixing of minimum wages and working conditions had similarly 'profound' effects on the 'economic structure'.[297] Although it was subject to 'almost continuous controversy', the system became politically entrenched.[298] This meant it had a shaping effect on federal politics as well: attempts to alter the system would result in 'periodical party crises'.[299] It also influenced thinking on aspects of public law. To take an obvious but rather telling example, the existence of a body with both court-like and arbitral powers with jurisdiction over the socially and economically critical (and contested) policy field of industrial relations contributed to the development of one of the key implications drawn from the *Constitution* — the separation of judicial power.[300]

287. Geoffrey Sawer (n 262) 40; McMinn (n 232) 129; J A La Nauze, *Alfred Deakin: A Biography* (Angus & Robertson, 1979) 410.
288. See both La Nauze (n 287) 410, and Brett (n 60) 360, on Deakin's 'humanitarian' commitment to the policy.
289. Plowman (n 258).
290. Ibid.
291. Provisions central to the schemes of both Acts were invalidated: see *R v Barger* (1908) 6 CLR 41; *Huddart, Parker & Co Ltd v Moorehead* (1909) 8 CLR 330. See also Geoffrey Sawer (n 262) 83–84.
292. Plowman (n 258) 21.
293. See, eg, Rickard (n 176) 174.
294. See, eg, Brett (n 60) 361.
295. Colin Foster, 'The Economy, Wages and the Establishment of Arbitration' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 203, 221; See also Higgins (n 1) 15. Centralised minimum wage fixing remains a feature of the modern system.
296. Geoffrey Sawer (n 262) 40.
297. Ibid.
298. Macintyre and Mitchell (n 14) 2.
299. Geoffrey Sawer (n 262) 40.
300. See, eg, Sir Anthony Mason, 'Mike Taggart and Australian Exceptionalism' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart, 2009) 179, 180.

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E *The 'New Province for Law and Order'*

The distance of more than a century, and the familiarity that conciliation and arbitration came to assume, have obscured just how revolutionary the ideas expressed (intentionally or otherwise) in s 51(xxxv) were. Its use of the terms 'conciliation' and 'arbitration' meant that the scope and nature of this power was limited to these methods. The inclusion of these terms in the Constitution, and the use to which this power was put by Commonwealth Parliament from the very earliest stages of Federation, gave rise institutions that embodied a unique form of state intervention. In his dissenting judgment in the *Work Choices Case*, Kirby J described conciliation and arbitration as 'an institution and a process that would prove very important to the societal and industrial balances struck…in the Australian Commonwealth'.[301] Section 51(xxxv) provided, in his terms, an 'important guarantee of industrial fairness and reasonableness'.[302] The existence of the provision, and the institutions created in accordance with it, 'instilled in Australian work standards an egalitarian principle not always present in the pure operation of the market'.[303]

In the 'classical' liberal conception, property and private rights were desirably kept free from interference by the state. Traditionally, employment relationships were thought be contractual and thus private. State intervention in the regulation of these contracts was regarded by classical liberals as overreach. Dicey, for instance, described s 4 of the *Trade Disputes Act 1906* (Imp), which prohibited actions in tort against trade unions for the taking of industrial action, as 'a triumph of legalised wrong-doing'.[304] In the United States, in *Lochner*,[305] a majority of the Supreme Court found that the Fourteenth Amendment to the *United States Constitution* protected the 'general right of an individual to make a contract in relation to his business'.[306] The Court subsequently invalidated many laws containing similar measures, including those aimed at protecting minimum wages[307] and those allowing workers to unionise regardless of the desires of their employers.[308]

In contrast with the beliefs and values of classical liberalism, for social liberals, freedom of contract in the employment context was seen as a 'misnomer'.[309] This was owing to the disparity in the respective bargaining positions of the parties.[310] In an era with few social supports, the choice for the employee might be to accept low wages and poor conditions or face starvation.[311] For social liberals, 'the struggle for liberty had to be concerned with the inequality in social, economic and political power flowing from industrial competition'.[312] This meant that '[f]reedom of contract' was for them a phrase synonymous with 'oppression'.[313] Liberal advocates for conciliation and arbitration rejected the laissez-faire notion that 'labour was a commodity like any other'.[314] In his essay on liberalism, Evatt had written that it now reached the point where it had embraced a

301. *Work Choices Case* (n 149) 217 (Kirby J).
302. Ibid 218.
303. Ibid 219.
304. Dicey (n 45) 436.
305. *Lochner* (n 204).
306. Ibid 53 (Peckham J for the majority).
307. *Adkins v Children's Hospital* 261 US 525 (1923); *Morehead v Tipaldo* 298 US 587 (1936).
308. *Coppage v Kansas* 236 US 1 (1915).
309. Higgins (n 1) 25.
310. Ibid.
311. Ibid.
312. Sawer (n 4) 4.
313. Ibid.
314. Ibid 60.

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recognition that 'state interference' in labour markets 'is supported on the principles of equality of opportunity and social freedom'.[315]

The bitter strikes of 1890–91 caused 'alarm' amongst liberals.[316] They were regarded as 'deeply disturbing, not just to public order but to the very principles upon which public life rested'.[317] They had been precipitated by rising class conflict. Prior to the 1890s, in keeping with the history already described, there had been a greater degree of state regulation of the employment contract in Australia than in countries like England.[318] In this period, however, employers began to insist upon 'freedom of contract' — that is, the right to bargain individually with employees free from any interference.[319] At the same time, unions resorted to new tactics such as 'closed shop' demands.[320] According to Macintyre, this 'growing class mobilization' seemed to 'threaten the basis of liberalism' itself.[321] This sense that the unrest represented a more fundamental peril led to 'a widespread and strong desire to repair the social fabric'.[322]

The 'widespread and genuine desire to protect the community at large from economic loss and inconvenience resulting from chronic industrial strife' is sometimes said to have been 'the most important' factor which encouraged the adoption of the arbitration system.[323] Macintyre wrote that arbitration 'was initiated neither by labour nor capital but by liberals who stood at a remove from both'.[324] Further, 'insofar as sections of the labour movement took up arbitration, they did so within a political paradigm that the liberals had established'.[325] This is supported by Sawer, who suggested that '[t]he background of strike camps and violent confrontations enabled those introducing arbitration legislation to point to the public interest in preventing the harm to the whole community caused by industrial warfare'.[326]

Social liberalism 'was absolutely central to the institutional discourses of industrial relations'.[327] Conciliation and arbitration, the solution devised to address this rising class conflict, remained liberal in its essence:

> The social liberals did not seek the abolition of the market economy but believed it must be subordinated to the democratic state which put the welfare of its citizens before the sanctity of contract and the rights of property.[328]

315. Evatt (n 128) 63.
316. Macintyre (n 163) 134.
317. Macintyre (n 107) 183.
318. See Michael Quinlan, '"Pre-arbitral" Labour Legislation in Australia and its Implications for the Introduction of Compulsory Arbitration' in Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 25.
319. See, eg, Bray and Rimmer (n 172) 61; Svenson (n 169) 66.
320. See, eg, Bray and Rimmer (n 172) 60.
321. Macintyre (n 108) 184.
322. Ibid.
323. D W Oxnam, 'Industrial Arbitration in Australia: Its Effects on Wages and Unions' (1956) (4) *Industrial and Labor Relations Review* 610, 610.
324. Macintyre (n 107) 182.
325. Ibid.
326. Sawer (n 4) 80 (where Macintyre is also quoted).
327. Ibid 50.
328. Ibid 4.

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The 'institution and process' of conciliation and arbitration was not designed to bring about an end to the labour or any other market.[329] Rather, it was an intervention aimed at addressing a social and economic power imbalance in a way that was 'in the interests of the public'.[330]

The constitutional foothold in s 51(xxxv) was used as a basis for legislation and the creation of novel institutions which were the primary measures employed to structure a key area of public policy. The approach adopted acknowledged that rights in the employment context have a collective aspect. Workers were asked to surrender their right to strike, and employers were required to submit to the curtailment of their powers to engage in lockouts and set their own terms of employment. The positive dimension of conciliation and arbitration does not solely derive from the fact that it was an intervention by the state designed to improve individual welfare or even industrial accord. It was also an intervention aimed at *social and political* wellbeing. One purpose of the institution was to structure the exercise of forms of power in society in a way that avoided resort to more destructive uses of such power. Much like the adoption of electoral structures and institutions in support of democracy, this embodied a recognition that something more than purely legal or political forms is needed to achieve a well-functioning constitution.

V Conclusion

As the result of the 2023 referendum attests, Australia is a nation that struggles to appreciate and reckon with its own history. This manifests in various ways.[331] It is not only that history is not faced, but that its role in shaping the present is not always understood. This has ramifications for public law scholarship. If we are seeking to understand and critique contemporary states of affairs, it is useful to have clarity regarding what might have precipitated them, if only to be sure we are correctly diagnosing perceived problems and prescribing appropriate remedies.

While the drafters of the *Constitution* often invoked English institutions of government, the material set out here suggests that it is open to question how closely Australian notions of institutional role and function mapped onto the English ones of the time. It was understood by the drafters that combining English-style institutions with a federal system of government would modify them somewhat. At a minimum, it necessitated divergences from tradition such as a court with the power to determine controversies regarding the scope of the respective spheres of federal and state governments. But when the drafting of the *Constitution* is placed in the wider background of the Australian politics of the period, it becomes possible to see that differences are likely more profound than this.

This article has identified two overarching, reciprocal ideas that can be detected in Federation-era politics. One that is that true liberty required state action to provide individuals with what was needed to allow them to reach their potential. The second, related, idea is that citizens should take an interest in civic affairs and be active, at a minimum by voting, to ensure the state remained responsive to their needs. The ideas that have been outlined above are distinct in several ways from those found within a classical liberal conception of the relationship between the individual and the state. Did the presence of these ideas at such a critical point in time help to influence the very notion

329. Hence, it was often critiqued from the left.

330. Higgins (n 1).

331. See, eg, McKenna (n 138) 562. In this elegant essay on Australia's struggle with its own past, McKenna noted that '[t]he incongruity of living in an ancient country in which settler society was "new" only heightened the sense of impermanence, fragility and anxiety concerning the past'.

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of constitutionalism itself in Australia? Is it possible to go so far as to say that positive liberty is one of the 'assumptions' of the *Australian Constitution*?

There is a further, large and complex question regarding the extent to which this background of ideas might have influenced constitutional interpretation,[332] and judicial approaches to public law questions more generally. The prevalence of legislation has likely been one factor that has influenced the development of the principles of judicial review of administrative action. Has this also resulted in greater comfort with the notion that the administrative state has its own legitimate role to play, which in turn has informed the shaping of the role of the judiciary on review of administrative action by reference to that of the other branches of government?[333] It must be noted that nothing said here is intended to deny the fundamental role of the judiciary within the Australian system. But what has been set out should be considered as a potential source of constitutional values from which notions of the separation and scope of judicial power are derived.

This paper has considered the use of legislation and institutional experimentation to structure and order rights and the exercise of power, particularly in the context of industrial relations, but also in the electoral context. It has aimed to demonstrate that this preparedness to innovate with legislation and institutional design in the service of these aims is expressive of a positive conception of the power of the state. This is indicative that the Australian Constitutional tradition cannot be entirely squared with the Diceyan one. It also cannot be explained solely in terms of legal or political constitutionalism. There has been (historically at least) a preparedness in Australia to develop new ways of structuring, directing and controlling the power of the state, rather than treating it as fundamentally illegitimate or not capable of being subjected to control. The power of the state has in turn been used in creative ways to mediate the power of other groups within society. The contribution of this to the development of a healthy civic and civil society requires renewed attention.

There are other examples of innovative use of legal structures to perform functions that contribute to what can be described as constitutionalism.[334] These include a series of rights protecting statutes such anti-discrimination acts, but also the administrative law reforms of the 1970s and the later establishment of integrity bodies. On one view, these share resonance with the approach taken to the policy problem of industrial relations in the earliest years of Federation. There has likewise been a continuing, if imperfect,[335] commitment to the use of legislation and novel forms of institutional design to achieve social reform and individual 'self-realisation'.

Finally, while conciliation and arbitration is no longer a central feature of the framework of the national government of Australia, its example should not be regarded as obsolete. It was an approach that pragmatically acknowledged the fundamental power imbalances that can exist in the employment contract. As such, it was systemic or institutional response to not only this problem but

332. See Stone (n 51) on the difficulties with this. Stone noted such ideas and others that she refers to lack the 'clarity' that would be required for them to be drawn upon in interpretation. Further, and perhaps more fundamentally, the balance of what Stone calls the 'institutional' and 'substantive' dimensions of Australian constitutionalism mean that it is likely 'potentially self-defeating' for courts to draw upon these ideas to develop limits on the power of the state, which has been designed to be 'active'.

333. Lynsey Blayden, 'Institutional Values in Judicial Review of Administrative Action: Re-Reading *Attorney-General (NSW) v Quin*' (2021) 49(4) *Federal Law Review* 594, 616–18.

334. See, eg, Lynsey Blayden, 'Designing Administrative Law for and Administrative State: The Carefully Calibrated Approach of the Kerr Committee' (2021) 28(4) *Australian Journal of Administrative Law* 205, for the contribution made by the novel institutions established following the recommendations of the Kerr Committee in 1971.

335. See, eg, Lisa Burton Crawford, 'The Rule of Law in the Age of Statutes' (2020) 48(2) *Federal Law Review* 159 for an examination of contemporary Commonwealth legislative practice, which has resulted in statutes that are 'prolix, complex and unstable': 160.

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wider inequities that it contributes to. The system was deliberately designed to bring about structural or systemic practical outcomes, including the facilitation of collective political action in the form of trade unionism. Although it was centred around an adjudicative body, it was not one that determined solely individual rights, but rather might be regarded as having a more direct role in the deliberative development of social and economic policy. There is reason enough to think that such interventions might still contribute to our arrangements for government.[336]

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336. See Dixon (n 157) 233, on what is required for states to 'live up to democratic ideals'.

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