

JUDICIAL ACTIVISM AND CONSTITUTIONAL (MIS)INTERPRETATION: A CRITICAL APPRAISAL

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In this article, the authors explore the concept of judicial activism and its application in the Australian domestic cases of Australian Capital Television Pty Ltd v Commonwealth and Love v Commonwealth, and in the US case of Obergefell v Hodges. The article highlights the devastating effects of judicial activism on legal interpretation, arguing that such activism compromises the doctrine of separation of powers and affects the realisation of the rule of law, resulting in a method of interpretation that incorporates personal biases and political opinion, thus ignoring the original intent of the framers of the Australian Constitution. Moreover, the article highlights that implementing a federal Bill of Rights might further exacerbate these ongoing problems concerning judicial activism in Australia.

I INTRODUCTION

This article highlights the emergence and effects of judicial activism in Australia and, briefly, the United States. Such activism no doubt occurred in the Australian cases of *Australian Capital Television Pty Ltd v The Commonwealth*¹ ('ACTV') and *Love v Commonwealth* ('Love'),² as well as during the federal takeover of income taxation. In the United States ('US'), judicial activism is evident in the well-known case of *Obergefell v Hodges* ('Obergefell').³ In this article, we assess the aforementioned cases and highlight some fundamental elements of judicial activism. We then critically assess the broader implications of judicial activism, not only for democracy and the rule of law, but also for federalism and the doctrine of separation of powers. The article also provides important reasons as

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¹ (1992) 177 CLR 106 ('ACTV').

² [2020] HCA 3 ('Love').

³ 576 US 644 (2015) ('Obergefell').

to why the enactment of a federal Bill of Rights in Australia would only aggravate the problems created by judicial activism.

II DEFINING JUDICIAL ACTIVISM

Judicial activism is a term normally used to describe a certain tendency of judges to consider outcomes, attitudinal preferences and other extra-legal issues when interpreting the applicable law. That being so, Professor Galligan has described 'judicial activism' in terms of 'control or influence by the judiciary over political or administrative institutions'.⁴

The phrase 'judicial activism' is used by its detractors to indicate the deliberate act of judges who subvert, ignore or otherwise flaunt the law. This exercise of judicial power has been vehemently condemned by some leading judicial voices in common-law history, including the much-celebrated 19th century American judge and constitutional lawyer, Thomas M Cooley. In his *Principles of Constitutional Law*, Cooley commented:

The property or justice or policy of legislation, within the limits of the Constitution, is exclusively for the legislative department to determine; and the moment a court ventures to substitute its own judgement for that of the legislature, it passes beyond its legitimate authority, and enters a field where it would be impossible to set limits to its interference.⁵

Sir Owen Dixon was another deeply influential judicial voice to speak out very strongly against judicial activism. Chief Justice of Australia from 18 April 1952 to 13 April 1964, Sir Owen is widely regarded as the nation's greatest-ever jurist. Duly credited with transforming the High Court into one of the most respected in the common-law world, he was a passionate advocate of judicial restraint and constitutional government. He once explained his favoured interpretative approach as follows:

It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions. It is an entirely different thing for a judge who is discontented with a result held to flow from a long-accepted principle deliberately to abandon the principle in the name of justice or of social necessity or of some social convenience. The former accords with the technique of the common law and amounts to no more

⁴ Brian Galligan, 'Judicial Activism in Australia' in Kenneth Holland (ed), *Judicial Activism in Comparative Perspective* (Macmillan, 1991) 70, quoted in Chief Justice RS French, 'Judicial Activism — The Boundaries of the Judicial Role' (2010) 10(1) *Judicial Review* 1, 9.

⁵ Thomas M Cooley and Andrew C McLaughlin (ed), *Principles of Constitutional Law* (Little, Brown & Co, 3rd ed, 1898) 158.

than an enlightened application of modes of reasoning traditionally respected in the courts ... The latter means an abrupt and almost arbitrary change ... The objection is that in truth the judge wrests the law to his own authority.⁶

Sir Harry Gibbs (1917–2005) is another celebrated Australian judge who fiercely opposed all forms of judicial activism. Australia's Chief Justice from 1981 to 1987 (and serving as a member of the High Court from 1970 to 1981), Gibbs argued that '[a]t the heart of what is called judicial activism is the notion that in deciding a case the judges ... must reform the law if the existing rules or principles appear defective'.⁷ Such an approach, according to him, 'confound[s] the distinction between legislative and judicial functions, and in that respect is contrary to constitutional principle'.⁸

According to the late US Supreme Court Justice Antonin Scalia, the 'Great Divide' with regard to constitutional interpretation is that between *original* meaning (whether derived from the Framers' intent or not) and *current* meaning.⁹ This 'progressive' method of constitutional interpretation assumes the existence of what is called 'the living constitution' — a body of law that grows and changes from age to age, in order to meet the 'changing needs of society'.¹⁰ Whereas the originalist method recognises the importance of knowing the drafters' intent and context, the idea of 'living constitution' is based on the premise that the document must evolve over time, according to the 'changing needs of society' as perceived by the judicial elite.

Michael Kirby, a former High Court judge and undoubtedly a judicial activist himself, once postulated that 'the Constitution is to be read according to contemporary understandings of its meaning, to meet ... the governmental needs of the Australian people'.¹¹ According to Kirby, 'the text of the Constitution must be given meaning as its words are perceived by succeeding generations of Australians, reflected in this Court'.¹² Lionel Murphy, another former Higher Court judge, contended that judges are entitled to change the law 'openly and not by small degree ... as much as they think necessary'.¹³ He was referring to legal

⁶ Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (Law Book Company, 1965) 158.

⁷ Sir Harry Gibbs, 'Judicial Activism and Judicial Restraint: Where Does the Balance Lie?' (Conference Paper, Constitutional Law Conference, University of New South Wales, 20 February 2004) 1 <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/59_HarryGibbs.doc>.

⁸ Ibid 7.

⁹ Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 1997) 38.

¹⁰ Ruth Bader Ginsburg, 'Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication' (2004) 22(2) *Yale Law & Policy Review* 329, 337.

¹¹ *Eastman v The Queen* (2000) 203 CLR 1, 80 [242].

¹² *Brownlee v The Queen* (2001) 207 CLR 278, 314 [105].

¹³ Lionel Murphy, 'The Responsibility of Judges' in Gareth Evans (ed), *Law, Politics and the Labor Movement* (Legal Services Bulletin, 1980) 5–6.

interpretation in general and the interpretation of the Constitution in particular. Such an approach regards judicial activism as always preferable, while an intentionalist or purposive approach would be relevant only in terms of legal history. Based on such a premise, Deane J opined that to take an originalist approach is 'to construe the Constitution on the basis that the dead hands [of the past] reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines', so as to deprive the document of 'its vitality and adaptability to serve succeeding generations'.¹⁴

This activist approach comports with a notion of the evolution of the law that harbours a considerable distrust of tradition. Though one might think it is a good idea for members of the judicial elite to interpret the written constitution according to contemporary needs, there is actually a remarkable degree of superficiality in maintaining that no good reason can be given for today's generation being ruled by the 'dead hands of the past'.¹⁵ After all, the *Australian Constitution* was intended to be an enduring instrument, aiming at expressly limiting (restraining) the potentially arbitrary powers of the government, including the judicial branch of government. Moreover, it is entirely possible to 'evolve' the *Constitution* by democratic means and not by way of judicial activism. After all, the document can be altered at any time via popular referendum pursuant to s 128 of the *Australian Constitution*.

To claim that unelected judges are entitled to evolve the law in the light of contemporary values is dangerously misleading. This sort of argument is always open to the objection that there are actually myriad opinions in our pluralistic society as to what such values might be. For members of the judicial elite to give the *Australian Constitution* an operation that appears to be the most convenient, is to basically run two grave risks: (1) judicial misappropriation of contemporary values, and (2) writing out of the *Constitution* the provision requiring popular referendum for the amendment of the constitutional text.¹⁶ As Sir Harry Gibbs correctly points out, 'to regard social attitudes as a source of law tends to undermine confidence in the courts, when it is thought that the judges have based their decision on their own notions rather than on the law, and it also renders the development of the law unpredictable since the values which the court recognises are in effect those in the minds of the judges themselves'.¹⁷

Another influential former judge to express his firm opposition to all forms of judicial activism is Dyson Heydon. Prior to being appointed to the country's

¹⁴ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171.

¹⁵ Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1, 27.

¹⁶ *New South Wales v Commonwealth* (2006) 229 CLR 1, 303–5 [738] (Callinan J) ('Work Choices').

¹⁷ Gibbs (n 7) 7.

highest court, Heydon served as the youngest ever Dean of Law at The University of Sydney, and then as a Justice of the New South Wales Court of Appeal. Activist judges are described by him as those who decide cases not by reference to established principles, but instead by 'some political, moral or social programme'.¹⁸ In the words of two leading constitutional-law academics:

There is no doubt that Heydon was and is a brilliant legal mind, with a very firm grip on the applicable law. His distinguished legal and judicial career is credit to that ... He [has] spent his entire judicial career crafting a judicial philosophy of the judge whose intellect, integrity and fidelity to the law would maintain the public's confidence in the justice system and the rule of law.¹⁹

The activist judge is described by Heydon as someone who is deliberately engaged in activities that are pre-emminently 'political' in nature. Such activism reflects the attitude of judges who are negatively affected by self-interest or partisan politics. Rather than creating law or debating the merits of legislation, judicial activists forget that their legitimate role is to do justice according to the law. In his celebrated article, 'Judicial Activism and the Death of the Rule of Law', Heydon commented:

Judges are appointed to administer the law, not elected to change it or undermine it ... A judge who dislikes the constraints of membership of the judiciary because it prevents the fulfilment of a particular program or agenda, should ... leave that group, join or start a political party, and seek to enter a legislature.²⁰

The doctrine of precedent as applied in the common-law system is no more than a refined and formalised example of the ordinary decision-making process that seeks to avoid arbitrariness and promote efficiency, certainty and consistency. As Heydon correctly puts it, precedent is 'a safeguard against arbitrary, whimsical, capricious, unpredictable and autocratic decision making. It is of vital constitutional importance. It prevents the citizen from being at the mercy of an individual mind uncontrolled by due process of law.'²¹

Precedent is important, but it is not precedent that ultimately binds in matters of constitutional law. Instead, what really binds in such matters is the authentic meaning of the law as expressed in its literal words and reflected in the drafter's original intent. Thus, as famously stated by the late Felix Frankfurter (1882–1965) of the US Supreme Court, 'the ultimate touchstone of

¹⁸ Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10(4) *Otago Law Review* 493, 495.

¹⁹ Gabrielle Appleby and Heather Roberts, 'Bias and the Black-Letter Judge: Who is Dyson Heydon?' *The Conversation* (21 August 2015) <<https://theconversation.com/bias-and-the-black-latter-judge-who-is-dyson-heydon-46341>>.

²⁰ Heydon (n 18) 507.

²¹ *Ibid* 515.

constitutionality is the *Constitution* itself and not what we have said about it'.²² After serving as a distinguished professor of administrative law at Harvard Law School from 1914 to 1939, Frankfurter went on to serve as Associate Justice of the US Supreme Court from 1939 to 1962. As stated by his obituary published in *The Harvard Crimson*, 'his greatest contribution was not in the particular areas of law he illuminated, but in the conception of a judge's role that he forged. Deeply believing that judges must give wide scope to the other, elected branches of government, Frankfurter sought to restrain the exercise of judicial power.'²³

Frankfurter strongly believed that precedent, if it is not in perfect harmony with the letter and spirit of the *Constitution*, ought to be overruled. In this context, whereas respect for precedent is important to produce predictability and fairness in the legal system, the courts are not ultimately subject to their previous decisions if this might involve a question of vital constitutional importance. In fact, Frankfurter considered that the courts should re-examine any decision objectively involving the creation of precedent that is manifestly wrong and therefore contrary to the express words of the law. Naturally, he was talking about the Supreme Court's obligations with respect to its own prior decisions. Lower courts are not free to ignore what the highest court has said about the written constitution, for that would introduce chaos into the legal system. This was the same view expressed by Sir Isaac Isaacs (1855–1948), who served on the High Court of Australia from 1906 to 1931. He once pointed out that some decisions actually need to be overruled. As he explained:

A prior decision does not constitute the law, but is only a judicial declaration as to what the law is ... If we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should ultimately be right.²⁴

The High Court has traditionally taken the view that, as the nation's highest court, it is not really bound by its own previous decisions. However, and for quite obvious reasons, its judicial members have been extremely reluctant to overturn the Court's previous decisions. The unanimous Court commented on the issue in *Lange v Australian Broadcasting Corporation* ('*Lange*'), declaring that '[t]his Court is not bound by its previous decisions. Nor has it laid down any particular rule or

²² *Graves v New York ex rel O'Keefe*, 306 US 466, 491 (1939).

²³ Anon, 'Felix Frankfurter Dies; Retired Judge Was 82', *The Harvard Crimson* (23 February 1965) <<https://www.thecrimson.com/article/1965/2/23/felix-frankfurter-dies-retired-judge-was/>>.

²⁴ *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 275–8.

rules or set of factors for re-opening the correctness of its decisions.’²⁵ A few decades earlier, in *Hughes & Vale Pty Ltd v New South Wales*, Kitto J explained that, in constitutional cases, ‘it is obviously undesirable that a question decided by the Court after full consideration should be re-opened without grave reason’.²⁶ However, a unanimous Court in *Lange* stated that it should not be doubted that the Court should re-examine any decision if it objectively ‘involves a question of “vital constitutional importance” and is “manifestly wrong”’.²⁷

Needless to say, judges who adhere to the philosophy of judicial activism are much less inclined to respect precedent. One such activist judge was Lionel Murphy, an Australian politician who was a Senator for New South Wales from 1962 to 1975, serving as Attorney-General in the Whitlam Government, and then sitting on the High Court from 1975 until his death in 1986. He deemed precedent ‘a doctrine eminently suitable for a nation overwhelmingly populated by sheep’.²⁸ Activist judges such as Murphy have treated judicial work as ‘an act of uncontrolled personal will’.²⁹ With respect to existing laws that bring about legal certainty and predictability, which are two important elements for the realisation of the rule of law, judges who openly eschew precedent are ultimately violating their own sworn allegiance to upholding the law faithfully. Of course, it must go without saying that one of the primary roles of judges is to pronounce the words of the law. As noted by the celebrated Chief Justice John Marshall of the US Supreme Court in *Osborne v Bank of the United States*:

The judicial department has no will in any case ... Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law.³⁰

III HOW AUSTRALIAN JUDGES HAVE UNDERMINED FEDERALISM (AND THE FRAMER’S DESIRE FOR A ‘FEDERAL BALANCE’)

In drafting the *Australian Constitution*, the framers sought to maintain a balance of powers between the Australian states and their newly formed central government. They designed the federal *Constitution* to distribute and limit the powers of each tier of government, federal and state. Hence, one of the basic

²⁵ (1997) 189 CLR 520, 554 (‘*Lange*’).

²⁶ (1953) 87 CLR 49, 102.

²⁷ *Lange* (n 25) 554.

²⁸ Murphy (n 13) 5.

²⁹ Heydon (n 18) 505.

³⁰ 22 US (9 Wheat) 738, 866 (1824).

characteristics of Australia's constitutionalism is precisely the express limitation on federal powers where all the remaining powers shall continue with the states.

Whereas the federal power is limited to express provisions that are found in ss 51 and 52 of the *Constitution*, with these powers being variously concurrent with the states and exclusive, the substantial remaining residue was left undefined to the Australian state.³¹ The basic idea was to reserve to the people of each state the ultimate right to decide for themselves on the more relevant issues through their own legislatures.³² Sir Samuel Griffith, the leading federalist proponent at the first Convention, who then served as the inaugural Chief Justice of Australia from 1903 to 1919, commented in 1891:

The separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves.³³

The Judiciary Bill was introduced by Alfred Deakin (1856–1919) into federal Parliament in 1903. A prominent leader of the Federation movement — indeed one of the principal authors of the *Australian Constitution* — Deakin managed to become Australia's second Prime Minister after Edmund Barton resigned to take up a seat on the High Court. When the Judiciary Bill was introduced and put to vote in Parliament, Deakin explained that the federal courts would have power to guarantee continuing powers of the states and the preservation of the federal balance. Deakin then called the High Court the 'keystone of the federal arch'.³⁴

In his comment concerning the early days of Australian federation, which is found in the eighth edition of his celebrated *Introduction to the Study of the Law of the Constitution*, the British jurist and constitutional theorist Albert V Dicey (1835–1922) explains that members of the High Court were expected by the drafters of the *Australian Constitution* to be 'the interpreters, and in this sense the *protectors* of the Constitution. They are in no way bound ... to assume the constitutionality of laws passed by the federal legislature.'³⁵

The High Court originally comprised only three members: Chief Justice Samuel Griffith and Justices Edmund Barton and Richard O'Connor. Griffith was the leader of the 1891 Convention and Barton of the 1897–8 Convention. O'Connor was one of Barton's closest associates. These judges had a deep commitment to the spirit and letter of the *Constitution*. They clearly sought to protect the federal

³¹ Mark Cooray, 'A Threat to Liberty' in Ken Baker (ed), *An Australian Bill of Rights: Pro and Contra* (Institute of Public Affairs, 1986) 35, 35.

³² Albert V Dicey, *Introduction to the Study of the Constitution* (Macmillan, 1915) 387.

³³ *Official Report of the National Australasian Convention Debates* (Sydney, 11 March 1891) 243, citing Edward Augustus Freeman, *History of Federal Government in Greece and Italy* (Macmillan, 2nd ed, 1893) 31–2.

³⁴ Commonwealth, *Parliamentary Debates*, Senate, 18 March 1902, 10,967, cited in Geoff Gallop, 'The High Court: Usurper or Guardian?' (1995) 9(2) *Legislative Studies* 60, 61.

³⁵ Dicey (n 32) 387–8 (emphasis added).

nature of the *Constitution* by applying two basic doctrines: 'implied immunity of instrumentalities' and 'state reserved powers'.

'Implied immunity of instrumentalities' seeks to protect the independence of the existing tiers of government. It ensures that both the central and state governments remain immune from each other's laws and regulations. If federalism implies that each government enjoys autonomy in its own spheres of power, then no level of government should be allowed to tell another level of government what it must or must not to do.

'State reserved powers' ensure that the residual legislative powers of the states must not be undermined by an expansive reading of federal powers.³⁶ The doctrine protects the powers belonging to the states when the *Constitution* was formed — 'powers which have not by that instrument been granted to the Federal government, or prohibited to the States'.³⁷ Curiously, such an idea of reserved power is actually manifested in s 107 of the *Australian Constitution*, which states: 'Every power of the Parliament of a Colony which has become ... a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth.'³⁸ In other words, every power that is not explicitly given to the Commonwealth shall be reserved to, or 'continue' with, the Australian states.

Regrettably, the doctrines of 'state reserved powers' and 'implied immunity of instrumentalities' were gradually undermined by subsequent members of the High Court. The problem started to manifest itself more vividly when two of the most notorious centralists who had attended the Conventions, Sir Isaac Isaacs and Henry Higgins, were appointed by the federal government to the High Court in 1906. Isaacs and Higgins had indeed participated at the 1891 and 1897–8 Conventions. However, they were often in the minority in all of the most important decisions. They had no formal role in shaping the final draft of the *Constitution*. In fact, they were excluded from the drafting committee that settled the final draft of the *Constitution*.³⁹

Although there is good reason to question the reliability of their views regarding the underlying ideas and general objectives of federation,⁴⁰ from the very beginning Isaacs and Higgins adopted a highly centralist reading of the *Constitution*. Under Isaacs' leadership, both the 'implied immunity of instrumentalities' and the 'state reserved powers' doctrines were overturned. For Isaacs, s 107 was not about protecting state reserved powers, but rather about

³⁶ Peter Hanks, Jennifer Clarke, Patrick Keyzer and James Stellios, *Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 7th ed, 2004) 569.

³⁷ Cooley and McLaughlin (n 5) 35–6.

³⁸ *Australian Constitution* s 107.

³⁹ Walter Sofronoff, 'Deakin and the Centralising Tendency' (2008) (September) *Quadrant Online* 86.

⁴⁰ Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly is Wrong with the Reserved Powers Doctrine?' (2008) 32(1) *Melbourne University Law Review* 1.

continuing its exclusive powers and protecting them by express reservation in the *Constitution*. This is a misreading of s 107, which determines that the state parliaments should continue to exercise their full legislative powers, except for those powers that had been exclusively given to the Commonwealth Parliament at Federation.

The drafters intended to provide the Australian states with ‘original powers of local self-government, which they specifically insisted would continue under the [federal] *Constitution* subject only to the carefully defined and limited powers specifically conferred upon the Commonwealth’.⁴¹ Because their intention was to allow these state legislative powers to ‘continue’, only the federal powers were specifically defined by the written text of the *Constitution*.

In this sense, it is perfectly reasonable to conclude that the continuation of state powers in s 107 is logically prior to the conferral of any powers to the federal Parliament, in s 51. As Professor Aroney correctly points out, ‘[s]uch a scheme ... suggests that there is good reason to bear in mind what is *not* conferred on the Commonwealth by s 51 when determining the scope of what is conferred. There is a good reason, therefore, to be hesitant before interpreting federal heads of power as fully and completely as their literal words can allow.’⁴²

This leads to our analysis of s 109 of the *Constitution*. According to s 109, ‘when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’.⁴³ Two things must be said about this provision. First, only federal legislative powers are explicitly limited by the *Constitution*, and not the legislative powers of the states. Second, it is only a *valid* federal law that can prevail over a state law. Hence, no inconsistency arises if the federal law cannot be justified by any head of federal power conferred by the *Constitution*, or it goes outside the explicit limits of the *Constitution*. If so, the matter is not really about inconsistency, but instead about the invalidity of federal law on grounds of its unconstitutionality.

This would have been less complicated if the courts had not decided to apply a controversial ‘test’ to resolve such matters of inconsistency. Nowhere to be found in the *Constitution*, such a test has been instrumental in expanding central powers at the expense of the powers of the states. First mentioned by Isaacs J almost 100 years ago, in *Clyde Engineering Co Ltd v Cowburn*, and then endorsed by the High Court in almost every subsequent case, the ‘cover the field test’ suggests that ‘[i]f ... a competent legislature expressly or impliedly evinces its intention to

⁴¹ Ibid 13.

⁴² Nicholas Aroney, ‘The Ghost in the Machine: Exorcising Engineers’ (Conference Paper, The Samuel Griffith Society, 14–16 June 2002) <<https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d51704e17b63ec0f3114a/1553813877635/v14chap2.pdf>>.

⁴³ *Australian Constitution* s 109.

cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field.’⁴⁴ As noted by Gibbs, the adoption of such an inconsistency test ‘no doubt indicates that the Courts have favoured a centralist point of view rather than a federal one’.⁴⁵

The High Court has normally favoured a literalist approach at the expense of an originalist approach toward the *Constitution*. Its non-originalist approach is clearly observable in the traditional interpretation of s 51(xxix) of the *Constitution*. This provision gives the federal Parliament power to make laws with respect to external affairs. Since the federal Executive has entered into thousands of treaties on a wide range of matters, the potential for its legislative branch to rely on such power in order to legislate on all sorts of topics is considerable.

Unfortunately, in *R v Burgess; Ex parte Henry*, the Court held that reliance by the Commonwealth on the external affairs power is not restricted to its own enumerated powers to make laws with respect to the external aspects of the subjects mentioned in s 51.⁴⁶ As a result, together with the regular operation of s 109 (inconsistency), the external affairs power has the potential to ‘annihilate State legislative power in virtually every respect’.⁴⁷

This possibility of an expansive or broader interpretation of the external affairs power undermining the federal compact, particularly by the transferal of powers originally allocated in the states to the federal government, was recognised by Dawson J, who saw such a broad interpretation as having ‘the capacity to obliterate the division of power which is a necessary feature of any federal system and our federal system in particular’.⁴⁸ The same problem was identified by Gibbs J in *Commonwealth v Tasmania*, where his Honour stated:

The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the [Commonwealth] Parliament so that they embraced literally all fields.⁴⁹

⁴⁴ *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 486.

⁴⁵ Sir Harry Gibbs, ‘The Decline of Federalism?’ (1994) 18(1) *University of Queensland Law Journal* 1, 3.

⁴⁶ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 641.

⁴⁷ Gibbs (n 45) 5.

⁴⁸ *Victoria v Commonwealth [Industrial Relations Act Case]* (1996) 187 CLR 416, 568.

⁴⁹ (1983) 158 CLR 1, 100 (Gibbs CJ, dissenting).

IV JUDICIAL ACTIVISM IN THE FEDERAL TAKEOVER OF INCOME TAXATION

One of the least satisfactory aspects of the Australian federal system is its vertical fiscal imbalance.⁵⁰ While the drafters wished to secure the states with a privileged financial position and independence, the courts have actively facilitated a dramatic expansion of federal taxation powers. As a result, the states have become heavily dependent on the Commonwealth for their revenue, and any semblance of federal balance has largely disappeared.

To provide an example, in 1901, only the Australian states levied income tax. In 1942, however, the Commonwealth sought to acquire exclusive control over the income tax system. The takeover was finally confirmed by the High Court in *South Australia v Commonwealth* ('First Uniform Tax Case').⁵¹ When the war was over and the argument for the income tax takeover was no longer valid, the Commonwealth did not return this power to the States but continued to monopolise the income tax system. Hence, a further challenge was made by the states regarding the constitutionality of the takeover. In *Victoria v Commonwealth* ('Second Uniform Tax Case')⁵² the High Court confirmed the validity of the Commonwealth's income tax system, as well as its power to impose whatever conditions it sees fit in granting money to the states.

Talking about this granting of federal money, s 96 of the *Australian Constitution* gives the Commonwealth power to grant financial assistance 'to any State on such terms and conditions as the Parliament thinks fit'.⁵³ The Court has allowed the grants section to be used to subject the states to conditions that the central government chooses to impose on them.⁵⁴ As such, the states have been induced to achieve all sorts of objects on behalf of the Commonwealth that the Commonwealth itself would never be able to achieve under its own heads of powers found in the *Constitution*. This includes the important areas of education,⁵⁵

⁵⁰ Brian Galligan and Cliff Walsh, 'Australian Federalism: Developments and Prospects' (1990) 20(4) *Publius* 7.

⁵¹ (1942) 65 CLR 373 ('First Uniform Tax Case').

⁵² (1957) 99 CLR 575.

⁵³ *Australian Constitution* s 96.

⁵⁴ See *First Uniform Tax Case* (n 51).

⁵⁵ In *A-G (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559, the High Court held that the Commonwealth could grant the states money on condition that the states then paid it to religious schools.

health, roads,⁵⁶ and compulsory purchase of land.⁵⁷ Thanks to the non-originalist interpretation by the Court, it did not take so long for s 96 to become, in the words of Sir Robert Menzies, 'a major, and flexible instrument for enlarging the boundaries of Commonwealth action; or, to use realistic terms, Commonwealth powers'.⁵⁸

The financial problems of the states have been further aggravated by judicial rulings that disregard the intention of the constitutional legislator. Such decisions have prevented the Australian states from raising their own taxes. They cannot raise anywhere near the revenue they so desperately need. The Commonwealth collects over 80 per cent of taxation revenue (including GST), but is responsible for only 54 per cent of government outlays. By contrast, the states collect 16 per cent of taxation revenue but account for approximately 39 per cent of all outlays.⁵⁹ As a result, the states have turned to other sources of 'taxation', including traffic fines and gambling, although they continue to remain heavily dependent on federal grants. When the Commonwealth grants them money, it often does so with conditions attached. However, as George Williams points out, 'the States have no real choice but to accept the money, even at the cost of doing the Commonwealth's bidding'.⁶⁰

As can be seen, disregard for the federal nature of the *Australian Constitution* has allowed for a gradual and continuous expansion of Commonwealth powers. This has resulted in a Federation that is far removed from that which was originally envisaged by the framers of the *Constitution*. From the perspective of preserving the federal nature of the *Constitution*, writes Professor Greg Craven,

the High Court has been an utter failure as the protector of the States, and even this conclusion does less than justice to the depth of the Court's dereliction of its intended constitutional duty. The reality is that the Court has not merely failed to protect the States, but for most of its constitutional history has been the enthusiastic collaborator of successive Commonwealth governments in the extension of central power. Indeed,

⁵⁶ In *Victoria v Commonwealth [Federal Roads Case]* (1926) 38 CLR 399, the High Court allowed the Commonwealth to grant the states money on the condition that it should be used to construct roads designated by the Commonwealth, even though road-building did not fall within any enumerated power.

⁵⁷ In *Pye v Renshaw* (1951) 84 CLR 58, the High Court dealt with the effect of s 51(xxxi) (Commonwealth's power to make laws for acquiring property on just terms) on s 96 (the grants power). The High Court held that the Commonwealth is able to get around the restrictions in s 51(xxxi) by ensuring that the law could not be characterised as land acquisition. Hence, s 51(xxxi) does not restrict the s 96 grants power, and the Commonwealth can therefore evade the s 51(xxxi) requirement that property must be acquired on just terms.

⁵⁸ Robert Menzies, *Central Power in the Australian Commonwealth* (Cassell, 1967) 76.

⁵⁹ Andrew Stewart and George Williams, *Work Choices: What the Court Said* (Federation Press, 2007) 12–13.

⁶⁰ *Ibid* 13.

the enthusiasm of the Court for this centralising enterprise has not uncommonly exceeded the appetite of the federal government itself.⁶¹

The fundamental point in terms of understanding the impact upon the states of the High Court's exegesis of the *Constitution* is that, since the 1920s, the Court has constantly allowed the Commonwealth to expand its powers, and even to the point where many of the purported advantages of federalism have either been lost or are not realised to their full extent.⁶² The Court needs to understand that the federal nature and structure of the *Australian Constitution*, in particular its limited powers conferred upon the central government (as opposed to those powers that should have continued with the Australian states), 'by no means implies that federal legislative power is to be accorded interpretative priority. Quite the contrary.'⁶³

V *AUSTRALIAN CAPITAL TELEVISION: ANOTHER EXAMPLE OF JUDICIAL ACTIVISM?*

The implied freedom of political communication is a constitutional principle recognised by the High Court in the early 1990s, which effectively prevents the government from disproportionately restricting freedom of political expression. The principle is based primarily on an understanding of our system of representative (and responsible) government, which therefore requires that the people and their representatives must be able to communicate in a free and open manner about political matters.

The High Court case of *ACTV* came about within the context of election broadcasting and advertising.⁶⁴ It concerned the validity of pt IIID of the *Political Broadcasts and Political Disclosures Act 1991* (Cth) ('BPD'),⁶⁵ which governed political advertising throughout election campaigns, and mandated broadcasters to televise political advertisements for free at other times.

The High Court held pt IIID to be invalid, on the basis that it contravened the *Australian Constitution's* implied freedom of political communication

⁶¹ Greg Craven, 'The High Court and the States' (Conference Paper, The Samuel Griffith Society, 18 November 1995) <<https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d2bf7817f7035849dc52/1553804289685/v6chap4.pdf>>.

⁶² See George de Q Walker, 'The Seven Pillars of Centralism: Federalism and the Engineers' Case' (Conference Paper, The Samuel Griffith Society, 14–16 June 2002) <<https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d515a104c7b096eed3480/1553813860731/v14chap1.pdf>>.

⁶³ Aroney (n 42).

⁶⁴ Alison Hughes, 'The High Court and Implied Constitutional Rights: Exploring Freedom of Communication' (1994) 1(2) *Deakin Law Review* 173, 173.

⁶⁵ *Political Broadcasts and Political Disclosures Act 1991* (Cth) ('BPD') pt IIID.

provisions.⁶⁶ Disregarding the fact that the framers declined to incorporate a Bill of Rights in the *Constitution*,⁶⁷ Mason CJ insisted that '[f]reedom of communication in the sense just discussed is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision.'⁶⁸

In a joint judgment, Deane and Toohey JJ highlighted that the extent of legislative power in s 51 of the *Australian Constitution* is expressly made 'subject to' the *Constitution*. Their Honours opined that the section directs obedience to the implications in the *Constitution*. Devoid of legislative intention to deviate from the inference of freedom of political communication, the *BPD* was interpreted as subject to this implication.⁶⁹

However, Dawson J dissented, removing himself from what he believed was 'a slide into uncontrolled judicial law-making'⁷⁰ or, in other words, judicial activism. His Honour rejected the idea that the *Australian Constitution* possessed an implied freedom of communication provision, relying on the deliberate decision of the framers to abstain from a Bill of Rights:

[I]n this country the guarantee of fundamental freedoms does not lie in any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values ... [T]here is no warrant in the Constitution for the implication of any guarantee of freedom of communication which operates to confer rights upon individuals or to limit the legislative power of the Commonwealth.⁷¹

Dawson J believed that valid implications can only be made if they are drawn from other Constitutional provisos, or from the *Constitution* as a whole:⁷² 'If implications are to be drawn, they must appear from the terms of the instrument itself and not from extrinsic circumstances.'⁷³ In support of his dissent, Dawson J referred to Brennan J's judgment in *Queensland Electricity Commission v Commonwealth*.⁷⁴

⁶⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. See also Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (University College London, 2004) 175; Donald Speagle, 'Australian Capital Television Pty Ltd v Commonwealth' (1992) 18(4) *Melbourne University Law Review* 938, 944.

⁶⁷ Hughes (n 64) 177.

⁶⁸ ACTV (n 1) 140.

⁶⁹ Hughes (n 64) 177.

⁷⁰ Ibid 188.

⁷¹ ACTV (n 1) 183–4.

⁷² Hughes (n 64) 178.

⁷³ ACTV (n 1) 181.

⁷⁴ (1985) 159 CLR 192, 231: 'The Constitution summoned the Federation into existence and maintains it in being. Any implication affecting the specific powers granted by the Constitution must be drawn from the Constitution itself. It is impermissible to construe the terms of the Constitution by importing an implication from extrinsic sources when there is no federation save that created by the express terms of the Constitution itself.'

This ‘implication’ of an implied freedom of political communication may be regarded as another example of judicial activism by Australia’s highest court. According to James Allan, ‘this implied right was [not] discovered; rather, it was made up by the judges at the point of application’.⁷⁵ As Professor Allan points out,

it would be a mistake for 22 million Australians to have their free-speech problems sorted out for them by a committee of seven unelected ex-lawyers because the people you vote for haven’t got the courage to repeal what needs to be repealed. That, in my view, is a terrible mistake on any view that takes account of long-term consequences. We are better off as a country to be stuck with 18C for a few more years than to go to the judges and have them fix it for us.⁷⁶

Professor Allan’s view is that the implied freedom of political communication is itself the result of judicial activism. Indeed, the Court’s decision in that case, as well as others concerning a possible implied freedom, initially generated considerable discussion and debate. Much of the ongoing debate concerns the question of whether such an implication can be legitimate when the framers of the *Constitution* deliberately decided to not explicitly include in the constitutional text a right like freedom of political communication. Of course, some may suggest that such an implication could be legitimate when all the evidence suggests that freedom of speech is essential to the democratic nature of our system of representative government. Considered in isolation, each step in the reasoning in cases like *ACTV* appears to be very plausible but, according to Nicholas Aroney et al, when its cumulative effect is considered, the result actually involves ‘a significant transfer of power to the courts to make determinations of elections and political speech’.⁷⁷

There is no actual disagreement between Professor Allan and us about the activist nature of these decisions. However, the implied freedom of political communication is now an entrenched part of the Australian constitutional landscape and — judging by the recent pronouncements of the Court — it is not going anywhere anytime soon. We also believe that the separation of powers between the judiciary and the legislature is fundamental to a functioning democracy. This separation, however, can be disturbed by excessive judicial activism. This is why Professor Allan is correct to state that Australia should not

⁷⁵ James Allan, ‘The Three “Rs” of Recent Australian Judicial Activism: Roach, Rowe and (No)’riginalism’ 36(2) *Melbourne University Law Review* 743, 748, citing James Allan, ‘Implied Rights and Federalism: Inventing Intentions while Ignoring Them’ (2009) 34(2) *University of Western Australia Law Review* 228, 230–3.

⁷⁶ James Allan, ‘18C: Repeal It!’, *Quadrant Online*, 2 August 2020 <<https://quadrant.org.au/magazine/2016/06/18c-repeal/>>.

⁷⁷ Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 361.

enact a federal Bill of Rights. He has written prolifically on the topic of judicial activism and how the judicial elite lacks the legitimacy and training to engage in wider debates about social or economic policy. We agree that, in our legal system, the courts are not well equipped to carry out public policy decisions — a function that parliaments are far better equipped to handle. To think that courts are or should be so equipped involves adding to the judiciary an extraordinary function that, on balance, may diminish rather than enhance the rule of law.⁷⁸

VI *WORK CHOICES*: ANOTHER EXAMPLE OF JUDICIAL ACTIVISM?

The federal power for the regulation of industrial relations is found in s 51(xxxv) of the *Australian Constitution*. It is quite a narrow grant of power, as it provides only a very limited scope for federal regulation of the area. Accordingly, the federal law on this subject matter should be limited solely to matters of conciliation and arbitration, and only for the prevention and settlement of industrial disputes extending beyond the limits of any one state. Because of the narrow scope of this provision, it is no coincidence that the present national industrial relations system is not based on s 51(xxxv), but rather primarily on s 51(xx). The latter has the regulation of corporations as the proper head of power. However, a literal interpretation of the *Constitution* has allowed the federal government to create a comprehensive industrial relations system ‘with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth’.⁷⁹

The Commonwealth has used s 51(xx) to legislate on employees of ‘constitutional corporations’ formed within the limits of the Commonwealth. This is a clear attempt to overcome the express limitations of the *Constitution*, which are found in s 51(xxxv). However, in *New South Wales v Commonwealth* (‘*Work Choices*’) a five-to-two majority of the Court held that so long as the federal law can be directly or indirectly characterised as a law somehow dealing with corporations, it does not matter whether such a law may affect another subject matter altogether.⁸⁰ In sum, a head of power does not need to be read narrowly in order to avoid breaching an explicit limitation that is derived from another head of power, even if the final result may render the latter entirely ineffective.

⁷⁸ Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, ‘How to Repeal 18C’ (2016) 32(3) *Policy* 62, 64.

⁷⁹ *Australian Constitution* s 51(xx).

⁸⁰ *Work Choices* (n 16).

Work Choices basically confirmed the centralist approach of the High Court to matters of constitutional interpretation, thus allowing the Commonwealth to legislate over areas originally under the control of the Australian states. For the states, write Andrew Stewart and George Williams, ‘the *Work Choices* case was lost as far back as the *Engineers* decision’, in 1920, when ‘the Court discarded any idea of a balance between federal and State power’.⁸¹ Strongly dissenting in *Work Choices*, Callinan J contended that the centralising principles adopted by the Court have produced ‘eccentric, unforeseen, improbable and unconvincing results’.⁸² These principles, according to his Honour, ‘have subverted the Constitution and the delicate distribution or balancing of powers which it contemplates’.⁸³ As noted by Callinan J:

There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth’s powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society. This Court too is a creature of the Constitution. Its powers are defined in Ch III, and legislation made under it. The Court goes beyond power if it reshapes the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s 128.⁸⁴

Since *Work Choices*, the scope of the corporations power has become ‘almost without limits’.⁸⁵ That being so, Greg Craven satirically describes the decision in terms of ‘a shipwreck of Titanic proportions’.⁸⁶ According to him, *Work Choices* has struck ‘a devastating blow against Australian federalism’.⁸⁷ However, he acknowledges that such a decision was not unexpected due to the Court’s long history of not only ignoring the drafter’s intentions, but also not properly recognising that no provision in the text of the *Constitution* should be interpreted in isolation, so that the document can be interpreted as a whole.⁸⁸

Work Choices, therefore, does not strictly speaking represent an instance of judicial activism. After all, the Court merely applied its own traditional methods of centralist interpretation in disregard of the original intent of the framers, as well as the federal balance to be found in the *Australian Constitution*. Such a method, while violating some basic rules of hermeneutics, ultimately supports

⁸¹ Andrew Stewart and George Williams, *Work Choices: What the High Court Said* (Federation Press, 2007) 8.

⁸² *Work Choices* (n 16) 319–20 [772].

⁸³ *Work Choices* (n 16) 325 [775].

⁸⁴ *Ibid* 327 [779].

⁸⁵ David Flint, ‘High Court Strikes Blow Against States’ Rights’, *Newsweek* (20 January 2007) <http://www.newsweek.com.au/articles/2007jan20_cover.html>.

⁸⁶ Greg Craven, ‘Work Choices Shipwreck’, *Perspective* (6 December 2006) <<https://www.abc.net.au/radionational/programs/archived/perspective/greg-craven/3382392>>.

⁸⁷ *Ibid*.

⁸⁸ *Ibid*.

the view that any federal legislation can regulate any aspect or activity of a constitutional corporation as properly defined in accordance with s 51(xx) of the *Australian Constitution*.⁸⁹

VII ADDING THE RACIAL ELEMENT TO MIGRATION LAW: *LOVE V COMMONWEALTH*

The *Love* case⁹⁰ represents a further instance of aggressive judicial activism by the High Court. The notorious case has been succinctly summarised by Chris Merritt: 'Even when born overseas and holding the citizenship of another country, foreign criminals with Aboriginal ancestry can no longer be treated as aliens for the purposes of migration law.'⁹¹

Love involved two plaintiffs, Daniel Love and Brendan Thoms. Both men were born overseas and each had one Aboriginal Australian parent. Love was born in Papua New Guinea and Thoms in New Zealand. Both identified as Aboriginal Australian apparently in order to avoid extradition. Although they had somehow managed to be recognised as members of an Aboriginal community, neither men actually sought to become Australian citizens.⁹²

Both plaintiffs were serving a term of imprisonment of 12 months or more. Mr Love was given a 12-month jail sentence for assault occasioning bodily harm.⁹³ Mr Thoms was convicted of a domestic violence assault for which he received an 18-month sentence.⁹⁴ The Commonwealth sought to deport them pursuant to s 501(3A) of the *Migration Act 1958* (Cth).⁹⁵ The Commonwealth's rationale was founded upon the citizenship status, or lack thereof, of Mr Love and Mr Thoms.

⁸⁹ George Winterton et al, *Australian Federal Constitutional Law: Commentary and Materials* (Lawbook Co, 2nd rev ed, 2007) 280.

⁹⁰ *Love* (n 2).

⁹¹ Chris Merritt, 'Lunacy Protects Foreigners Over Us', *The Australian* (Online, 12 February 2020) <<https://www.theaustralian.com.au/business/legal-affairs/lunacy-protects-foreigners-over-us/news-story/274e7b2c2690ecc9023beb021ac40b26>>.

⁹² Gavin Scott et al, 'Love v Commonwealth; Thoms v Commonwealth [2020] HCA 3', *Norton Rose Fulbright* (Case Summary, 13 February 2020) <<https://www.nortonrosefulbright.com/en/knowledge/publications/baf59e4f/love-v-commonwealth-thoms-v-commonwealth>>, citing *Love* (n 2) [31], [44], [126], [133], [147], [178], [181].

⁹³ Anon, 'A Man Has Launched a High Court Case Suing the Commonwealth for False Imprisonment', *News.com.au* (Online, 17 October 2017) <<https://www.news.com.au/national/queensland/a-man-has-launched-a-high-court-case-suing-the-commonwealth-for-false-imprisonment/news-story/4013b54dc2ff771a09d964e28c13190c>>.

⁹⁴ Elizabeth Byrne and Josh Robertson, 'High Court Rules Aboriginal People Cannot be Deported for Criminal Convictions, Cannot be 'Alien' to Australia', *ABC News* (Online, 11 February 2020) <<https://www.abc.net.au/news/2020-02-11/high-court-rules-aboriginal-people-cant-be-deported/11953012>>.

⁹⁵ *Migration Act 1958* (Cth) s 501(3A).

The Commonwealth argued that the plaintiffs were aliens, since they were not Australian citizens and, therefore, it was within the Commonwealth's power to deport them pursuant to s 51(xix) of the *Australian Constitution*.⁹⁶

By a majority of 4–3, the Court decided that, although born overseas and not Australian citizens,

Aboriginal Australians (understood according to the tripartite test in *Mabo v Queensland [No 2]* (1992) 175 CLR 1) are not within the reach of the power to make laws with respect to aliens, conferred on the Commonwealth Parliament by s 51(xix) of the *Constitution* (“the aliens power”). That is the case even if the Aboriginal Australian holds foreign citizenship and is not an Australian citizen under the *Australian Citizenship Act 2007* (Cth).⁹⁷

Setting this precedent essentially subjects Australia's migration law to the arbitrary proclamation of Aboriginality by any possible Aboriginal community member.⁹⁸ However, the law traditionally says that being an Australian citizen is a privilege, not a right. Citizenship should not be automatically imposed based on race or any subjective identification of a person, particularly when such a person has no intention of becoming an Australian citizen. The minority judgment in *Love* echoed a similar concern, maintaining that ‘the Commonwealth's constitutional power under s 51(xix) should not be limited by race’.⁹⁹ Chief Justice Susan Kiefel stated:

[T]he legal status of a person as a “non-citizen, non-alien” would follow from a determination by the Elders, or other persons having traditional authority amongst a particular group, that the person was a member of that group... [This] would be to attribute to the group the kind of sovereignty which was implicitly rejected by *Mabo [No 2]* — by reason of the fact of British sovereignty and the possibility that native title might be extinguished — and expressly rejected in subsequent cases.¹⁰⁰

Sky News host Andrew Bolt also highlighted that

the High Court ruled that people who identify as Aboriginal now have one right that people of any other race do not ... No one calling themselves Aboriginal can now be expelled by the government from Australia — even if they're born overseas, even if they aren't Australian citizens and even if they're criminals.¹⁰¹

⁹⁶ *Australian Constitution* s 51(xix). Cf Scott et al (n 92).

⁹⁷ High Court of Australia, ‘*Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3’ (Judgment Summary, 11 February 2020) <<https://www.hcourt.gov.au/assets/publications/judgment-summaries/2020/hca-3-2020-02-11.pdf>>.

⁹⁸ *Love* (n 2) [25], [137], [196].

⁹⁹ Scott et al (n 92), citing *Love* (n 2) [31], [44], [126], [133], [147], [178], [181].

¹⁰⁰ *Love* (n 2) [25].

¹⁰¹ As quoted by Frank Chung, ‘High Court Ruling on Indigenous Deportation “Will Lead to Racial Division and Strife”’, *News.com.au* (Online, 12 February 2020) <<https://www.news.com.au/>

It seems, therefore, that racial identity is somewhat ‘fluid’. Is this the direction in which Australia wishes to go?

The majority in *Love* recognised the existence of a third category of person. Such person is neither an alien nor a citizen. Chris Merritt has highlighted the potentially unintended consequences of the Court’s decision: ‘The High Court’s ruling means Aboriginal elders and community leaders can stymie moves to deport foreign criminals if they determine they have Aboriginal ancestry.’¹⁰² As a result, ‘indigenous people — even those born overseas — cannot be considered “aliens” and deported on character grounds’.¹⁰³

The Morrison Government has commented that, ‘on the face of it’, the High Court decision in *Love* has ‘created a new category of persons — neither an Australian citizen under the Australian Citizenship Act, nor a non-citizen’.¹⁰⁴ However, such persons have been given the protection of an Australian citizen if they commit a deportable offence under the *Migration Act 1958* (Cth). We can call this ‘synthetic citizenship’. As noted by James Allan, the Court ‘effectively constitutionalised identity politics ... [and] introduced a race-based limit on the parliament’s power’.¹⁰⁵ Allan was so appalled by this act of sheer activism that he even proposed a way to fix the debacle, namely, that the ‘the Attorney-General needs to call the Solicitor-General in and tell him, order him, to take the position in every single future case that *Love* was wrongly decided’.¹⁰⁶

Morgan Begg has similarly opined that the High Court’s decision ‘to exclude a specific group from the scope of the constitutional aliens power is the most radical instance of judicial activism in Australian history’.¹⁰⁷ He also identifies the concern highlighted earlier, namely, that the decision in *Love* ‘has led to the absurd position that a person can be a non-citizen but not subject to Australia’s migration laws’.¹⁰⁸

national/courts-law/high-court-ruling-on-indigenous-deportation-will-lead-to-racial-division-and-strife/news-story/4e03589cbdbbf9f455a753b44b2d725>.

¹⁰² Chris Merritt, ‘No Place for Race in the Constitution’, *The Australian* (Online, 14 February 2020) <<https://www.theaustralian.com.au/business/legal-affairs/no-place-for-race-in-the-constitution/news-story/3bfa8f2c19c2164c3b0f9495f864f19f>>.

¹⁰³ Olivia Caisley, ‘High Court Rules on New Status for Indigenous People’, *The Australian* (Online, 12 February 2020) <<https://www.theaustralian.com.au/nation/high-court-says-indigenous-men-daniel-love-and-brendan-thorns-are-not-aliens/news-story/9bff27b00ad8b7ee6f98e4a46bea28f>>.

¹⁰⁴ As quoted by Chung (n 101).

¹⁰⁵ James Allan, ‘High Court Ruling: Activist Justices’ Alien View of Court’s Power’, *The Australian* (Online, 14 February 2020) <<https://www.theaustralian.com.au/business/legal-affairs/activist-justices-alien-view-of-courts-power/news-story/bfff4c2f860a65426ddaf5f91cf9ff6>>.

¹⁰⁶ James Allan, ‘High Court of Wokeness: How on Earth Did the Coalition Allow This Travesty to Happen?’, *The Spectator Australia* (Online, 21 February 2020) <<https://www.spectator.com.au/2020/02/high-court-of-wokeness/>>.

¹⁰⁷ As quoted by Chung (n 101).

¹⁰⁸ *Ibid.*

VIII AN EXAMPLE OF JUDICIAL ACTIVISM IN US JURISPRUDENCE — *OBERGEFELL V HODGES*

Although Australia faces its own demons of judicial activism, it is not alone. The 2015 US case of *Obergefell*¹⁰⁹ also demonstrated the presence of judicial activism. The underlying principle of the majority in *Obergefell* was that individual liberty enshrines one's right to personal choice.¹¹⁰ Although the majority understood that 'the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights',¹¹¹ the Court injected post-modern thought into the legal system, arguing that fundamental rights evolve with society; they are not stagnant with traditional thought.¹¹² The majority therefore concluded that same-sex couples could exercise their fundamental right to marry prior to legislative approval.¹¹³

As previously noted by one of the authors of this article, 'the majority's view subverts and invalidates laws due to matters of personal opinion'.¹¹⁴ This is a clear example of judicial activism. Chief Justice Roberts (dissenting) maintained that '[w]hether same-sex marriage is a good idea should be of no concern to' his contemporaries on the bench.¹¹⁵ His Honour further highlighted that 'a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history' is not considered a violation of fundamental right.¹¹⁶

It is because of five unelected members of the Supreme Court of the United States that same-sex marriage is now considered 'a fundamental right'. It is simply not compatible with democratic theory that the law means whatever it ought to mean, and that unelected judges get to decide what that is.¹¹⁷ Again, this is another example of judicial activism confounding 'the distinction between legislative and judicial functions'.¹¹⁸ As Scalia J (dissenting) explained:

¹⁰⁹ *Obergefell* (n 3).

¹¹⁰ Ibid 646 (majority opinion).

¹¹¹ Ibid 676 [17] (majority opinion).

¹¹² Ibid 705–6 (majority opinion). See Augusto Zimmermann, 'Judicial Activism and Arbitrary Control: A Critical Analysis of *Obergefell v Hodges* 556 US' (2015) 17(4) *University of Notre Dame Law Review* 77, 79.

¹¹³ *Obergefell* (n 3) 677 [18] (majority opinion): 'The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.'

¹¹⁴ Zimmermann (n 112) 79.

¹¹⁵ *Obergefell* (n 3) 686 (Roberts CJ, dissenting).

¹¹⁶ Ibid.

¹¹⁷ Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in Amy Gutmann (ed), *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 3, 22.

¹¹⁸ Zimmermann (n 112) 79.

This is a naked judicial claim to legislative — indeed, super-legislative — power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices’ “reasoned judgement”. A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.¹¹⁹

The ‘dreaded monster’ of the ruling minorities is the so called tyranny of the majority. It conjures up visions of peasants with pitchforks storming their masters’ castle.¹²⁰ Small wonder, then, that such a ‘tyranny of the majority’ has been a favourite slogan of the ruling minorities, who, according to Mary Ann Glendon, conveniently prefer to ignore that one of our most basic rights is the freedom to govern ourselves and our communities by bargaining, persuading and, ultimately, majority vote.¹²¹ As Professor Glendon points out, the reality is that ‘tyranny by the powerful few’ is by far the most likely outcome of any method of judicial interpretation that concentrates so much decision-making power over the details of everyday life in a ‘vanguard’ of privileged individuals, particularly the members of a judicial elite who think they ‘know better than the people what the people should want’.¹²²

The Founding Fathers of the United States viewed fundamental rights as pre-existing the state; ‘it was generally believed that rights were God-given, existing separate and apart from any human grant of power and authority’.¹²³ Fundamental rights were called ‘inalienable’ precisely because they were viewed as sourced in God.¹²⁴ Thus, the American Founders ‘regarded government as creative of no rights, but as strictly fiduciary in character, and as designed to make more secure and make more readily available rights which antedate it and which would survive it’.¹²⁵ As Professor Barnett has pointed out, fundamental rights ‘were the rights persons have independent of those they are granted by

¹¹⁹ *Obergefell* (n 3) 717 (Scalia J, dissenting). Justice Scalia also stated (at 713): ‘Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court ... This practice of constitutional revision by an unelected committee of nine, always accompanied ... by extravagant praises of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.’ Cf Zimmermann (n 112) 79 n 23.

¹²⁰ Mary Ann Glendon, ‘Comment’, in Gutmann (n 117) 95, 113.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Lael Daniel Weinberger, ‘Enforcing the Bill of Rights in the United States’ in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis, 2nd ed, 2011) 93, 105.

¹²⁴ Suzanna Sherry, ‘The Founders’ Unwritten Constitution’ (1987) 54(4) *University of Chicago Law Review* 1127, 1132, quoting Silas Downer, *A Discourse at the Dedication of the Tree of Liberty* (1786), in Charles S Hyneman and Donald S Lutz (eds), *American Political Writing During the Founding Era, 1760–1805* (Liberty Fund, 1983) vol 1, 97, 100.

¹²⁵ Edward S Corwin, *The ‘Higher Law’ Background of American Constitutional Law* (Cornell University Press, 1955) 67.

government and by which the justice or property of governmental commands are to be judged'.¹²⁶

It is upon this foundation that the American Bill of Rights was constructed, enshrining rights that already existed. These rights rejected any idea of human-made 'fundamental rights'. As Thomas Jefferson rhetorically asked: 'Can the liberties of a nation be secure when we have removed their only secure basis, a conviction in the minds of the people that these liberties are a gift of God?'¹²⁷ This is precisely the 'higher law' background of American constitutional law, argued the celebrated Edward S Corwin, the McCormick Professor of Jurisprudence at Princeton University from 1908 to 1946.¹²⁸ Universally acclaimed as among the leading constitutional scholars of the 20th century, Professor Corwin argued that the American Founders were profoundly inspired by an idea of fundamental rights. These fundamental rights were entirely based on the rules of a higher-law jurisprudence deemed by them 'to be binding on Parliament and the ordinary courts alike'.¹²⁹

By contrast, the US Supreme Court has essentially created new 'fundamental rights' — rights that were once viewed as God-given and, accordingly, inalienable vis-à-vis the individual. As such, the US Supreme Court judges essentially become 'God' unto themselves.¹³⁰ The autonomy is indistinguishable. It is this arbitrary power currently exercised by unelected judges that is the primary catalyst for the ongoing, uncontrolled form of judicial activism taking place both in the United States and beyond.

If constitutional interpretation simply means such a raw exercise in judicial power, then the very ideal of fundamental rights might not serve in the long term to protect the people from new forms of tyranny by the most powerful, the more privileged elements of society. Tyranny, Professor Glendon reminds us, 'need not ... announce itself with guns and trumpets. It may come softly — so softly that we will barely notice when we become one of those countries where there are no citizens but only subjects.'¹³¹ So softly, she adds, 'that if a well-meaning foreigner should suggest, "Perhaps you could do something about your oppression", we might look up, puzzled, and ask, "What oppression?"'¹³²

¹²⁶ Randy E Barnett, *Restoring the Lost Constitution* (Princeton University Press, 2004) 54.

¹²⁷ As quoted in Rousas John Rushdoony, *The Politics of Guilt and Pity* (Fairfax Thoburn Press, 1978) 135.

¹²⁸ Corwin (n 125).

¹²⁹ Ibid 48.

¹³⁰ Zimmermann (n 112) 80.

¹³¹ Glendon (n 120) 113–14.

¹³² Ibid 114.

IX A FEDERAL BILL OF RIGHTS? THE POTENTIAL GROWTH OF JUDICIAL ACTIVISM IN AUSTRALIA

If judicial activism in Australia has been possible even without the enactment of a federal Bill of Rights, one can only imagine what might happen if and when such abstract declarations are enacted at the federal level. Indeed, judicial activism in Australia has occurred regardless of an abstract declaration of rights.

A federal Bill of Rights will allow judges to have the final say on all sorts of matters of social policy. The result could be very detrimental to the rule of law, because it could culminate in ‘a great temptation to appoint judges whose views on those questions of policy are views of which the executive government approves’.¹³³ As noted by Sir Harry Gibbs, ‘the circumstances surrounding some judicial appointments in the United States show that it has often been impossible to resist this temptation. Thus one of the essentials of a free society — an independent judiciary — tends to be weakened when the judges are given what virtually amounts to political power.’¹³⁴

The framers of the *Australian Constitution* generally believed that the institutions of representative and responsible government, coupled with a well-designed federal system, ‘would provide adequate protection for civil and political rights without the need for a judicially-enforced bill of rights’.¹³⁵ Hence, in a landmark ruling, Anthony Mason CJ stated: ‘[T]he prevailing sentiment of the framers [of the *Australian Constitution*] [was] that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.’¹³⁶

Sir Robert Menzies, Australia’s longest serving Prime Minister, maintained that the framers had deliberately refrained from adopting a Bill of Rights because they understood that ‘to define human rights is either to limit them — for in the long run words must be given some meaning — or to express them so broadly that the discipline which is inherent in all government and ordered society becomes impossible’.¹³⁷ That being so, under the system of constitutional government envisaged by the Australian Founders, one proceeds on the assumption of full rights and freedoms, and then turns to the positive law only to see whether there

¹³³ Sir Harry Gibbs, ‘Does Australia Need a Bill of Rights?’ (Conference Paper, The Samuel Griffith Society, 18 November 1995) <<https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d2c2cf9619a31d240c2f0/1553804334067/v6chap7.pdf>>.

¹³⁴ Ibid.

¹³⁵ Aroney et al (n 77) 356.

¹³⁶ ACTV (n 1) 136.

¹³⁷ Robert Menzies, *Central Power in the Australian Commonwealth* (Cassell & Co, 1967) 52.

might be an exception to the general rule. After comparing this model with the American one of a constitutionally enacted Bill of Rights, the late constitutional lawyer W Anstey Wynes commented:

The performance of the Supreme Court of the United States has become embroiled in discussions of what are really and in truth political questions, from the necessity of assigning some meaning to the various “Bill of Rights” provisions. The Australian Constitution ... differs from its American counterpart in a more fundamental respect in that, as the ... Chief Justice of Australia [Sir Owen Dixon] has pointed out, Australia is a “common law” country in which the State is conceived as deriving from the law and not the law from the State.¹³⁸

Naturally, the supporters of a federal Bill of Rights may argue that its enactment by an elected government makes the invalidation of statutes on the basis of interpreting the Bill indirectly democratic. Nothing could be further from the truth. In reality, increasing judicial power by means of legislation, even if done by democratic means, amounts to ‘voting democracy out of existence, at least so far as a wide range of issues of political principles is concerned’.¹³⁹ Bills of rights may have such a deleterious effect of weakening democracy by transferring the decision-making authority from elected representatives of the people to an unelected and barely accountable judiciary, although there is no moral or political consensus amongst members of the judicial elite. As noted by James Allan:

What a bill of rights does is to take contentious political issues — ... issues over which there is reasonable disagreement between reasonable people — and it turns them into pseudo-legal issues which have to be treated as though there were eternal, timeless right answers. Even where the top judges break 5–4 or 4–3 on these issues, the judges’ majority view is treated as *the view* that is in accord with fundamental rights.

The effect, as can easily be observed from glancing at the United States, Canada and now New Zealand and the United Kingdom, is to diminish the politics (over time) to politicize the judiciary.¹⁴⁰

The delicate constitutional balance of power between the judiciary and the legislature is basic to a functioning democracy. Such a balance, however, has been deeply upset in numerous countries across Europe and North America due to human-rights legislation. Indeed, the legal philosopher Jeremy Waldron believes that judicial enforcement of a Bill of Rights is utterly inconsistent with the ability

¹³⁸ W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book Co, 2nd ed, 1956) vii.

¹³⁹ Jeremy Waldron, ‘A Rights-Based Critique of Constitutional Rights’ (1993) 13(1) *Oxford Journal of Legal Studies* 18, 46.

¹⁴⁰ James Allan, ‘Why Australia Does Not Have, and Does Not Need, a National Bill of Rights’ (2012) 24(2) *Journal of Constitutional History* 35, 40.

of ordinary citizens to influence decisions through democratic political processes. He says:

If we are going to defend the idea of an entrenched Bill of Rights put effectively beyond revision by anyone other than the judges, we should ... think [that] ... even if you ... orchestrate the support of a large number of like-minded men and women and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges' views.¹⁴¹

It is impossible not to observe the irony in such decision-making reducing the size of the electoral franchise. Decision-making rule in the top courts simply determines that five votes beat four. It is as simple as that and a mere reduction of the franchise. What this process does, therefore, is to provide a small committee of lawyers with the ultimate power to decide controversial moral values by striking down of an Act of Parliament. Of course, there may be distrust of the judicial elites and their capacity to make 'proper' decisions. Commenting on this fact, Goldsworthy concludes:

My impression is that in countries such as Britain, Canada, Australia and New Zealand, a substantial proportion of the tertiary-educated, professional class has lost faith in the ability of their fellow citizens to form opinions about public policy in a sufficiently intelligent, well-informed, dispassionate and carefully reasoned manner. They may be attracted to the judicial enforcement of rights partly because it shifts power to people (judges) who are representative members of their own class, and whose educational attainments, intelligence, habits of thought and professional ethos are thought more likely to produce "enlightened" decisions.¹⁴²

Bills of Rights, federal or otherwise, lead to the further politicisation of the judiciary. As the generalities expressed in such legal documents are applied to real-life situations (and rights frequently conflict with one another), there is a concrete need for the imposition of methods of judicial interpretation that truly respect the spirit of the document and the intention of the legislator. After all, writes Mirko Bagaric, 'rights documents are always vague, aspirational creatures and give no guidance on what interests rank the highest. This leaves plenty of scope for wonky judicial interpretation.'¹⁴³ The way a judge may 'interpret' an abstract right may be influenced by the political environment and his or her own political biases and ideological inclinations.

Given that these factors are outside the judge's area of expertise, there is no reason as to why judges should determine the whole hierarchy of rights and interests in our community. There is obvious potential in such a situation for partisan administration of justice. In practice, as far as declarations of rights are

¹⁴¹ Waldron (n 139) 50–1.

¹⁴² Jeffrey Goldsworthy, 'Losing Faith in Democracy', *Quadrant Online* (25 May 2015) <<https://quadrant.org.au/magazine/2015/05/losing-faith-democracy/>>.

¹⁴³ Mirko Bagaric, 'Your Right to Reject the Bill of Rights', *The Herald Sun* (Melbourne, 8 November 2005) 19.

concerned, the supposed neutrality and moderation of judges prove illusory. As Professor Moens has written:

The possibility of attributing different meanings to provisions of bills of rights creates the potential for judges to read their own biases and philosophies into such a document, especially if the relevant precedents are themselves mutually inconsistent. Indeed, in most rights issues, the relevant decisions overseas are contradictory. For example, rulings on affirmative action, pornography, "hate speech", homosexual sodomy, abortion, and withdrawal of life support treatment vary remarkably. These rulings indicate that the judges, when interpreting a paramount bill of rights, are able to select quite arbitrarily their preferred authorities ... Since a bill of rights will often consist of ambiguous provisions, judges can deliberately and cynically attribute meanings to it which are different to the intentions of those who approved the bill ... in Australia's case the electorate.¹⁴⁴

The *Canadian Charter of Rights and Freedoms* ('Charter') is a good point of observation because it is broadly regarded as a model by most human-rights activists in Australia. Curiously, such a charter has allowed the Supreme Court of Canada to find 'legal' grounds to invalidate all laws against abortion. The Court has used the *Charter* to protect tobacco advertising, to extend the franchise to all prisoners, to rewrite the marriage laws to include homosexuals, and even to make it much harder to freeze the salaries of judges in comparison to the those of other civil servants! These Canadian judges have clearly read their own ideology into the law and are now the country's major political players. The clause in the *Charter* that allows review of legislation if reasonable limits can be justified in a free and democratic society has proved entirely ineffective in curbing the problem of judicial activism. As noted by Professor Moens:

Since that criteria [sic] means essentially nothing in a legal sense, judges are effectively commanded by the instrument itself to give rein to their own moral sensibilities over legal criteria in deciding the validity of legislation. In such circumstances, it is not surprising in Canada the individual social and political beliefs of the judges are considered more important than the words of the Constitution itself.¹⁴⁵

Whereas it may be argued that in most legal systems a judicially enforceable Bill of Rights might improve human-rights protection, the basic question for nations like Australia is whether this would be desirable for that particular reason. As any Bill of Rights consists of abstract and flexible principles of political morality, judicial 'interpretation' of such documents eventually becomes rather indistinguishable from the moral and political philosophy of a few unelected judges. Human rights legislation, being entirely abstract and general in nature,

¹⁴⁴ Gabriël A Moens, 'The Wrongs of a Constitutional Entrenched Bill of Rights' in MA Stephenson and Clive Turner (eds), *Australia: Republic or Monarchy? Legal and Constitutional Issues* (University of Queensland Press, 1994) 233, 236.

¹⁴⁵ Ibid.

naturally requires some form of 'creative' interpretation. And yet, there is little guidance to assist in the process of applying such abstract provisions. The outcome depends largely on the views of a few unelected judges, thus facilitating a mechanism whereby a small elite of privileged lawyers can force its own values and beliefs on a reluctant majority of the people.

X CONCLUSION

Judicial activism is a phenomenon increasingly growing in importance all over the world, including in common-law countries such as Australia and the United States. This article has explained how judicial activism negatively affects the application of the law by giving a meaning that substantially departs from the drafters' original intent, and sometimes even departing from the literal meaning of the words as conveyed in the law. Such a problem was noticeable in the cases of *Work Choices*, *ACTV* and *Love* in Australia, and in the *Obergefell* case in the United States, as it relates to the creation of a 'fundamental right' to same-sex marriage by unelected judges.

Unfortunately, as explained in this article, the values that an activist judge is willing to enforce do not necessarily derive from the law. Otherwise, the term 'activist' would not be applied to such instances. This exercise in raw judicial power should be challenged, and the reason is quite simple: Not only does it violate the proper role ascribed to members of the judiciary, but also, in a true democracy, it is the will of the people, directly or indirectly manifested by means of their elected representatives in Parliament, that should always prevail, not the individual opinions of a tiny judicial elite composed of privileged members of the legal profession.

Judicial activism obscures the doctrine of separation of powers, seemingly voiding the walls that separate them. While social change may be a factor in interpreting the law, it should not be the intentional factor that eases the need for the judge to faithfully apply the law according to the intention of the legislator. As rightly stated, judges should leave their political and social prejudices out of the court room. To do otherwise is to poison the role that should be seen as a privilege, not an entitlement. Precedent should be one of the influencing factors when it comes to matters of constitutional interpretation, but ultimately it is the text of the *Constitution* that remains the ultimate touchstone when it comes to matters of constitutional interpretation.

To conclude, the rule of law requires that judges are not free to decide a case in any way they like. The legitimacy of the court system effectively depends on judges exercising their power on the basis of something other than personal

opinion or politics.¹⁴⁶ Thus, we conclude this article with the words of one of Australia's most respected legal academics and constitutional lawyers, Professor Emeritus Jeffrey Goldsworthy. As he has correctly reminded us, just as the majority of citizens may be wrong, so too may be the opinions of a judicial minority. That being so, he concludes: '[I]n the absence of an objective method of determining who is right, it is better that the majority should prevail'.¹⁴⁷

¹⁴⁶ Elizabeth Ellis, *Principles and Practice of Law* (Lawbook Co, 2005) 169.

¹⁴⁷ Jeffrey Goldsworthy, 'Losing Faith in Democracy' (2015) (May) *Quadrant Magazine* 13.