RIGHTS PROTECTION AND CONSTITUTIONAL JUSTICE: SOME COMPARATIVE REFLECTIONS

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This symposium's organising topic – accessing constitutional justice – is ripe with normative and empirical questions. On the normative side, the topic raises the perennial questions: What is justice? How might a constitution organise a political system to promote it? What roles do the political branches, especially courts, play in promoting constitutional justice? What procedures should be in place for individuals to access constitutional justice? Many of the symposium's papers rightly focus on the access gates (elements such as standing, costs, amicus curiae) that enable or prevent individuals from litigating, or the process gates (such as the issuance of advisory opinions) that shape the form of justice that may or may not come from courts. This paper takes the liberty of not comparing Australia's access and process gates to those in other countries. Rather, it focuses on the implements available to litigants and judges to promote constitutional justice once access to the judicial system is secured. In this light, accessing constitutional justice concerns more than simply getting into the system. It also concerns what sort of justice litigants may contest and what sort of justice the courts can provide. This varies cross-nationally, based, in part, on how judicial power is allocated and how legal and political rights are protected in the constitutional system. The simple point is that the justice one can access or secure depends to some extent on what is or is not included in the constitutional system.

The Rudd government's announcement in late April 2010 that it would not move legislation creating a national charter of rights suspends any formal action in Canberra for the next several years, although the public debate and advocacy certainly will continue. The National Human Rights Consultation, charged in 2008 by Attorney-General Robert McClelland to investigate the adequacy of rights protections and make policy recommendations on how to strengthen rights protections, submitted its report in September 2009 after completing a thorough, nation-wide consultation that elicited some 35,000 written submissions and verbal testimony from over 5,000 individuals. The report recommended, inter alia, enactment of a federal statutory charter of rights that mimics elements of the Australian Capital Territory's *Human Rights Act 2004* (ACT) and Victoria's *Charter of*

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Rights and Responsibilities Act 2006 (Vic), including: an enumerated list of individual rights and freedoms drawn from the *International Covenant on Civil and Political Rights*; a requirement that ministers confirm all proposed legislation abides by the national charter; a requirement that judges interpret legislation, wherever possible, in a manner consistent with the charter, and if not, issue a statement of incompatibility that puts parliament on notice about the inconsistency; and finally, granting parliament discretion to amend the offending legislation or leave it untouched notwithstanding the incompatibility.

There were early hints that the Labor government in Canberra would draw upon the Committee's report to introduce a national charter of rights akin to the Australian Capital Territory (ACT) and Victoria models; however, division within the Labor Party over a charter, little enthusiasm among voters for it, and a resurging Liberal Party that would use any charter against the Rudd government at the next election all contributed to scrapping it.[1] Others point to conservative elements in the national media exercising disproportionate influence on the national debate.[2] Criticisms of the national charter came from varied quarters – legal elites, politicians, the public, even the judges – but they are animated, as I argue elsewhere,[3] out of a shared concern over the juridification of the political order. In its most basic form, juridification occurs when a political system increasingly relies on courts and court-generated law for collective decision making, which critics worried a national charter would necessitate.[4]

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1 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009). See also Michael Pelly, 'Rights Push Finally Put out of Misery', *The Australian* (Sydney), 23 April 2010.

2 Bede Harris, 'The Bill of Rights Debate in Australia: A Study in Constitutional Disengagement' (2009) 3 *Journal of Politics and Law* 2.

3 Jason L Pierce, 'Courts Under Siege in Other Nations' in Bruce Peabody (ed), *The Judiciary Under Siege* (Johns Hopkins University Press, forthcoming 2010).

4 For an introduction to the juridification literature, including its application to legal reforms in Great Britain and elsewhere, see Lars Blichner and Anders Molander, 'Mapping Juridification' (2008) 14(1) *European Law Journal* 36; Mark Bevir, 'The Westminster Model, Governance, and Judicial Reform' (2008) 61(4) *Parliamentary Affairs* 559; Michael Delli Carpini, 'Adversarial Legalism and Parliamentary Democracy: Attitudes towards the Juridification of Politics in Germany and the US' (Paper presented at the annual meeting of The Law and Society Association, Berlin, Germany, 25 July 2007); Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) *Modern Law Review* 853; Jiri Přiban, 'The Juridification of European Identity: Its Limitations and the Search of EU Democratic Politics' (2009) 16(1) *Constellation* 44; and Gordon Silverstein, 'Juridification in America: How the Equilibrium between Law and Politics Changed, and Why It Matters' (Paper presented at the annual meeting of the American

Whatever the reasons behind this decision, Australia's rights regime (here defined as the institutions charged with protecting civil and political rights and the collection of federal and state or territory laws delineating those rights) finds itself in a unique position on at least two fronts. First, it remains the only western democracy without a national charter of rights. Second, while Canberra has not moved on a rights document, Victoria and the ACT have enacted statutory rights documents, and other jurisdictions are considering it. As Pamela Tate aptly put it, while Sir Owen Dixon was correct to say in his famed 1942 American Bar Association speech that those who framed the Commonwealth Constitution were unenthusiastic about securing personal liberties in the federal document, 'Well over a 100 years after the voyage of the *SS Lucinda*, State and Territory Parliaments have found the necessary enthusiasm'.[5] That enthusiasm creates a patchwork of rights documents at the subnational level that impose new duties on state and territory governments and courts, and provides citizens with new avenues for accessing constitutional justice, if 'constitutional' is defined in the broadest sense of those core laws and legal norms that form a political order. This patchwork raises a number of common questions associated with rights protection in any federal system and a subset of questions germane to Australia's federal system.

Because the state and territory rights charters operate, the national consultation occurred, and the decision against a national charter was made within the context of a federal political system. Accordingly, the experiences of other federal systems deserve close study. This paper draws upon the US rights regime as a reference point for Australia's rights debate. It explores potential implications that the decision against a national charter may carry for accessing constitutional justice and how the current patchwork of rights documents may prompt the High Court to play a more active role in adjudicating rights claims in the federal system.

The missed incorporation opportunity

There are few events in US constitutional history that promoted access to constitutional justice more than what legal scholars refer to as the 'incorporation' or the nationalisation of the Bill of Rights.[6] Absent adoption of a national charter of

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Political Science Association, Hynes Convention Center, Boston, Massachusetts, 28 August 2008).

5 Pamela Tate, 'Protecting Rights in a Federation' (2008) 33(2) *Monash University Law Review* 220, 222.

6 See, eg, Richard Cortner, *The Supreme Court and the Second Bill of Rights* (University of Wisconsin Press, 1981); Garrett Epps, 'Second Founding: The Story of the Fourteenth Amendment' (2006) 85 *Oregon Law Review* 895; Michael Kent Curtis, 'The Fourteenth Amendment and the Bill of Rights' (1982) 14 *Connecticut Law Review* 237.

rights, this particular avenue to expanding constitutional justice remains blocked in Australia. Put in more provocative terms, failure to adopt a national charter of rights denies Australians access to two potential sources of constitutional justice that which comes from holding federal law accountable to a national statement of rights and the justice that comes from holding state and territory laws to those same national standards. This section begins with a description of the incorporation process and its significance to constitutional justice in the US. It then illustrates the contemporary relevance of incorporation to constitutional justice in the US, and subsequently analyses the opportunities for incorporation under the models that the National Human Rights Consultation have considered.

Ratification of the US Bill of Rights in 1791 was predicated on the understanding that this statement of rights, forged in response to Anti-Federalist concerns that the 1787 Constitution vested so much power in the national government that abuses were likely, governed the relationship between the new national government and its citizens. It was not envisioned to regulate the relationship between citizens and their state governments. This view was affirmed early in Supreme Court history and remained accepted doctrine through much of the nineteenth century despite various attempts to extend the Bill of Rights to state action.[7]

Adoption of the Fourteenth Amendment after the Civil War, with its guarantees against state governments violating the equal protection, due process, and the privileges and immunities clauses, raised new questions about just what limitations it imposed on state governments. For much of the 1870s and 1880s, the Court was disinclined to give its three provisions expansive interpretation and did not consider the Fourteenth Amendment to obligate state laws to abide by the Bill of Rights.[8] It was not until *Chicago, Burlington & Quincy Railroad v City of Chicago*[9] that the Court first concluded that states were bound by protections outlined in the Bill of Rights. In this case, the railroad challenged the amount of compensation that the City of Chicago offered for land it acquired from the railroad under eminent domain powers. The railroad sought relief, asking the Court to apply the Fifth Amendment's 'just compensation' requirement to the city. This amendment requires that when private property is secured for public purposes, just compensation must be provided. The Court granted the railroad's request, concluding that the Fourteenth Amendment's due process clause required the city to follow the Fifth Amendment's instructions as well. As Harlan J noted, 'If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth

7 *Baron v Baltimore*, 32 US 243 (1833).

8 *The Slaughterhouse Cases*, 83 US 36 (1873); *Hurtado v California*, 110 US 516 (1884).

9 *Chicago, Burlington & Quincy Railroad v City of Chicago*, 166 US 226 (1897).

Amendment, then the final judgment of a state court . . . is to be decreed the act of the State within the meaning of that amendment'.[10] In short, a state violated the Fourteenth Amendment's due process when it did not provide just compensation under the Fifth Amendment.

Chicago, Burlington marked the genesis of a court-driven process that unfolded gradually through much of the twentieth century; namely, the incorporation or nationalisation of the Bill of Rights through the Fourteenth Amendment. The door was cracked open with *Chicago, Burlington* and over the next sixty years of so; the Court extended one Bill of Rights protection after another to citizens litigating the constitutionality of state laws, concluding in each that the Fourteenth Amendment's due process protections against state action required it. By the late 1960s, the Court nationalised nearly all of the Bill of Rights, but not without generating white-hot debate among the justices and within the legal academy over how much and which portions should be incorporated and on what theoretical bases.[11] Scholars refer to the nationalised Bill of Rights as a 'second bill of rights'.[12] Only a few provisions have not been incorporated. Those include the Second Amendment's right to keep and bear arms, the Third Amendment's right against quartering soldiers, the Fifth Amendment's right to a grand jury hearing, the Seventh Amendment's right to jury trial in civil cases, and the Eight Amendment's right against excessive bail and fines.

Many observers anticipate that the Court will incorporate the Second Amendment's individual right to bear arms in the foreseeable future.[13] The necessary predicate was laid in the Court's 2008 *District of Columbia v Heller*[14] decision, which challenged the constitutionality of a District of Columbia's handgun ban.[15] In what was its first

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10 *Chicago, Burlington & Quincy Railroad v City of Chicago*, 166 US 226, 235 (1897).

11 Raoul Berger, 'Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat' (1981) 42 *Ohio State Law Journal* 435; Charles Fairman, 'A Reply to Professor Crosskey' (1954) 22 *University of Chicago Law Review* 144; Charles Fairman, 'Does the Fourteenth Amendment Incorporate the Bill of Rights?' (1949) 2 *Stanford Law Review* 5.

12 See Cortner, above n 6.

13 See Nelson Lund, 'District of Columbia v. Heller: Anticipating Second Amendment Incorporation, the Role of Inferior Courts' (2008) 59 *Syracuse Law Review* 185; Janice Baker, 'The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment' (2002) 28 *Dayton Law Review* 35.

14 *District of Columbia v Heller*, 554 US ___ (2008).

15 The Second Amendment reads, 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed'. For an introduction to the jurisprudence concerning it, see David Williams, *The mythic meanings of the Second Amendment: taming political violence in a constitutional republic* (Yale University

significant foray into Second Amendment jurisprudence in eighty years, the Court confronted the thorny historical question of whether the Second Amendment's 'right to keep and bear arms' was a personal liberty or only a collective right dependent upon the formation of state militias. A majority in *Heller* rejected the collective right theory, concluding that the Constitution protects an individual's right, though not unfettered, to keep and bear arms. *Heller* reached critically important historical, even linguistic conclusions about the Second Amendment, but its application was limited to the District of Columbia, a federally controlled jurisdiction.[16] Because the Second Amendment has not been nationalised, similar gun laws are presently immune from the decision, at least for the time being.

That may soon change. Immediately after *Heller* was issued, litigants filed suits around the US arguing that *Heller* should bind state gun laws as well. The Seventh and Second Circuit Courts rejected incorporation, while a three-judge Ninth Circuit panel accepted incorporation. An en banc Ninth Circuit appeal was stayed when the Supreme Court granted certiorari in January 2010 to hear an appeal from the Second Circuit Court in *McDonald v City of Chicago*.[17] Oral arguments occurred in March and a decision is expected before the Court concludes its current term. Given the tenor of the oral arguments, where discussion focused not on whether to incorporate but how to justify the incorporation, most observers anticipate the Second Amendment right to bind state and local laws as well.[18]

Incorporation of the Bill of Rights – holding the states to constitutional provisions originally intended to operate against the national government alone – was one of the more significant constitutional developments in the twentieth century. It fundamentally altered the relationship between the states and the federal government by bringing under judicial scrutiny a wide array of state action that had been theretofore beyond the Court's reach.[19] Incorporation changed the Supreme

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Press, 2003); and Richard Uviller and William Merkel, *The militia and the right to arms, or, How the Second Amendment fell silent* (Duke University Press, 2002).

16 The judges' opinions dedicated significant attention to the history surrounding the adoption of the Second Amendment, the historical roles of state militias and individual rights to keep and bear arms in association with the militias. The linguistic debate focused on the awkwardly worded Second Amendment, specifically whether the comma separating its two clauses was intended to link one to the other or define two independent rights.

17 567 F.3d 856 (2009).

18 Tony Mauro, 'Justices shoot down 'privileges argument in gun case', *National Law Journal*, 2 March 2010.

19 While this paper focuses on the incorporation process through the US Supreme Court, it should be noted that the Canadian system secured a similar result with enactment of s 32 of

Court's workload as well. Prior to incorporation, the Court handled very few cases concerning civil and political rights, but as Cortner points out, 'As a result of the nationalization process the docket of the Court was opened to litigation challenging an almost unlimited array of state and local policies that had previously been insulated from attack'. In short, incorporation introduced a second bill of rights, 'a bill of rights more salient to the liberty of the average American than the original document authored by Madison and ratified by the states in 1791'.[20] Of the 175 freedom of speech cases decided by the Court between 1931 and 1970, for example, 70% challenged state laws under the Fourteenth Amendment. From 1963 to 1970, 85% of right to counsel cases emerged after incorporation.[21] Still more, incorporation established a rights culture and rights jurisprudence that shaped how the Court later approached civil rights and liberties cases against federal law. For example, the Court overturned a Texas law banning flag burning in 1989 as a violation of the First Amendment's freedom of speech, creating a precedent the Court used that next term when striking down a similar federal law.[22]

In his seminal study on the US Bill of Rights, Akhil Amar makes the case that the Fourteenth Amendment is at least as important to contemporary rights protections as the original ten amendments because of the extensive rights litigation and subsequent jurisprudence it produced. In admittedly swooning language, he concludes:

> This swelling body of legal doctrine has spilled out of courtrooms and soaked into the vocabulary and worldview of law students, journalists, activists, and ultimately the citizenry at large. But without incorporation, and the steady flow of cases created by state and local laws, the Supreme Court would have had far fewer opportunities to be part of the ongoing American conversation about liberty. Here, too, we see that the central role of the Bill of Rights today owes at least as much to the Reconstruction as to the Creation.[23]

Controversy certainly surrounded the incorporation process as it unfolded, and one still finds the occasional scholar raising doubts today whether the whole enterprise was legitimate or not, but those voices are certainly in the minority. Incorporation

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the Charter. It reads, 'This Charter applies a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province'.

20 Cortner, above n 6, 301.

21 Ibid 345.

22 *Texas v Johnson*, 491 US 397 (1989) and *US v Eichman*, 496 US 310 (1990).

23 Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press, 2000) 291.

has proven to be a key catalyst to accessing constitutional justice in the US because it opened local and state laws to constitutional scrutiny.

What can be said then about the Australian case in light of this? Had the Rudd government moved forward with a national charter of rights a similar incorporation process may have unfolded. Whether that occurred would have depended upon the legal status of the national charter (statutory or constitutional), the document's language about scope, and the jurisprudence surrounding s 109. It should be noted that several earlier proposals for a national statement of rights would have applied at the federal, state, and territory levels, including the 1944 Referendum, the 1998 Referendum, the Human Rights Bill of 1973, the Australian Bill of Rights Bill 1984, Senator Meg Lees' Charter of Rights and Freedoms Bill 2001, and Dr. Andrew Theophanous's Australian Bill of Rights Bill 2001. These proposals failed, in part, because of the explicit obligations they imposed on state and territory laws – the obligations that would come from incorporation.[24]

One detects a broader concern raised in the Report and in many submissions about any new national rights regime – whether constitutional or statutory in form – aggrandising power in Canberra, specifically the High Court, and trumping state or territory efforts to promote human rights. This concern was most evident when the Report addressed the question of the jurisdictional scope of any national rights charter. Should the charter bind just Canberra or the states and territories as well? Following the Victorian government's submission, the Committee concluded:

> It would be counter-productive and unwise to have the Federal Parliament impose on the states and territories a catalogue of human rights and process for determining the regular limitation of those rights. Given the history of attempts to legislate for human rights at the national level in Australia, the Committee thinks the Commonwealth should look to its own affairs and lead by example. ... Any Human Rights Bill should be drafted so as to apply only to the Commonwealth and those public authorities exercising functions under the Commonwealth law.[25]

To suggest that limiting the jurisdictional scope of a national rights document, constitutional or statutory, to the Commonwealth is problematic. From a US vantage point, the idea that the federal government should 'lead by example' is difficult to countenance because of the constitutional tragedies it would have tolerated in US history. As described above, many of the greatest rights gains occurred when the US

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[24] George Williams, *A Charter of Rights for Australia* (University of New South Wales Press, 2007).

[25] National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009), 364.

Supreme Court applied the Bill of Rights to state action. Had the US taken the 'lead by example' approach toward racial segregation, for example, would that have quickened integration?

The recommendation to circumscribe a national charter to regulate Canberra alone is significant for what it says implicitly about the anticipated federal-state relationship. First it carries a heavy dose of pragmatism. The reasoning goes that because national charters have been voted down in the past, it is best not to ruffle the states' feathers by 'imposing' another. Second, it suggests that because reform efforts at the state, territory, and federal levels are all drawing inspiration from Australia's international treaty obligations, similar legislative and judicial outcomes should be expected across jurisdictions. Whether coming from the ACT, Victoria, or Canberra, the substantive meaning given to these internationally grounded rights will vary little from one jurisdiction to the next. The argument goes that given this shared trajectory, any national charter can limit its scope to federal laws and authorities with little worry about wayward states or territories. Third, it presumes that leading by example will work. Once the states and territories see how the Commonwealth leads, the scales will fall from their eyes. Jeremy Waldron argues that dialogues about civil and political rights rarely involve opinions easily dislodged through education or mere exposure. Rather, rights dialogues are inextricably riddled with disagreement, in which case leading by example may not foster the sort of consensus about rights that the Report anticipates.[26] Fourth, Australian courts will be immune from the rights related federalism disputes that pepper US and Canadian rights jurisprudence.

These assumptions raise empirical questions best addressed by looking comparatively at how other federal systems have handled rights protection and by looking at how the Commonwealth, states, and territories have negotiated other federalism disputes. Some skepticism is warranted that if the Commonwealth 'leads by example' and legislates in a manner 'broadly consistent' with the states and territories that incorporation disputes will not emerge. Victoria's *Charter of Rights and Responsibilities Act 2006* (Vic) and the ACT's *Human Rights Act 2004* (ACT) do not contain language encouraging those jurisdictions to follow the Commonwealth's lead. In fact, as James Stellios has pointed out, these statutes say very little about how they are to operate in a federal system.[27] The Report underplayed, I believe, the extent to which federal systems with national and state/territory rights documents require some institution and process for harmonising the outputs.

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[26] Jeremy *Waldron*, *Law and Disagreement* (Clarendon Press, 1999).

[27] James Stellios, 'Federal Dimensions to the ACT *Human Rights Act*' (2005) 47 *Australian Institute of Administrative Law Forum* 33. See also James Stellios, 'State/Territory Human Rights Legislation in a Federal Judicial System' (2008) 19 *Public Law Review* 52.

While the National Human Rights Consultation canvassed a wide range of issues, the most heated discussions revolved around what mechanisms should be used to further protect human rights at the national level. The Committee's terms of reference required that any policy recommendations preserve the sovereignty of parliament, which the Committee took to mean that a constitutionally entrenched document was not an option.[28]

It may have been politically astute and expedient not to include a constitution bill of rights as an option in its report, but the Committee's reasoning was faulty. To 'preserve the sovereignty of parliament' can mean many different things, but in the Commonwealth context it cannot mean that Parliament gets to legislate on whatever and however it wants. By enumerating the powers of the federal parliament, the Commonwealth Constitution limits parliament in ways that Westminster is not. The most obvious example of this is s 51, which enumerates specific legislative powers rather than granting general legislative powers. But I do not think that the Consultative Report invokes the phrase in this Westminster sense. Instead, it took the charge to 'preserve the sovereignty of parliament' to mean that the federal parliament should have the last word in the rights dialogue – not the Executive, not the Judiciary. The report is mistaken, however, in concluding that a constitutionally entrenched bill of rights necessarily prevents the federal parliament from having the last word. Canada's Charter manages to constitutionally entrench individual rights and parliament's right to have the last word through s 33, the notwithstanding clause. The two are not mutually exclusive.

The report also suggests that institutional dialogue is anathema to constitutionalised rights regimes because the courts exercise strong judicial review. That is simply not the case. Dialogue occurs. It just looks different. This point is well illustrated in two recent Supreme Court cases, *Citizens United*[29] and *US v Stevens*.[30] In *Citizens United*, the Court concluded that a federal ban on corporations paying for political advertisements leading up to primary and general elections violated the First Amendment. This was a controversial decision, no doubt, but it represents the latest exchange in an ongoing dialogue between Congress and the Court concerning free speech rights and the role of interest groups in American elections. In *US v Stevens*, the Court struck down a federal law criminalising the creation and sale of videos that portrayed, 'conduct where a living animal is intentionally maimed, tortured, or killed'. The Court concluded this language was overly broad and could reasonably

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28 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009), 370.

29 *Citizens United v Federal Election Commission*, 130 S. Ct. 876 (2010).

30 *US v Stevens*, 130 S. Ct. 1577 (2010).

expect to impinge on otherwise constitutionally protected speech, including fishing and hunting television shows. Using the Court's judgments, observers now expect Congress to draft a more narrowly tailored, constitutionally sound law. These two cases illustrate institutions in dialogue.

The other point to be made is that in political systems with constitutionally entrenched bills of rights the character of the dialogue may evolve. James Kelly convincingly demonstrates that immediately following enactment of the Canadian Charter, the Canadian Supreme Court struck down more laws on Charter grounds than it had historically on other constitutional grounds. Kelly argues that was to be expected in the years immediately following enactment of the Charter because the Court was being asked to reconcile pre-Charter laws with the Charter. In more recent years, the parliaments are more attuned to passing Charter-proof legislation, and consequently, the Court's activism has waned.[31]

A more pronounced High Court?

While the incorporation process certainly increased access to constitutional justice in the US by giving litigants a federal constitutional standard to measure state laws, and while incorporation encouraged uniformity across jurisdictions, nationwide compliance with the latest constitutional doctrines is far from immediate or complete in the US. The promotion of legal uniformity in the US is dependent on litigation and because that litigation often occurs in state and federal judiciaries, it is not uncommon for substantive differences to exist on points of law from state to state and across the federal judicial circuits. In fact, one criterion that factors prominently into the US Supreme Court granting a petition for certiorari is the presence of jurisdictional disagreements on a particular legal question.[32] When these legal gaps emerge, the Court often takes that as a cue that the underlying legal issue warrants resolution.

Sometimes gaps emerge because the federal constitution grants rights and imposes obligations to which state laws fall short. There also are instances where the state constitutions grant rights and impose obligations that outpace federal law. This latter source for legal gaps seems more relevant given the presence of state/territory charters of rights in Australia, so consider a contemporary US illustration: gay marriage. Five states and the District of Columbia currently allow same sex-marriage, while the *Defense of Marriage Act of 1996* (DOMA) forbids recognition of same-sex marriages at the federal level. Forty-one states have state equivalents to DOMA. Two

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31 James Kelly, *Governing with the Charter* (UBC Press, 2005).

32 For a definitive analysis of the US Supreme Court's certioriari process, see HW Perry, *Deciding to Decide* (Harvard University Press, 1992).

pending federal lawsuits challenging DOMA are garnering close legal and media attention, *Perry v Schwarzenegger* and *Gill v Office of Personnel Management*. *Perry* involves a challenge to California's Proposition 8, adopted in 2008, that prohibits the state from recognising gay marriages. Ted Olson and David Boies, opposing counsel in the infamous *Bush v Gore* case, have joined forces to argue that the proposition violates the Fourteenth Amendment's equal protection clause. The case is currently pending in a California federal district court. *Gill* involves litigants married under Massachusetts' gay marriage law who were denied, under DOMA, federal health insurance and tax benefits granted to heterosexual married couples. This case is particularly interesting because the litigants are claiming DOMA unfairly limits the recognition of their marriages to those states where gay marriage is sanctioned. In addition to this portability argument, the case raises a classic federalism question: whether the Constitution authorises Congress to define marriage or is that power reserved to the states under the Tenth Amendment. *Gill* is currently before a US federal district judge in Massachusetts.

Both of these cases illustrate how in the US system rights protections can vary across jurisdictions. The underlying constitutional question of gay marriage will end up before the Supreme Court eventually, where it will decide the extent to which a legal gap may or may not remain between the states and the federal government. Given the current patchwork of rights regimes in Australia, it certainly is conceivable that legal gaps will emerge between jurisdictions and it is incumbent upon scholars to monitor the extent to which they do emerge. It must be admitted that the likelihood of significant differences emerging in Australia is attenuated by the fact that existing anti-discrimination statutes and human rights acts draw upon the same international treaties and vest their respective branches of government with commensurate powers. However, several scholars anticipate not inconsequential variations emerging.[33] The US and Canadian experiences suggest they will. Those differences may be heightened by the absence of a national charter of rights that promotes uniformity, and by the fact that existing statutory rights documents say very little about how rights regimes operating at the state and territory levels function within a broader federal system. Fastidious attention was paid in Victoria, the ACT, and the national consultation to construct rights regimes that preserved legislative power and circumscribed the responsibilities of courts. Despite those intentions, if variations emerge among the states and territories, it is altogether possible that the High Court will assume a more pronounced role in rights litigation. Ironically, by not moving

[33] For a valuable introduction, see Stefanie Wilkins, 'Constitutional Limits on Bills of Rights Introduced by a State or Territory' (2007) 35 *Federal Law Review* 431. See also Stephen McDonald, 'Territory Courts and Federal Jurisdiction' (2005) 33 *Federal Law Review* 57; and Malcolm Farr, 'States Rights Push Wrong', *The Daily Telegraph* (Sydney), 7 April 2006, 17.

forward with a national charter of rights, in part out of a fear of augmenting the Court's power, the Labor government may have created an altogether new set of questions for the Court to confront and invited a more pronounced role.

The question becomes then, is the High Court equipped, absent a national charter, to handle any legal gaps that emerge from the patchwork of rights mechanisms in place? The Court has authority to hear both federal and state matters under s 73 of the Constitution, but courts in Victoria and the ACT are now empowered under their respective rights charters to do more than interpret law. They are authorised to issue declarations of incompatibility if they decide that a particular law cannot be reconciled with the respective charter. Such a declaration puts the Government on notice that the law contravenes the rights statute and leaves it to the Government to decide if and how to respond. Issuance of a declaration does not affect the validity or operation of the law.

This newfangled power has not proven to be a potent weapon in either jurisdiction. The declarations will come and when they do, there is widespread disagreement over whether the High Court will have the authority to review them or not. This jurisdictional question turns on two questions. First, would reviewing a declaration ask the Court to exercise a power incompatible with Ch III courts, a principle established in *Kable*?[34] Second, could review of a declaration constitute a 'matter' under s 73 of the Constitution? The relevant doctrines appear to point in the direction of the Court having authority to review declarations of incompatibility. In *In Re Judiciary and Navigation Acts*,[35] the Court concluded that parliament was unauthorised to confer jurisdiction on the Court to offer advisory opinions. For the Court to exercise judicial power there must be a justiciable controversy capable of being quelled by the exercise of Commonwealth judicial power. Because issuance of an advisory opinion presented no 'right, duty, or liability to be established by the Court,' conferral of such jurisdiction was unconstitutional. In the more recent *Mellifont* case, the Court upheld a Queensland statute that allowed the state Attorney-General to refer questions to the Criminal Appellate Court after the accused had been acquitted or when charges were withdrawn.[36] Under *In Re Judiciary and Navigation Acts*, review of a declaration of incompatibility may be similar to asking the Court to issue an advisory opinion, and therefore beyond review, because the declaration does not affect the law and affords no remedy to the person wronged. I am persuaded by those who conclude *Mellifont* gives the Court authority to review a

[34] *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

[35] (1921) 29 CLR 257.

[36] *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289.

declaration because the declaration is to be seen as part of a larger justiciable matter and is an extension of the interpretive process.

Time will tell how the Court responds to the invitation. One could imagine a national charter bringing some needed clarity to this issue with relevant language about the High Court's authority to review lower court declarations of incompatibility. One also could imagine a national charter giving the Court authority to bring the requisite level of legal uniformity in the federal rights regimes. It appears that the Labor government has given scholars and practitioners alike until 2014 to observe and evaluate experiences accessing constitutional justice under the patchwork of rights.