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Foreword: Expanding Our Constitutional Imagination

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Thirty years ago, as part of a Symposium in the *Sydney Law Review*, Michael Detmold declared the advent of 'The New Constitutional Law' stating 'we now have everything a written bill of rights could give us'.[1] He was reacting to the High Court's decision in *Australian Capital Television v Commonwealth*,[2] just 2 years earlier, where the High Court recognised a constitutional 'implication' protecting 'freedom of political communication'. The development was widely regarded as a break with Australia's constitutional past and to promise a new era, if not a constitutional revolution.

The decision's most enthusiastic supporters regarded it as a full-throated recognition of principles immanent in the Australian constitutional order. For Michael Detmold, extensive rights-based protection for the individual arose from the very idea of a constitution.[3] For Michael Stokes, the decision was an elaboration of the *Constitution*'s 'commitment' to a set of core political values including federalism, representative democracy and responsible government.[4]

More moderate supporters sought to defend the developments from charges of judicial activism. Though the constitutional implication was an innovation,[5] it was grounded in established methods of reasoning or justified as a procedural protection of constitutional government.[6] But even for these moderate enthusiasts, it was widely expected that the case would be followed by the recognition of further right protecting implications that would bring Australia closer to the mainstream of liberal constitutions.[7] Indeed, the new doctrine was often cast as a 'constitutional right' or even a 'human right'.[8]

1. Michael Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228, 248.
2. (1992) 177 CLR 106.
3. Detmold (n 1) 229: 'We, the citizens, have a constitution. Granted that premise, we have it equally. And, having the Constitution equally, we have the power that it generates equally. The justification for the implied right of equality as a control on our equally held power is as simple as that'.
4. Michael Stokes, 'Constitutional Commitments not Original Intentions: Interpretation in the Freedom of Speech Cases' (1994) 16 *Sydney Law Review* 250, 268.
5. Michael Coper, 'The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur?' (1994) 16 *Sydney Law Review* 185.
6. See David Tucker, 'Representation-Reinforcing Review: Arguments about Political Advertising in Australia and the United States' (1994) 16 *Sydney Law Review* 274, drawing on the American theorist John Hart Ely, but arguing that the Australian context warranted greater judicial constraint.
7. See George Williams, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20 *Melbourne University Law Review* 848.
8. George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013).

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More than 30 years on from that heady time, not much has eventuated. The freedom of political communication has survived despite some instability in the doctrine and is now an entrenched and frequently litigated aspect of Australian constitutional law. However, its development has been cautious — even cramped[9] — and the idea of a constitutional 'right' firmly resisted.[10] Moreover, there remains a persistent (if minority) critical line of thinking among constitutional scholars and judges[11] and we have seen neither much more by way of development of other constitutional rights by implication from representative government nor much progress towards a rights-oriented constitutional law in general. The dominant characterisation of the *Constitution* continues to be understood (even celebrated) as old fashioned, uninspiring and practical. Metaphors abound. Australia is a 'frozen continent',[12] a 'small brown bird',[13] a mere 'rule book'.[14]

However, the last decade has also seen the emergence of a vein of thought, that Chief Justice Gageler has called 'The New Constitutional Scholarship'.[15] This work envisions the *Australian Constitution* in quite different terms and relies on quite different sources of ideas. The scholarship of the 1990s was oriented to questions of constitutional interpretation and broader questions of constitutional theory. It was also developed with at least one eye to the rest of the world, much of it seeking to align Australian constitutionalism with the liberal democratic mainstream. This newer scholarship emphasises the distinctiveness of the *Australian Constitution* and, whilst acknowledging its significant flaws, argues for its progressive potential.[16]

This volume contains four important new contributions to this literature. Three of the four turn to our constitutional history, building on the work of Marian Sawer,[17] John Hirst[18] and Helen Irving[19] among others. These contributions each focus on an aspect of the *Australian Constitution* that, viewed in its historical perspective, are taken to reveal both the progressive foundations and future potential of the *Constitution*. Lynsey Blayden characterises the constitutional framing as motivated by a form of social liberalism and places her focus on the conciliation and arbitration power. As she characterises it, this power, in a rare move for its era, empowered the Commonwealth to intervene in what were hitherto understood as private relations between employer and employee. She traces how this power was central to social and

9. Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29.
10. See, eg, *Brown v Tasmania* (2017) 261 CLR 328, 359–60 [88]–[90] (Kiefel CJ, Bell and Keane JJ), 407 [258] (Nettle J), 430 [313] (Gordon J), 503–4 [558]–[560] (Edelman J); *Comcare v Banerji* (2019) 267 CLR 373, 295 [20] (Kiefel CJ, Bell, Keane and Nettle JJ), 441 [164] (Edelman J) ('*Banerji*'). *Clubb v Edwards* (2019) 267 CLR 171, 306 [393].
11. Following in the footsteps of Justice Dawson who dissented in *Australian Capital Television v Commonwealth* (1992) 177 CLR 104 are Justice Callinan in *ABC v Lenah Game Meats* (2001) 208 CLR 199, 338–339 [347]-[348], Justice Heydon in *Monis v the Queen* (2013) 249 CLR 92, 183–84 [249]-[251] and most recently Justice Steward in *LibertyWorks Inc v Commonwealth of Australia* (2021) 274 CLR 1, [300]–[204]; each of whom has expression scepticism of, or outright opposition to, the recognition of an implication protecting freedom of political communication.
12. Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.
13. The Hon Patrick Keane, *In Celebration of the Constitution* (Speech, National Archives Commission, 12 June 2008).
14. See, Adrienne Stone, 'More than a Rulebook: Identity and the Australian Constitution' (2024) 32 *Public Law Review* (forthcoming) and the sources cited therein.
15. Stephen Gageler, 'The New Constitutional Scholarship in Australia' (2024) 48(1) *Melbourne University Law Review* (forthcoming).
16. An especially important early contribution was written by Patrick Emerton. See Patrick Emerton 'Ideas' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143. For my contributions along these lines, Stone (n 5) and Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values, Aspirations and the Australian Constitution' (2016) 14 *International Journal of Constitutional Law* 60.
17. Marian Sawer, *The Ethical State? Social Liberalism in Australia* (Melbourne University Press, 2003).
18. John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press, 2000).
19. Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999).

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economic policy over much of the 20th century, encouraged the growth of trade unions and their role in the setting of wages and conditions. Will Bateman's attention is focussed on the financial structure of federation and the ways in which it ensured that the national government had power to act in support of a modern market economy, both owning and operating state capital and providing social insurance. On Bateman's account, this model of 'egalitarian state potency' was innovative for its time and distinct from the constitutional models of the United Kingdom and the United States. He claims also that it explains and justifies the High Court's decision in the *Surplus Revenue Case*,[20] that moneys appropriated for the credit of certain Commonwealth trust accounts, but not expended, were not 'surplus revenue' for the purposes of s. 94 of the *Constitution* and thus not required to be distributed to the states. Lastly, William Partlett provides an account of 'popular political constitutionalism' that has given rise to a distinctive for Australian democracy.

These articles, which can be taken as contributions to an understanding of Australian constitutional identity,[21] promise to open rich veins of scholarship. But they also reveal points of tension. There is, first, a tension between the idea of the *Australian Constitution* as a framework for a strong state and the *Constitution*'s federal design. The *Surplus Revenue Case* effectively renders the Commonwealth obligation to distribute surpluses to the states ineffective.[22] It may contribute to 'egalitarian state potency' by ensuring the fiscal power of Commonwealth, but it arises from a judicial nullification of an element of the federal scheme.

Second, there is a tension *within* the idea of 'popular political constitutionalism'. On the one hand, the strong commitment to a role for the people seems to explain and justify constitutional limits on governmental powers to interfere with the 'direct choice' of the people. But at the same time, there are strong commitments to political constitutionalism, that would require that governments and parliaments be free to protect democracy and to innovate without judicial restriction.[23] As Partlett puts it, 'the critical question … is how the Court can protect the role of the people without undermining Australian political constitutionalism'.[24]

The final contribution to this Symposium offers one idea as to how these strands might be reconciled, at least with respect to the protection of Australian democracy. Rosalind Dixon's account of 'responsive constitutionalism' would allow the High Court to drive constitutional law in a more democratically sensitive direction. Tellingly, however, she does so through a revitalised and explicitly normative principle of legality, an aspect of Australia's small 'c' constitution that leaves political constitutionalism largely intact.

The great value in this work lies in its power to expand our constitutional imagination. Australia's constitutional distinctiveness need not be regarded as lying in its uninspiring or muted practicality. Nor need a morally attractive vision of our *Constitution* be pursued by aligning it with the dominant international model for a liberal democracy. It might, on the contrary, lie in an older, progressive tradition, albeit one that itself contains conflicting strands and internal tensions.

20. *New South Wales v Commonwealth* (1908) 7 CLR 179.
21. Stone (n 14).
22. *New South Wales v Commonwealth* (1908) 7 CLR 179. See, Stephen McLeish, 'Money' in Saunders and Stone (n 16) 784.
23. Stone (n 14) noting that '[a]n expansion of the *Constitution's* limiting … is potentially self-defeating. For it is in the absence of limits in the very commitment of some aspects of our electoral process to the political process that has allowed for Australia's success' as a democratic innovator.
24. Partlett (n 23).

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