In our previous article, we argued with respect to government powers, constitutions serve two basic functions: the establishment of legitimate governing institutions, and providing mechanisms to manage political conflict, and that a constitution that failed in either of these respects should be considered merely putative rather than genuine. We also proposed that any “genuine” constitution is required to define the limits of legitimate state authority, usually at least partly through the description of “rights”; we thus distinguished between a powers constitution and a rights constitution. We also described two structural elements of a constitutional system – one or more texts and conventions of political practice -- and an underlying shared constitutional ethos that together define a particular nation’s form of constitutionalism. In different constitutional systems the relationship between text, convention, and ethos vary, but in any genuine constitutional system the three work in concert to perform the basic tasks that a constitution is required to do.

Applying these criteria for a genuine constitutional system, and using the 1975 dismissal crisis as a case study, we found that Australia’s constitutional system falls short in one key sense: rather than channeling and mitigating political conflict, the constitutional text reinforces that conflict. That functional failure, we suggested, derives from a structural problem: a basic inconsistency between the written constitutional text and established constitutional conventions, resulting in a situation in which Australia has a constitution without genuine constitutionalism. We pointed to the 1975 dismissal crisis as a case study in both the way in which the appeal to the constitution intensified political conflict, to the point that existing political arrangements were destroyed, and the way in which the written text operated to disrupt rather than reflect well-established conventions.

One way to think about this is in terms of an inversion of the relationship of the constitution to ordinary politics. In most models of constitutionalism, political practices are themselves based on the constitutional text and conventions, so that in a real sense politics is understood to serve constitutional positions. In Australia these arrangements are inverted: instead of a political system oriented around constitutional norms, during normal periods of operation the constitutional text is subordinate to political norms. As a result, during such normal periods Australia is governed by a system of conventions that express an underlying constitutional ethos, but only by virtue of a shared willingness to disregard the constitutional text. Conversely, when the system is subjected to extraordinary pressure – that is, when the shared willingness to ignore the text gives way in the face of strident political conflict, as occurred in 1974 and 1975 – then the conventions ultimately give way to the text, in a way...
that magnifies the consequences of the underlying disagreements by removing institutionalized mechanisms of compromise and resolution. Hence with respect to those portions of a constitution that relate to the design and operation of a political system it can be said that Australia has a constitutional text that is entirely separate from its constitutional conventions or ethos. This is what we described as a constitution without constitutionalism.

In this article we continue our examination of Australian constitutionalism. Where we previously analyzed the structure of government powers, or “powers constitution,” here we address Australia’s “rights constitution,” those portions of the constitution that define the limits of government power by creating legally enforceable rights of citizens. We use the term “rights” in the minimal classically liberal sense, to mean individual prerogatives that government is bound to observe; a “constitutional right” consists of a constraint on the exercise of governmental power imposed by the terms of a constitution.\(^1\) While a right need not be absolute to meaningful, it must be the case that for infringing on that right requires a greater justification than is considered sufficient for acts of ordinary lawmaking or government action. The securing of individual rights, understood in this way, is a basic function of any constitution. A constitution that guarantees no rights against the exercise of government power is a facade, to use Giovanni Sartori’s term, whether it results from of an absence of any limits on government from the formal recognition of rights that are never respected in practice.\(^2\)

Australia is unique among ex-Commonwealth nations in that it has no written charter of rights. There is no parallel to an American-style Bill of Rights in the Australian constitution, nor are there any enacted statutes purporting to identify basic rights comparable to Canada’s Constitution Act of 1982, the U.K.’s Human Rights Act of 1998, or New Zealand’s Bill of Rights Act of 1990.\(^3\) Moreover, there are only a few references to “rights”

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\(^1\) There are broader definitions of rights, such as the Lockean model which recognizes a governmental duty to protect us against other private actors, or an even more expansive conception in which the government has an affirmative duty to provide services.


\(^3\) Fleur E. Johns, “Human Rights in the High Court of Australia, 1976-2003: The Righting of Australian Law?” 33 Federal Law Review 287 (2005): 287-331, 287. Each of these rights statutes has its own history. The U.K.’s Human Rights Act is largely a result of attempts to bring national practices into accordance with European practices to which Britain is bound by treaty. New Zealand’s law was designed to be essentially advisory; the New Zealand courts are required to employ its terms in interpreting and applying statutes, but do not have the power to strike down statutes on the grounds that they violate the Act. (Mai Chen and Sir Geoffrey Palmer, Public Law in New Zealand: Cases, Materials, Commentaries and Questions (1993): 463-564.) Nonetheless, in practice the New Zealand High Court has used its authority to declare and enforce substantive rights. Canada’s Charter of Rights and Freedoms provides the strongest and broadest rights guarantees of any ex-Commonwealth state’s charter of rights. Within Australia there is one exception to the rule, in the form of the Australian Capital Territory Human Rights Act of 2004. With that exception,
in the constitutional text, and for the most part those refer to very specific and particular procedural guarantees rather than substantive freedoms. The constitutional text is almost exclusively an authorizing document, with a mere handful of sections that limit government power, and which serve as only minimal constraints on government action.

Australia stands as exceptional for its complete lack of textual commitment to constitutional rights guarantees.

The sections of the Australian constitutional text referring to “rights” are s.s 41, 44, 51(xxii), 74, 78, 84, 100 and 117. S. 41 appears to create a right to vote (“No person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a state shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth”), but current jurisprudence holds that this language applies only to people who had the right in 1902, when the first Commonwealth franchise was created. As a result, “the practical effect of s. 41 is spent.” R v Pearson; Ex Parte Sipka (1983) 152 CLR 257, 268, Murphy J. S. 44 sets out five categories of persons ineligible for membership in Parliament. It may be assumed that anyone not falling into one of those categories is entitled to run for office, but it can not be assumed that such a right is entrenched, with the result that Parliament could presumably limit such eligibility at any point in the future. S. 51(xxii) states only that Parliament has authority over “parental rights”; it is thus the opposite of a guarantee of an entrenched right, it is a specification of legislative supremacy over a recognized category of “rights.” S. 55 establishes a right to be taxed only under a written law enacted specifically and solely for that purpose. S. 75 guarantees the right to seek court remedies against Commonwealth officials in the form of writs of mandamus, orders of prohibition, or injunctions. S. 80 requires a jury trial “on indictment of any offense against any law of the Commonwealth,” but Parliament itself determines what offenses require indictment. See R v. Bernasconi (1915) 19 CLR 629. S. 116 prevents the Commonwealth from “mak[ing] any law for establishing any religion, or imposing any religious observance, or for prohibiting the free exercise thereof,” but the courts have interpreted this language very narrowly, upholding most laws even if they have the effect of infringing on or promoting religion, as long as that was not their intent. In no sense are these clauses analogous to restrictions in the U.S. Bill of Rights. The one exceptional case is s. 92, which guarantees that trade among the provinces shall remain “absolutely free.” In one crucial case, this provision was found to act as a guarantee of a substantive freedom, the right to travel. See Gratwic v. Johnson, 70 C.L.R. 1 (1945).

Many commentators have called for Australia to adopt a Bill of Rights, to secure Australians’ freedoms against an overweening government. See, e.g., Hilary Charlesworth, Writing in Rights: Australia and the Protection of Human Rights (University of New South Wales, 2002); George Williams, A Bill of Rights for Australia (UNSW 1999) and The Case for an Australian Bill of Rights: Freedom in the War on Terror (UNSW 2005). Those who oppose such charter argue that the democratic process is the best bulwark against government abuse, and that a strong textual guarantees could undermine democratic legitimacy by giving unelected judges excessive powers. At least one critic proposes that adoption of a written bill of rights could result in reducing, rather than expanding, the scope of rights protections afforded under Australia’s constitutional system. Fleur E. Johns, “Human Rights in the High Court of Australia, 1976-2003: The Righting of Australian Law?” 33 Federal Law Review 287 (2005): 287-331. Opponents to written rights guarantees prominently include two present High Court justices, Callinan and Kirby. Justice Ian David Francis Callinan, “For and Against Constitutional Rights,” Address to the Bar Centenary Conference 24-27 April 2003, Cairns, 1, 2. (available at http://www.conservative.com.au/articles/pdf/constitutional %20Rights.pdf.) Callinan allies himself with American Supreme Court Justice Scalia in this regard, just as George Winterton – another opponent of codified rights – states his sympathy with Justice Byron White’s majority opinion in Bowers v. Hardwick. Callinan, id. at 19; Winterton, “Extra-Constitutional Notions in Australian Constitutional Law,” 16 Federal Law Review 223, 234 (1986). These appeals to American jurisprudence are somewhat confusing, since Scalia and White were both talking about the necessity of confining rights guarantees to the terms of the written text, not questioning the
But noting the absence of a written set of constitutional rights guarantees is only the first step of any inquiry into the character of Australia’s constitutional rights. A constitution of rights, like a constitution of powers, can take several forms; to assume that only a written text can satisfy the definitional requirements of a “constitution” would be a case of American parochialism. One can imagine three templates for the relationship between text and convention in the rights context: a written constitutional text that is the exclusive statement of constitutionally guaranteed rights; a written constitution that includes guarantees of rights but that coexists with unwritten constitutional conventions that supplement or conflict with those guarantees; or an entirely unwritten constitution that depends solely on conventions to establish rights guarantees. To assume that constitutional rights do not exist unless they are enforced through judicial review would likewise be parochial. One can also imagine any number of institutional arrangements to guarantee rights, including James’ Madison’s proposed Council of Revision. It is noteworthy that in modern times and in western nations, courts have consistently emerged as the key actor in defining and enforcing constitutionally guaranteed rights; to some extent, at least, Australia is unusual for the depth of its resistance to this trend. Nonetheless, to be meaningful in a comparative context, the term “constitution” must be understood to include both text and conventions. As noted earlier, in the case of a genuine rather than a putative constitution these elements express the set of widely shared norms that constitute a nation’s constitutional ethos.

This article focuses on the relationships between Australia’s rights constitution, desirability of such a text in the first place. Combining a strict textualism with the absence of any textual rights guarantees, of course, yields the conclusion that there are – and should be -- no constitutionally guaranteed rights at all. This is precisely the position that Callinan embraces as a version of the classic British theory of parliamentary supremacy – Callinan cites A.V. Dicey at the beginning of his remarks (id. at 1) – but we find it peculiar that an American jurisprude should be cited in support of such a position. See also Kirby, “A Bill of Rights for Australia - But do We Need It?” paper delivered in Brisbane to the Queensland Chapter – Young President’s Association, 14 December 1997, available at http://www.lawfoundation.net.au/ljf/app/id=A60DA51D4C6B0A51CA2571A7002069A0.

See generally, Alec Stone-Sweet, Governing With Judges: Constitutional Politics in Europe (Oxford 2000), comparing France, Germany, Italy, Spain and the European Union; Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asia (Cambridge 2003), looking at Mongolia, Korea, and Taiwan; and Ran Hirschl, Toward Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard 2004), comparing Canada, Israel, New Zealand and South Africa. Each author arrives at a different combination of description and explanation: Stone-Sweet focuses on an institutional analysis, Ginsburg proposes a theory of “political insurance” in which minority groups attempt to secure rights against the threat of future majoritarian tyranny, and Hirschl – taking a position that is in some ways the direct opposite of Ginsburg’s -- posits the move toward “juristocracy” as an attempt by elites to secure their interests against the threat of democratic politics. Interestingly, all of these explanations have been offered in historical accounts of the formation of the U.S. Constitution. See essays by Isaac Kramnick, Stephen E. Patterson, Gordon S. Wood, Jan Lewis, and Jack N. Rakove in Edward Countryman, ed., What Did the Constitution Mean to Early Americans? (Boston 1999). Regardless of their disagreements, however, all the authors mentioned note a move toward reliance on written constitutional texts authoritatively interpreted by judges, as do all the authors considering the novelty of the American constitutional project in the 18th century.
comprising a written text and a set of constitutional conventions, and the underlying constitutional ethos that appears in Australia’s constitutional rights jurisprudence. To sharpen our focus, we compare Australian constitutionalism to three alternative models – the United States, the U.K., and Israel – and conclude that the Australian model is fundamentally unlike any of them. Moreover, we argue that the Australian High Court’s discovery and enforcement of constitutionally guaranteed rights reveals a fundamental contradiction in Australian rights constitutionalism. In our previous article, we found that the conventions shaping routine political practices are not based on the constitutional text, but give way to the text when subjected to extraordinary stress. Here we find essentially the opposite case. We conclude that the High Court’s jurisprudence of implied rights is ungrounded in the constitutional text and fundamentally inconsistent with established conventions, and is instead based on a direct appeal to constitutional ethos. When the High Court finds procedural and substantive rights today, it acts without support from either textual or conventional sources. In other words, where Australia’s powers constitution is an expression of a constitution without constitutionalism, Australia’s rights constitution presents the opposite case: constitutionalism without a constitution. As in the case of powers, with respect to rights we ultimately conclude that Australia can be reasonably said to have no constitution.

Our analysis proceeds in three parts. In Part I, we summarize three models of constitutionalism using the British, American, and Israeli systems as our cases. In the U.S., a written constitution, enforced by strong judicial review, imposes explicit limits on government power. Where conventions appear, they generally take the form of rules for the interpretation and construction of the text, particularly where questions of rights are concerned. In Britain, there is neither a single constitutional text nor a theory of judicial supremacy. The “constitution” includes a series of historical documents, starting with the Magna Carta, which define the overall structure of the national government but do not circumscribe parliamentary authority. Instead, the “Westminster” model of British constitutionalism vests ultimate authority to Parliament itself. As a result, judicial review is not a significant element of the British constitutional system. British constitutionalism distinguishes sharply between laws and conventions. Conventions, while understood as entirely obligatory, are not enforceable by courts. Instead, they operate as normative constraints on the behavior of members of Parliament. In Israel, finally, a constitutional text is emerging piecemeal, in the form of “Basic Laws” enacted by the Knesset. These laws are best understood as quasi-constitutional, because they limit subsequent lawmaking but are also subject to change by future legislatures, in some cases without supermajority requirements. In Israel, judicial review has emerged through an exercise of bootstrapping, through which the Israel Supreme Court has taken on the role even though the source of its authority remains somewhat mysterious. While historically the Supreme Court has shown a willingness to find rights guarantees in sources outside the constitutional text, since 1992 the creation of additional Basic Laws has provided a textual basis for Israeli rights jurisprudence. As a result, the fiercely autonomous court has expanded the scope of individual rights through a broad reading of these quasi-constitutional texts, largely moving away from earlier appeals to extra-constitutional sources. While these three systems of
rights protections vary in important ways, each is internally consistent and satisfies the criteria for a genuine constitutional system.

In Section II, we return to the Australian example, focusing on two elements of constitutional jurisprudence. We first examine the development of constitutional interpretation generally. Historically, the High Court has moved from a strictly textualist approach, that insists on something like a literal reading of the words of the text, to a muscular originalism that attributes great importance to what the constitutional framers intended to do (rather than what they wrote down) and the underlying ethos that was reflected in their actions. This latter strategy, which we call “Founders’ Originalism” (to distinguish it from more familiar American versions of the phenomenon) appears most strongly in the jurisprudence of rights. With respect to the jurisprudence of powers, it remains the case that the High Court remains committed to a textualist approach, in which the text is the starting point of analysis. In the jurisprudence of constitutional rights, however, the High Court has rejected any semblance of textualism, and is willing to find implied rights that are unconnected to any constitutional language but rather grounded in background understandings of the constitution’s meaning and purposes. The rights that have been discovered in this way are extremely narrow by comparison with those identified in other constitutional systems; we will argue that they are also extremely insecure.

In Section III, we argue that this creates a unique and unstable constitutional arrangement. We identify several basic risks inherent in the Australian system of constitutional rights protection. With respect to rights guarantees, to repeat, Australia has “constitutionalism without a constitution.” That alone casts doubt on the constitutional status of rights guarantees, since there is no clearly identifiable “constitution” that serves as the reference point for the discussion. In addition, the inconsistency in the way the relationships among constitutional text, convention, and ethos are treated in different contexts raise fundamental question about the nature of Australian constitutionalism. Why should the approach to constitutional rights jurisprudence not spill over into the treatment of government powers, or vice versa? A consideration of Australia’s rights constitution returns us to our earlier discussion of Australia’s powers constitution. How do rights guarantees fit with a powers constitution based on an attempt to combine a written constitutional text with directly contradictory constitutional conventions? How – on the basis of what principles – do we determine which among the conflicting mandates of text, convention, and ethos should govern the outcome in a particular case?

These considerations lead us to identify a serious risk inherent in the Australian model of constitutionalism. The fear is that the basic constitutional arrangements are likely to fail precisely when they are most needed. Australians are comfortable (to the extent that they are) with the system of constitutional rights protections because they share an assumption that government actors will voluntarily restrain themselves from acting in ways that violate the broad shared understandings of “how things are done” in Australia. This

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7 Indeed, as we discussed in our previous article, it is precisely the reliance on strict textualism that leads to the result that at moments of crisis the constitution becomes a weapon rather than a channeling device for political conflict.
basis for securing rights is precisely analogous to our observation in the previous article that the Australian political system depends on the good will of political actors and their willingness to be bound by conventions rather than employing the full range of tactics permitted by the constitutional text. Particularly in an era of heightened concerns about security, it seems likely that the tradition of textual supremacy familiar from Australian powers constitutionalism is likely to be invoked against the assertion of extra-constitutional rights claims as well as against conventions of responsible government. Such a situation would be the equivalent for Australia’s rights constitution that the 1975 crisis presented for Australia’s powers constitution: a moment of crisis during which the contradictions that are finessed during ordinary periods can no longer be ignored.

In conclusion, looking at both the powers constitution and the rights constitution, we will argue that Australia’s system is an untenable basis for constitutional government. In the American understanding, one role of a written constitution is to serve as a buffer between popular opinion and outright rebellion; no matter how odious one might find any group of elected government actors, one can rest on the assurance that their powers are checked and their terms are limited. A commitment to the Constitution’s binding character supersedes views about the merits of any particular set of incumbents, and relieves pressures that otherwise might undermine the legitimacy of the government. In the Australian case, the political buffering mechanism is not found in the written constitutional text; with respect to powers, it is found in unwritten constitutional conventions, and with respect to rights it appears in the judicial articulation of the underlying constitutional ethos. These conventions and judicial constructions purport to be binding, but in practice they can be dispensed with at will by political actors. Government officials are free to disregard political conventions, and the discovery of extra-constitutional rights by one group of judges can be dispensed with by future judges by simply appealing to some other aspect of Australian values or just because in the absence of any reference to a constitutional source there is no particular reason to remain bound by earlier precedents. We conclude, in other words, that the Australian constitutional system with respect to both powers and rights reflect an arrangement that contradicts the premise of a written constitution in the first place. As a result, while the Australian government may be perfectly stable, the system of Australian constitutionalism is not.

I. Three Models of Constitutionalism: Text, Convention, and Practice.

A. The Standard American Model: A Written Constitution, Judicial Review, and Constitutional Law

The standard American model of constitutionalism is probably the best-known. By “standard” we mean only that we are describing the putative, formal system of American
constitutionalism, which features a single, authoritative written text; robust judicial review of legislation; and a clear (although by no means uncontested) understanding that the constitution is higher law capable of limiting government action. In all of these elements, the fact of the written-ness of the text is crucial; in American constitutionalism there is a close relationship between the status of law and the existence of a written text.

The importance of a written text was emphasized in the first clear judicial statement of modern American constitutionalism, John Marshall’s 1803 opinion in Marbury v. Madison. Marshall’s was not the first version of American constitutionalism articulated by members of the Supreme Court. In a series of cases decided in the 1790s, several Justices – notably James Wilson and Samuel Chase -- had shown a willingness to overturn laws based on their view that the Supreme Court was the arbiter of a pre-constitutional social contract. In this view, popular sovereignty was the grounding norm of American constitutionalism, and it was the court’s role to correct the government any time it acted in a way that seemed contrary to that principle. By the time of Marbury, political opposition from Anti-Federalists to such an expansive view of the authority of the largely Federalist judiciary was reaching a crisis point, illustrated by the attempted impeachment of Justice Chase in 1804.

Marshall’s changes to American constitutional doctrine were directed toward narrowing rather than expanding the scope of judicial authority, and toward emphasizing an understanding of the constitutional text as a legal document rather than as the expression of a political compact. To accomplish these moves, Marshall made the fact of a written constitution a central element of his proposition that unconstitutional laws are void.

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8. In a moment of marked circularity, in the Supremacy Clause of Article VI the U.S. Constitution defines itself as the “supreme law of the land,” followed by international treaties and federal statutes.

9. See, for example, Calder v. Bull, 3 U.S. 386 (1798), in which Justice Samuel Chase rejected a law passed by the Connecticut legislature: “An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded . . . . A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it Justice Iredell concurred in the outcome, but denied the validity of the reasoning. In his view, the question for a court was not the meaning of the “social compact,” but only the authorization granted to the legislature by the state’s constitution. “If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. . . . If the Legislature pursue the authority delegated to them, their acts are valid. If they transgress the boundaries of that authority, their acts are invalid.” In this way, Marshall’s standard American version is closer to Iredell’s positivism than to Chase’s search for underlying Grundnormen.

“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.”\(^{11}\) *Marbury* anchored the judiciary’s authority in the role of judges as interpreters of law – “It is emphatically the province and duty of the judicial department to say what the law is,” the most famous line in the case – and the written text as the source for that law’s content. When statutes conflicted with the constitution, courts were obliged to enforce the Constitution and strike down the law; to say otherwise would be to deprive the Constitution of its most powerful characteristic, its written-ness. “That it thus reduces to nothing what we have deemed the greatest improvement on political institutions – a written constitution – would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence.”\(^ {12}\)

In the very breath in which he introduced the idea of robust judicial review to enforce the written constitutional text as supreme law, Marshall also introduced the limiting principle of that authority, by declaring some actions as beyond the scope of judicial review. “The province of the court is, solely, to decide on the rights of individuals . . . . Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”\(^ {13}\) Thus in the standard American model, written-ness is a necessary but not sufficient condition for judicial enforcement. Not only judicially enforceable constitutional provisions, but also political conventions binding on actors in the other branches of government are to be found in the text; only those portions of the text that are “legal” are judicially enforceable. This is not to say that the enumeration of political conventions in the text is exhaustive, but the fact that written-ness extends to the identification of conventions as well as judicially enforceable “laws” is a distinctive element of American text-based constitutionalism.

*Marbury v. Madison* is probably the best-known case in the entire canon of American constitutional law. We have no intention of exploring its meaning any more than to emphasize the importance of a written constitutional text, the status of certain portions of the Constitution as legal and others as political, and the appeal to the characterization of at least portions of the constitutional text as “law” to ground the authority of courts to engage in judicial review. Most important, the written constitutional text is universally understood as the source, and the sole source, for binding higher law in the American legal system, and the sole source of authority for the national government.\(^ {14}\) This observation is particularly true with respect to America’s rights constitution: in all the times in which different justices, with different agendas, have sought to identify principles of substantive due process or other

\(^ {11}\) *Marbury v. Madison*, 5 U.S. 137, 177 (1803), emphasis added.
\(^ {12}\) *Marbury*, 5 U.S. at 178.
\(^ {13}\) *Marbury*, 5 U.S. at 169-70.
\(^ {14}\) See, e.g., concurring opinion of Justice Rehnquist in *Goldwater v. Carter*, 444 U.S. 996 (1979), arguing that questions concerning relations among the branches of government are political and hence nonjusticiable in the absence of an explicit constitutional mandate for court enforcement.
unenumerated rights, they have always come back to the necessity of finding a basis in the written text for the liberties that they want to see protected—most commonly in the term “liberty” in the Due Process Clause of the XIVth Amendment. In American rights constitutionalism, arguing that a right or national government power is unconnected to the constitutional text is an accusation, not a legitimate theory of justification. And the emphasis on the importance of the existence of the Constitution as a single, authoritative, written text appears consistently in the Court’s justifications for its continued exercise of the power of judicial review. Commentators as well as justices have recognized the central

15. So in *Lochner v. New York*, 198 U.S. 45 (1905), the right to contract one’s labor freely was found to inhere in the term “liberty” in the XIVth Amendment, and other rights have been found on the same basis in numerous substantive due process cases thereafter; in *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas found a right to privacy in “penumbras and emanations” of the 1st, IVth, Vth and IXth Amendments; in *Saenz v. Roe*, 526 U.S. 489 (1999), a right to travel was found to inhere in the words “privileges and immunities,” and so on. Remarkably, even the fact that constitutional text itself seems to specifically invite judges to look for extra-textual rights in the IXth Amendment has not altered this pattern, as justices have repeatedly denied the possibility of using that provision as the basis for a substantive right. The IXth Amendment provides “the enumeration of rights in this document shall not be construed to disparage other rights retained by the people.” The phrase “shall not be construed” appears to be directed specifically at judges, but if the intent was to persuade those judges to use the IXth Amendment as a basis for the protection of rights whose origins lay beyond the confined of the constitutional text it has been noticeably unsuccessful. Robert Bork has famously described the IXth Amendment derisively as an “inkblot,” Justice Scalia has declared that “the Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them,” and no case has ever been decided on the basis of the IXth Amendment. *Troxel v. Granville*, 530 U.S. 57 (2000) (Scalia, J., dissenting); 1 Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary 117, 289 (1989).

16. The case is more complex with respect to American powers constitutionalism. For one thing, a number of fundamental constitutional doctrines are drawn by implication from the “general structure” of the text rather than from particular provisions. These include doctrines of enumerated powers, checks and balances, separation of powers, “dual sovereignty” and “Our Federalism,” and even the commitment to textualism itself, none of which are mentioned anywhere in the text of the Constitution and several of which are arguably in tension with its provisions as written. In addition, in American powers constitutionalism there are a few areas in which the commitment to textualism is abandoned entirely. In *United States v. Curtiss-Wright*, 299 U.S. 304 (1936), Justice Sutherland proposed that where foreign affairs were concerned, the principle of textually enumerated powers does not apply, and since those powers were elements of the federal government’s external sovereignty, it followed equally that they must vest in the executive. From these considerations, Sutherland concluded that the President has inherent authority over foreign affairs, inherited directly from the Crown of England and neither dependent on the Constitution nor—less clearly—subject to alteration by its provisions. This principle was largely abandoned in later cases (see, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981)), but it occasionally makes an appearance (see, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), holding that the reference to treaties in the Constitution is not exclusive, so that the ratification of an extradition treaty with Mexico did not prohibit the Reagan administration from sending agents across the border to kidnap a suspect.) Notably, ideas of inherent executive authority have been featured in some of the Bush administration’s explanations for the president’s assertions of emergency power and, to a lesser extent, in the administration’s embrace of the theory of the “unitary executive.”

A second example of a possible exception to the American principle of textualism is the Rehnquist Court’s treatment of the XIth Amendment, which various justices have read to mean “not
importance of the written text to the understanding of American constitutionalism. In H.L.A. Hart’s terms, the existence of the written text provides the constitutional “rule of recognition”; “what is crucial is the acknowledgment of reference to the writing or inscription as authoritative, i.e. as the proper way of disposing of doubts as to the existence of the rule.” As William Harris nicely puts it, “within [American] constitutionalism . . . the sovereign acts of will and reason become the constitutional practices of writing and reading.” The written form of the constitutional text, in this view, indicates that “governmental power is in its essence derivative” and “that it must have justification and

what it says but rather the propositions for which it stands,” a “background understanding” that, according to the majority in a series of decisions, was imperfectly recorded in the constitutional text, leaving it to the justices to correct the omission. Specifically, where Article III of the U.S. Constitution provides that federal courts shall have jurisdiction over “cases . . . involving states and citizens of another state,” that text should have been understood all along to mean “shall not have such jurisdiction except by the consent of the affected state,” a singularly sloppy example of erroneous drafting. As a result, according to the majority of the justices, when Justice Wilson writing for the majority in 1793 concluded that federal courts had jurisdiction to hear a lawsuit brought against the State of Georgia (Chisholm v. Georgia, 2 U.S. 419 (1793)), Wilson was in error. The XIth Amendment was then adopted to correct that error. Unfortunately, the drafters of the XIth Amendment proved no more competent than the members of the committee who had drafted Article III; as a result, it has been necessary for courts to similarly correct the error of those drafters. “[W]e have understood the Eleventh Amendment to stand not so much for what it says but for the presupposition . . . which it confirms,’ is how Chief Justice Rehnquist explained the situation in 1995. Seminole Tribe v. Florida, 517 U.S. 44 (1995). In Justice Kennedy’s words, “the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment,” but is rather “a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.” Alden v. Maine, 527 U.S. 706 (1999) see also Federal Maritime Commission v. South Carolina Ports Authority, 122 S. Ct. 1864 (2002). Thus in the case of sovereign immunity, it is not the text, but the “background principle” which the text was supposed – but, sadly, failed – to express that federal courts are empowered to enforce, while in the case of the Ninth Amendment no such background principle can be discovered.

This somewhat lengthy discussion is included because we find the treatment of sovereign immunity and the idea of “inherent” executive authority to be profoundly aberrational cases in the scheme of what we are calling the standard American model of constitutionalism. Interestingly, in both of these exceptional cases, the outcomes have depended on moving away from the ideal of popular sovereignty in favor of finding sovereignty in the states or in the person of the president, both of which are more consistent with the British model of constitutionalism discussed in the next section than with the standard American model. These cases may, therefore, be understood not merely as aberrations or exceptions but as elements of a genuine counter-narrative challenging the standard American model. Since our concern with American constitutionalism is merely to present an ideal case that can be compared with Australian practice, we do not find it necessary to explore the question of the existence of alternative American models further. Nonetheless, it must be conceded that in American constitutional practice, too, it is sometimes the case that “the text does not mean what it says.”

17 One notable exception is David Strauss’ argument that the accretion of precedents interpreting the U.S. Constitution creates a system of constitutional common law in which no direct reliance on the written text is either meaningful or necessary. (Strauss, “Common Law Constitutional Interpretation,” 63 University of Chicago Law Review 877 (1996). As noted earlier, U.S. courts have not shown any willingness to embrace theories of this kind, except with respect to the doctrine of stare decisis. That doctrine, however, remains an exception to the textualist rule rather than the other way around.
hence accept limits, from a separate ground of broader authority.” In Keith Whittington’s words, the “law of the land” requires a written text. “[O]nly a fixed text can be adequately ratified, that is, legislated into fundamental law. In order to create law, the legislating body must be able to demonstrate its will and have an instrument that its members can examine and to which they can eventually give their assent.” Whittington goes much further, arguing that the fact of a written text requires a form of originalism in its interpretation. Harris, by contrast, reaches the opposite conclusion. “Once written,” he writes, “a work leaves the control of its drafters. The words of the Constitution, once they began their work of bringing a polity into force, lost their bond with the thoughts of the framers and established a bond with the political order.” Other writers have similarly taken both positions – that the fact of a written text requires or precludes an appeal to some original understanding or intent – while still others have suggested that the attempt to derive a mode of interpretation from the fact of writing is a fruitless endeavor. But the basic elements of the standard American model of constitutionalism emphasizing an authoritative written text is both well understood and, with rare exceptions, accepted.

B. The Standard British Model: Unwritten Constitutional Law, Constitutional Conventions, and Legislative Supremacy

The American model is neither the only nor the earliest version of constitutionalism. By comparison, consider the sketch of the British “Westminster” model of constitutionalism described in Albert Venn Dicey’s classic 1885 work, Introduction to the Study of the Constitution. Dicey’s work remains the basic statement the standard British model of constitutionalism.

19 Harris, The Interpretable Constitution, at x, 84
20 Whittington, Constitutional Interpretation, at 55.
21 Whittington, Constitutional Interpretation, Chapter III.
22 Harris, The Interpretable Constitution, at 161.
The term “constitution” as it is used in British and American writing has two very different and distinct understandings. In American usage, the term refers to a written text that has the character of supreme law and serves the dual functions of defining and limiting the system of state power. The word “constitution” thus refers to a specific object (the text) whose relation to the system of government is prescriptive; the American constitution defines rights, the elements of the apparatus of government, and the powers that apparatus may employ. The traditional British understanding is entirely different. In its oldest usage, the term “constitution” means the system of government itself, so that the “British constitution” is synonymous with “the system of government in Britain.” This, for instance, is the use of the word that resulted in the translation of the Greek word politeia as “constitution” in Aristotle’s Constitution of Athens. The term “constitution” thus at first blush appears in a descriptive rather than a prescriptive mode, a positivistic identification of prevalent practices and understandings rather than a statement of progressive aspiration or commitment to conservation.

In Britain, the “constitution” includes written texts – usually identified as the Magna Charta, the Declaration of Rights of 1689, and the Acts of Unity of 1706-1707 (in England and Scotland, respectively) and the Act of Settlement of 1701 – but those texts serve solely to identify narrow limitations to the scope of legitimate state action and to provide a partial description of government structure. The texts provide an incomplete definition of rights, an even more incomplete description of the structure of government, and say almost nothing about government powers. The bulk of the British constitution – structure, powers, and rights – are defined extra-textually. In this sense, Britain does not have a written constitution, despite the fact that its constitution includes written elements. Moreover, those written documents are not clearly “constitutional” in the sense of defining a supreme law alterable only through specified amendment procedures different from those applicable to the enactment of ordinary legislation.

The difference between textual and non-textual elements is explored most clearly in Dicey’s distinction between laws and “conventions,” a category that has no perfect counterpart in the American context. “Law,” according to A.B. Dicey, refers to principles that can be enforced by courts, while “conventions” refers to rules that political actors accept.
as binding on themselves.\textsuperscript{30} There is a parallel here to the political question doctrine of American constitutional law; indeed, Dicey distinguishes conventions from laws by stating that their subject “is not one of law but of politics.”\textsuperscript{31} But Dicey’s conventions are quite different from American political questions. In the American understanding, political questions are those concerning elements of the constitutional text that relate to the operations of government. In Dicey’s terms, constitutional conventions define the supreme law of the land, to which legal “laws” – the sort enforceable by courts – must be accommodated. In a very real sense, then, in Dicey’s version conventions are the constitution.

This observation raises a critical point about the relationship between constitutional text and governing practice. Consider the three principles that Dicey identifies as derived from constitutional convention: “the legislative sovereignty of Parliament,” “the universal rule or supremacy throughout the constitution of ordinary law,” and “the dependence in the last resort of the conventions upon the law of the constitution.”\textsuperscript{32} The sovereignty of Parliament is perhaps the most alien to American notions of constitutionalism. In the American understanding, the Constitution is universally understood to be the expression of popular sovereignty, and to reflect the sovereignty of the People over the government. This basic social contractual idea, in one form or another, is the source of the principle of enumerated powers; the federal and state constitutions, in various ways, reflect the powers that the People have chosen to bestow on their governments for their own benefit.\textsuperscript{33}

By contrast, in the British understanding Parliament is sovereign. No one – no other branch of government nor other political authority – can supersede the authority of Parliament, even on the basic question of the reach of its own powers.\textsuperscript{34} Dicey illustrates this point with an event that would be utterly alien to the American constitutional tradition. In 1694 Act limited Parliamentary duration to three years. In 1716, Parliament adopted the Septennial Act, which extended the term of office to seven years, including the terms of the then current members of the House of Commons. Thirty-one members of the House of Lords protested, citing popular sovereignty, that elected representatives lacked the authority to extend their own terms in the name of popular sovereignty.\textsuperscript{35} The House of Commons was

\begin{itemize}
\item \textsuperscript{30} “[T]he rule which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character. The one set of rules are in the strictest sense ‘laws,’ since they are rules which . . . are enforced by the Courts . . . . The other set of rules consist of conventions, understandings, habits, or practices which, thought they may regulate the conduct of the several members of the sovereign power . . . are not in reality laws at all since they are not enforced by the Courts.” Id., at 23.
\item \textsuperscript{31} Id., at 30.
\item \textsuperscript{32} Id., at 34.
\item \textsuperscript{33} In this regard, see Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill, NC 1998).
\item \textsuperscript{34} “The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.” Dicey, Introduction to the Study of the Law of the Constitution, at 38.
\item \textsuperscript{35} “[I]t is agreed,” wrote the aggrieved peers, “that the House of Commons . . . are truly the
unmoved, and the law remained in force. For Dicey, this outcome was a perfect demonstration of the convention of Parliamentary sovereignty. “That Act proves to demonstration that in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the state.”

Similarly, Dicey proposed that the only limitations on Parliament’s ability to interfere with private property – the only enforceable constitutional “rights,” in American terms – were those that Parliament chose to accept at any given moment. Even the national boundaries are within the control of the sovereign legislature. “[T]he Parliaments both of England and of Scotland did, at the time of the Union, each transfer sovereign power to a new sovereign body, namely, the Parliament of Great Britain. This Parliament, however, just because it acquired the full authority of the two legislatures by which it was constituted, became in its turn a legally supreme or sovereign legislature, authorised therefore, though contrary perhaps to the intention of its creators, to modify or abrogate the Act of Union by which it was constituted . . . . The statesmen of the two countries saw fit to constitute a new sovereign Parliament, and every attempt to tie the hands of such a body necessarily breaks down.”

The idea that a branch of government can determine its own powers is reflects a descriptive rather than prescriptive model of constitutionalism. It is also, it seems fair to observe, nearly incomprehensible in the American constitutional model.

The role of the judiciary in this model is curious. Since the definition of rights is a matter of convention rather than law, courts have no role in enforcing limitations on government; the only tribunal capable of reviewing Parliament’s actions is Parliament itself. On the other hand, the way we know whether something is a convention rather than a law is by virtue of the fact that courts will not enforce it. In other words, courts serve a meta-judicial function in which they decide what rules qualify as “laws” and “conventions,” and then, in their more immediate role, adjudicate the meaning of “laws” and provide for their enforcement.

The restraints that exist on Parliament come from two sources: politics, and ordinary law. Regarding politics, Dicey declares that “the essential property of representative government is to produce coincidence between the wishes of the sovereign and the wishes of the subjects.” For example, Dicey proposes that George III acted “constitutionally” in dissolving Parliament in 1784, because his action was in accordance with popular will. It

representatives of the people, which they cannot be so properly said to be, when continued for a longer time than that for which they were chosen; for after that time they are chosen by the Parliament, and not the people, who are thereby deprived of the only remedy which they have against those, who either do not understand, or through corruption, do willfully betray the trust reposed in them.” *Id.*, at 44.

Id., at 44-45.

“The statute-book teems with Acts under which Parliament gives privileges or rights to particular persons or imposes particular duties or liabilities upon other persons. The is of course the case with every railway Act . . . .” *Id.*, at 47.

Id., at 66-7 n.

“[H]e believed that the nation did not approve of the policy pursued by the House of Commons. He was right in this belief. No modern constitutionalist will dispute that the authority of
is in this crucial sense that British constitutionalism is descriptive rather than prescriptive, a fact which derives directly from the absence of reliance on any authoritative written text. The second constraint is the continued existence of the common law. “Where . . . the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the rights is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation. . . . The constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.”40 To an American reader, these seem curious sorts of limit. Dicey has already declared the authority of Parliament to alter the terms of office of its members, which would seem to significantly weaken the idea of elections as a check on government, and common law “rights” were subject to being superceded by ordinary acts of legislation. Indeed, Dicey is quite clear that the reliance on an unwritten constitution is directly connected to the fact that the convention of parliamentary supremacy is the ultimate constitutional principle. “[T]he constitution has never been reduced to a written or statutory form because each and every part of it is changeable at the will of Parliament.”41

Modern British practice does not square perfectly with Dicey’s description. For one thing, courts have asserted much greater authority in reviewing executive actions than in reviewing Parliamentary enactments. British courts exercise broad discretion, in fact, in invalidating executive actions under “heads” that encompass many of the elements of American due process; arguably, indeed, in some cases British courts are less deferential to executive authority than their American counterparts.42 The basic organizing concept for these bases for judicial review is the principle of ultra vires, that the government is acting beyond the scope of its legitimate authority. The limits of that authority, however, are drawn from a variety of sources, including common law and political first principles, not from a constitutional text.43 Thus while some British writers point to documents such as the Magna Carta to argue that Britain effectively has a kind of written constitution, there remains no counterpart to the American ideal of an authoritative text that empowers courts to engage in judicial review. In addition, British law has increasingly come to be subject to judicial review to test its consistency with European treaty law, especially the European Convention on Human Rights. This emerging system of written constitutionalism exists

the House of Commons is derived from its representing the will of the nation, and that the chief object of a dissolution is to ascertain that the will of Parliament coincides with the will of the nation.” Id., at 425-26, 430.
40 Id., at 81, 197.
41 Id., at 86.
42 “An executive act is illegal if it exceeds the bounds of the statutory power granted by Parliament. It is irrational if no reasonable executive could reach that decision. It is procedurally unfair if it violates norms of natural justice, including notice, reason giving, and consideration of all relevant factors.” Lori Ringhand, “Fig Leaves, Fairy Tales, and Constitutional Foundations: Debating Judicial Review in Britain,” 43 Columbia Journal of Transnational Law 865 (2005).

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alongside – and coexists uneasily with – the standard British model described by Dicey.\footnote{44}

It should be noted that these non-Diceyan elements of modern elements of British constitutional practice relate to the protection of individual rights. When it comes to the question of the powers and design of government, Parliament retains its supremacy, a fact illustrated by the Scotland Act of 1998 and the Government of Wales Act of 1998, in which parliamentary authority devolved from Westminster to the two states’ new national parliaments.\footnote{45} At its base, British constitutionalism retains a conception of sovereignty different from the American commitment to popular rule, despite similarities in the protections afforded individual liberties.\footnote{46} The British constitution’s protection of rights is political rather than legal,\footnote{47} and the British constitution remains essentially unwritten.

C. The Israeli Model of Statutory Constitutionalism: Written Law and Judicial Review Without a Constitutional Text

\footnote{44} See David Jenkins, “From Unwritten to Written: Transformation in the British Common-Law Constitution,” “36 Vanderbilt Journal of Transnational Law 863 (2003). The European Convention on Human Rights, however, only became binding on Britain by virtue of Parliament’s enactment of the Human Rights Act 1998; thus while the incorporation of European law into British law is significant for the written-ness of protections for individual liberty, it is not clear that it does much to alter the constitutional arrangement. The Human Rights Act, which went into effect in 2000, “requires the Government to draw Parliament’s attention to any new draft legislation which is likely to compromise civil liberties” and “directs the courts to interpret legislation compatibly with human rights whenever this is possible.” In the event a court determines that a law cannot be reconciled with principles of the ECHR, the Act requires the issuance of a declaration of incompatibility may be issued, which triggers a fast-track procedure for the statute’s reconsideration or amendment. As Lairg observes, although the Act does not give British courts the power of judicial review, as a political matter “the issue of a declaration of incompatibility is very likely to prompt the amendment of defective legislation. . . . Consequently, while British courts will not possess the power to strike down legislation which is incompatible with human rights, their power to issue a declaration of incompatibility is substantial.” Lairg, “Sovereignty in Comparative Perspective” at 18. See, generally, Lord Irvine of Lairg, “The Development of Human Rights in Britain Under an Incorporated Convention on Human Rights,” 1998 Public Law 221 (1998). Moreover, Parliament can, presumably, revoke the Human Rights Act of 1998 in the same manner that it can alter any other law. Remedies would still be available through the European Court of Human Rights; as noted earlier, however, Parliament has the authority to alter Britain’s status with respect to that law, as well. For an argument that the Human Rights Act leads to a “strong form” of judicial review in practice, see Mark Tushnet, “New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries,” 38 Wake Forest Law Review 813 (2003).

\footnote{45} The division of authority between the Houses is also a matter of current controversy. The House of Lords Act of 1999 stripped all but 92 hereditary peers of their positions, an action accepted by the House of Lords; this was followed most recently by a vote in Commons in March 2007 to replace the House of Lords outright with an elected body, a position rejected by the Lords in a vote a week later. What will happen next is a matter of speculation.

\footnote{46} Lairg, “Sovereignty in Comparative Perspective,” supra.

\footnote{47} For a discussion of Britain’s “political constitution,” in contrast to the American legal model, see J.A.G. Griffith, The Political Constitution 42 Modern Law Review 1 (1979). For a review of recent literature arguing that Britain either has moved or ought to move more in the direction of court-centered legal constitutionalism, see Andrew Geddis, Some Questions for the United Kingdom’s Republican Constitution,” 19 Canadian Journal of Law and Jurisprudence 177, 179n (2006).
Dicey’s statement of British constitutionalism and Marshall’s model of American judicial supremacy are not the only ways of relating constitutional practices and constitutional texts. Efforts at constitutional design are underway across the globe, and Europeans are wrestling with the problem of crafting a constitution for a continent. A brief look at a third case provides an additional perspective to those already considered.

When the State of Israel was created in 1948, the initial expectation was that an American-style written constitution would soon follow. Difficulties soon arose, however, in the form of conflicting conceptions of the new state, primarily over the proper role of religion. In 1950, the effort to write a constitution was effectively tabled indefinitely with the adoption of the Harari Resolution, described by David Barak as “Israel’s defining act of constitutional ambivalence.” The Harari Resolution authorized the Knesset to create a set of Basic Laws which would be combined to form a constitutional text at some unspecified future date, a process that Yoav Dotan describes as the creation of an “incremental constitution.” From 1950 to 1992, the Knesset passed nine Basic Laws, some of which contained special provisions limiting their subsequent amendment to actions undertaken by outright majority vote, in contrast to the ordinary legislative procedures of the Knesset.

In 1992, however, the Knesset passed two new Basic Laws, entitled “Freedom of Occupation” and “Human Dignity and Liberty,” which reached a new level of constitutional significance. These laws were remarkable both because they articulated basic, broadly phrased commitments to liberal democratic principles and because they contained special limitations on subsequent amendment. The Human Dignity and Liberty Basic Law is in some ways extremely weak. There is no supermajority requirement for its amendment, it had no effect on previously enacted laws. On the other hand, section 8, sets down critical


For general treatments of the historical development of Israeli constitutionalism, see Dalia Dorner, “Does Israel Have a Constitution?,” *43 St. Louis University Law Journal* 1325 (1999). Barak, David, 632. The Harari Resolution stated: “The first Knesset directs the Constitutional, Legislative and Judicial Committee to prepare a draft Constitution for the State. The Constitution shall be composed of separate chapters so that each chapter will constitute a basic law by itself. Each chapter will be submitted to the Knesset as the Committee completes its work, and all the chapters together shall be the State's constitution.” Yoav Dotan, “The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel 53 American Journal of Comparative Law 293 (2005): 293-341, 295.

conditions for subsequent amendment: any amending law must be appropriate to the values of the State of Israel, must have a valid purpose, and embody changes that do not exceed necessity; similar limitation appears in Basic Law: Freedom of Occupation, section 4.53 The obvious question is, who would have the authority to determine that a subsequently enacted law is or is not consistent with these conditions? The American answer would be “the courts”; the British answer (at least in Dicey’s version) would be “the Knesset.” What would be the Israeli answer?

Even before 1992, the Israel Supreme Court had begun to develop its own body of constitutional principles, starting with its recognition of free speech rights in the landmark 1953 Kol Ha’Am decision. The source of the right in question was a written text, but it was the Declaration of Independence rather than the nonexistent constitution. Justice Simon Agranat, writing for the majority, held that “we are bound to pay attention to the matters set forth in the [Declaration of Independence] when we come to interpret and give meaning to the laws of the State, and in particular the references in the Declaration to ‘the foundations of freedom’ and the securing of freedom of conscience.”54 The relationship between Basic Laws and ordinary legislation and between the courts and the legislature was made clear in the 1969 Bergman case, in which the court struck down a campaign finance law on the grounds that it was in conflict with a Basic Law. This action by the court’s action simultaneously established the principles that the Knesset could enact Basic Laws that limited its own future lawmaking authority and that the courts had the authority to enforce that limitation.55

Later cases followed Kol Ha’Am in relying on the articulation of principles in the Declaration of Independence to recognize additional rights.56 But even though the principles

53 Interestingly, the Basic Law: Occupations does contain a supermajority requirement, reflecting the fact that it was more widely supported than the Basic Law: Human Dignity and Liberty, which was powerfully opposed by the religious parties. See discussion, Dotan, “The Spillover Effect of Bills of Rights,” at 303-04.

54 For a discussion of Simon Agranat and his role in the development of Israel’s constitutional principles, see Pnina Lahav, Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century (Berkeley 1997).

55 Bergman v. Minister of Finance and State Controller, HCJ 98/69. Speaking of Justice Landau’s decision in Bergman, Justice Zamir wrote: “The constitutional revolution did not take place now, with the enactment of basic laws concerning human rights. It began a generation ago, in the Bergman affair. As is well known, in the Bergman affair it was first determined that the Knesset may restrain itself by a provision which is protected as a basic law, and the Court may disqualify an ordinary statute which conflicts with such a provision. Justice Landau’s ruling in this affair effected a revolution because it landed on the juridical community as an utter surprise and changed the primeval order: it overturned the concept which previously was axiomatic for the standing of the Knesset, the Court and their interrelationship.” C.A. 6821/93, Ha’Mizrachi Bank v. Migdal, 49 P.D. 221, 468 (Isr. S. Ct. 1995).

identified in the Declaration were taken to be a source of judicial authority, the text itself was not treated as legally binding in the manner of a written constitution. The reliance on underlying principles to discover constitutional rights prompted some commentators to describe Israel as having developed a “common law constitution,” but a more appropriate description would be to say that the Israel Supreme Court was finding enforceable rights in constitutional conventions. On the other hand, although in Kol Ha’Am the justices asserted their authority to declare actions of the government invalid on the grounds that they violated free speech rights, they did not go so far as to assert the authority to declare duly enacted laws invalid. In effect, then, the court was asserting the existence of a parallel system of laws that coexisted with ordinary legislatively enacted statutes. In cases of conflict, however, legislation remained supreme, especially Basic Laws. The Israeli constitutional system prior to 1992 was thus both like and unlike the classic British model. The non-textual legal norms that the courts were enforcing have obvious resonances with the British system of constitutional conventions. These conventions were judicially enforceable, to be sure, but it remained the case that they operated within a system of legislative supremacy. Thus the relation between text and practice essentially followed the British model at the same time that the courts were adopting an American-style institutional role.

In 1993 the Supreme Court changed this arrangement. In Mizrahi Bank, the court found that the 1992 Basic Laws gave it the authority to review and strike down legislation, thus ushering in an era of judicial supremacy akin to its U.S. cousin. This conclusion was based on the court’s determination that the 1992 Basic Laws were not mere legislation, but constituted a quasi-constitutional text against which subsequently enacted laws would be tested. Justice Aharon Barak, writing for the majority, explained the progression as follows: “[T]he Knesset ... has the authority to frame a constitution. It exercised this power in enacting two Basic Laws covering human rights. In so doing, the Knesset created a superior constitutional norm. In the normative hierarchy that was created, the two Basic Laws regarding human rights stand above regular legislation. Conflict between a provision of one of these two Basic Laws and a provision of a regular statute leads to the invalidation of the contradicting statute.” Since that time, the Israel Supreme Court has looked to the constitutional text contained in these Basic Laws as the foundation of individual rights.

It was a dizzying exercise of judicial bootstrapping: in effect, the court declared that it had the authority to find that the Knesset had created a constitutional text that gave the court the authority to find that the Knesset had created a constitutional text. One alternative, of course, would have been to leave everything up to the Knesset. Instead, the court opted for a textualist argument, locating its institutional authority in a retroactive reading of the significance of a legal text, a move not at all dissimilar from Marshall’s in Marbury. In

58 In 1989, the court explicitly recognized Basic Laws as superior to ordinary legislation in Laor v. the Knesset Speaker, 142/89.
other words, at its most essential, what was going on in *Mizrachi Bank* was that the Israel Supreme Court chose an American style conception of court-centered, legal constitutionalism rather than a British version of legislative superiority. The role of a written text was central in this process: declaring that the 1992 Basic Laws comprised a constitutional text was essential in order to anchor the court’s authority to engage in judicial review. (It is also the case, of course, that the political branches of the Israeli government accepted the legitimacy of the court’s actions.)

Thus Israeli constitutional history can be divided into two distinct phases; one prior to 1992 that featured something close to a British-style parliamentary supremacy tempered by a judicial willingness to enforce political conventions, and another, more American-style model after 1992 in which judicial interpretation and reliance on written texts came to the forefront of the process of constitution-making.

The Israeli model of constitutional development is not the same as either the American or the British models, although of the two it is now certainly closer to the American. On the one hand, Israel did not begin with the adoption of a single, authoritative text, and even over time what emerged was not a single written constitution on the American model so much as a more British-looking combination of various foundational texts (the Declaration of Independence, the set of Basic Laws) and judicially developed principles of constitutionalism (the “constitutional laws” that Dicey described). On the other hand, Israel has not embraced a model of pure legislative supremacy, and there are no obvious analogues to the British practice of constitutional conventions. The Israeli Supreme Court operates with a clear model of judicial supremacy; if anything, there are fewer

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63 Yoseph Edrey, by contrast, makes an essentially normative argument based on the opposite conclusion; he finds that the acts of the Knesset in enacting the Basic Laws of 1992, and the subsequent actions of the Israel Supreme Court, merely ratified an existing set of political commitments which were neither created by these branches of the government nor can be altered through any political or legal process. “[T]he Israeli legal system was able to develop [protections for human rights and judicial review] based on the following: the fact that the international community’s recognition of the state of Israel came with the requirement that the state would guarantee basic constitutional human rights; the fact that both the Zionist establishment and the state of Israel accepted this resolution; and the mere fact that Israeli society considers itself democratic. If this is the case, the current Knesset may merely acknowledge or even declare these constitutional concepts, but did not create them. As such, the Knesset does not have the power to curtail, diminish, or eliminate those basic fundamental concepts.” Edrey thus describes something like a move from a British to an American model, without any change in underlying political values. The American emphasis on written-ness is particularly evident in Edrey’s treatment of the possibility of amendment. “Only the Constitutional Assembly, a body elected by Israelis for the purpose of shaping Israel’s national values and credo, might have the power to modify these concepts. Without an election of the Constitutional Assembly, Israeli society must continue, through its agents, to develop Israel’s common law constitution one step at a time” Edrey, “The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements”, at 87, 121.
constraints on Israeli courts than on their American counterparts, especially on the question of when they may exercise authority. The Court has been described as one of the most activist high courts – meaning most willing to overturn legislation approved through majoritarian processes – of any in the world.

Moreover, Israel’s courts have continued to develop constitutional rights by engaging in broad readings of the Basic Laws. A key example is the judicial enforcement of a constitutional norm of women’s’ rights. There is no reference to gender equality any Basic Law, but justices have nonetheless found equality to be an implicit and judicially enforceable element of the law. In a 1998 case, the Supreme Court ordered that gender-based classifications undergo strict scrutiny. In his opinion, Justice Michael Cheshin of the Supreme Court, declared: “[Equality is] the king of principles - the most elevated of principles above all others. So it is in public law and so it is in each and every aspect of our lives in society. The principle of equality infiltrates every plant of the legal garden and constitutes an unseverable part of the genetic make-up of all the legal rules, each and every one. The principle of equality is, in theory and practice, a parent-principle or should we say a mother-principle.” As in the American case, critics describe describes these rulings as unconnected to the text. Further, Yoav Dotan argues that the rulings demonstrate that written rights guarantees are less important than an empowered judiciary willing to seek outcomes consistent with a dominant ideology. Nonetheless, as in the American case,
Israeli justices themselves continue to appeal to a norm of textual authority. While critics assert that they are engaged in the untrammeled creation of new legal doctrines, the justices themselves insist that they are grounding their rulings in readings of the text.

In its constitutional practice, then, Israel relies neither on an unwritten set of constitutional conventions nor on an authoritative written constitutional text. Instead, the Israeli system appeals to laws enacted by the legislature but given constitutional effect, combined with extremely powerful judicial review and a highly autonomous court. Our description of this model is necessarily incomplete. In particular, the relationship between constitutional principle and political practice remains unclear, as constitutional doctrines are not drawn from a long history of political activity, but rather from background principles and basic constitutional values that have no clear textual expression. But speaking solely in terms of the relationship between text and convention, Israel represents a combination of the British and American approaches, while in the degree to which courts exercise judicial supremacy and political autonomy Israel goes farther than either of the other cases.

D. Comparing the Three Cases

These three cases define a typology of relationships between text, institutions, and constitutional status. In the standard American model, there is a single authoritative constitutional text; courts engage in robust judicial review; and the constitution has the status of law, although some of its provisions cannot be enforced by courts. In the standard British model, there is no authoritative written text. The legislature is supreme, and courts do not engage in judicial review of laws unless that review is, itself, authorized by statute (although in modern times they have exercised some review over actions of the executive). And the constitution is a political arrangement grounded in popular acceptance of conventional understandings based on historical practice. Finally, the Israeli model is grounded on a series of “constitutional statutes” that constrain subsequent lawmaking, and a powerful court that engages in expansive judicial review.

These three models provide a background against which to consider Australian constitutionalism, a fourth model that seems to contradict the basic assumptions of all the

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68 We do not intend this to be anything like a complete typology of the relationship between constitutional texts and practices, only a working model useful for the discussion of the Australian case. Michael Rosenfeld describes a typology of constitutional identities, identifying a German ethnos, a French demos, and American national and a Spanish regional models in “Constitution-Making, Identity Building, and Peaceful Transitions to Democracy: Theoretical Reflections Inspired by the Spanish Example,” 19 Cardozo Law Review 1891 (1998). More generally, see Norman Dorsen, Michel Rosenfeld, Andras Sajo & Susanne Baer, eds., Comparative Constitutionalism: Cases and Materials (St. Paul, Minn., 2003.)

69 This is not to suggest that the Israel Supreme Court acts with complete autonomy in practice, only to note the constitutional model that is at work in practices that remain subject to political and ideological limitations. See discussion in Ran Hirschl, “‘Negative’ Rights vs. ‘Positive’ Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order,” 22 Human Rights Quarterly 1060 (2000).
II. The Australian Rights Constitution

Australia is a hybrid system in two distinct senses of the term. First, the Australian system of government features a federal republic combining British-style system of “responsible government” in which government ministers are drawn from and ultimately answerable to Parliament,70 a bicameral legislature, a federal structure, and an independent judiciary with the power of judicial review. This governmental structure has been alternatively described as a “compound republic”71 or a “Washminster” system.72 Little of this system is explicitly described in the constitutional text: to take one crucial example, the term “responsible government” never appears. Article III establishes the judiciary. The High Court is given appellate jurisdiction over cases arising in state and federal courts, and such original jurisdiction as Parliament shall see fit to grant.73

The second sense in which Australia’s constitutional system can be described as a hybrid is in its combination of a single, authoritative written text with a reliance on constitutional convention. Moreover, there is a distinct division of labor between the written and unwritten portions of Australia’s constitution: the written text defines the powers of the national government, while unwritten conventions – often expressed in terms of the implications of the text – are the source for the limitations on those powers. As was noted earlier, there is no Bill of Rights or explicit rights guarantees in the constitutional text. Under Section 51 Parliament is given the authority to make laws “for the peace, order, and good government of the Commonwealth”; essentially the only textual limitations on the exercise of that authority is that taxes and duties must be uniform among the several states.74

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70 See, generally, A.H. Burch, Representative and Responsible Government: An Essay on the British Constitution (London 1964). The British model of responsible government was independently adopted by all eight of the Australian colonies between 1850 and 1900, and provides a critical background understanding to the development of the Australian constitutional in 1902. Section 64 of the Australian Constitution provides that ministers of government shall be appointed by and serve at the pleasure of the Governor-General, and that all such ministers shall be members of the Federal Executive Council (the cabinet) and of Parliament.


72 Elaine Thompson, “A Washminster Republic,” in George Winterton, ed., We, the People (Sydney, 1994): 91-112.

73 In theory, all of these cases can then be appealed to the Queen in Council with the permission of the High Court. Sec. 74. reads as follows: “No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.”

74 Sec. 51 provides: “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) Trade and
 Where judicially enforceable limitations on state power have been discovered by the High Court, those limitations have been based on appeals to principles located outside the text. In this way, Australia’s pattern is the reverse of that of the United States Constitution, in which written rights guarantees provide the starting-point for discussions of limitations on government power while background concepts of federalism, enumerated powers, and checks and balances define the lens through which the descriptions of government powers are viewed.

The lack of any specific rights guarantees in the Australian constitution is usually attributed to the Founders’ reliance on conventions and representative government to secure liberties defined in the common law against the actions of Parliament. Contemporaneous commentators explained the reluctance in political theoretical terms. Quick and Garran, in their authoritative 1901 commentary on the Australian Constitution, suggest that the key distinction between Australian and American attitudes reflected the difference between a republic and a system grounded in allegiance to a sovereign monarch. Writing in 1902, Harrison Moore observed that American rights guarantees are rooted in a “spirit of distrust” that had no place in Australia, where the “great underlying principle is that the rights of individuals are sufficiently secured by ensuring as far as possible to each a share, an equal share, in political power.”

Historically, the Australian High Court has not been eager to find constitutional rights guarantees. In the 1970s and 1980s, Justice Murphy argued tirelessly that Australia’s constitutional traditions implied the existence of substantive rights guarantees, including rights to freedom of speech, assembly, communication and travel, freedom from slavery or serfdom, freedom from cruel and unusual punishment, discrimination on the basis of sex, and “freedom for fully competent adults from subjection to the guardianship of others.” More generally, in 1982 Murphy declared the foundational principle that the Australian constitution implicitly contained “many of the great principles of human rights stated in the English constitutional instruments such as those which require observance of due process, commerce with other countries, and among the States: (ii) Taxation; but so as not to discriminate between States or parts of States: (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth.” The only limitation that appears in the remaining thirty-six provisions is that under sub-section xxxvii laws made with respect to “matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States” are to apply “only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.” No other limitations appear in the numerous sub-sections, which cover a far more specific and substantive set of concerns that the U.S. Constitution’s Article I, sec. 8, including banking (xiii), insurance (xiv), the construction of railroads (xxxii-xxxiv), the operation of mail, telephone and telegraph systems (v), marriage (xxi), divorce (xxii), old-age and invalid pensions (xiii), and “The people of any race for whom it is deemed necessary to make special laws” (xxvi), referring to the Aboriginal people of Australia.

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75 Hilary Charlesworthy, “The Australian Reluctance About Rights,” 31 Osgood Hall Law Journal 195. See also discussion at n. 5, supra.

76 Quick and Garran, The Annotated Constitution of the Australian Commonwealth, at 957.


78 George Winterton, “Extra-Constitutional Notions in Australian Constitutional Law,” 16
and disfavour cruel and unusual punishment.” But Murphy was decidedly in the minority, and his arguments appeared primarily in dicta. There were only two cases in which his arguments became the basis for majority decisions. Both cases involved the assertion of a right to interstate communication, and even there the majority opinions provide only a weak case for implied rights since most of the other justices found the source of the right in s. 92’s guarantee of “free trade” rather than in any appeal to conventions expressed in historical documents.

It is useful to distinguish between substantive and procedural rights at this juncture. The High Court has recognized a number of procedural rights derived from Article III’s creation of an independent judiciary. Where Parliament attempts to control or usurp the functions of the courts, or to deny citizens access to the courts, the High Court has shown a willingness to discover substantive limitations on government power. The broadest statement of this principle appears in the 1992 case *Leeth v. The Commonwealth*, in which Justices Mason, Dawson, and McHugh joined in the statement that “It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.”

In later comments, Justice McHugh expanded on the notion at work in the case. “The procedural rights that are arguably beyond the power of the Parliament to change may be described as those rights which courts have traditionally regarded as fundamental to the effective functioning of judicial power.” So, for example, where judicial processes are concerned, the High Court has recognized rights of public inquiry, “the application of the rules of natural justice, the ascertainment of the facts as they are . . . and the identification of the applicable law, followed by an application of that law to those facts.” As McHugh puts it, “[o]nce it is accepted that the Constitution guarantees the right of a fair trial, it must follow that Chapter III also protects litigants from legislative and other acts that might compromise the fairness of any civil or criminal trial in federal jurisdiction.”

The recognition of these procedural rights was based entirely on the existence of Article III; the High Court has never accepted Justice Murphy’s invitation to make the Magna Carta and Declaration of Rights of 1689 part of the source materials for Australian constitutionalism. As a result, perhaps, where substantive rights guarantees are concerned, the High Court has been considerably more circumspect. The same justices who eagerly embraced wide-ranging declarations of procedural values in the conduct of trials, for example, rejected arguments for a constitutional right to the equal application of the laws. In *Leeth*, Justices Deane and Toohey asserted that “the doctrine of legal equality is, to a significant extent, implicit in the Constitution’s separation of judicial power . . . . [It] is the duty of a court to extend to the parties before it equal justice, that is to say . . . . to refrain

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from discrimination on irrelevant or irrational grounds.” The majority opinion in which Justices Mason, Dawson, and McHugh joined rejected the argument, declaring that “[t]here is no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth.”

The issue in *Leeth* was whether national laws had to apply equally to citizens of different states. But geography is not the only possible basis for discrimination. In 1997, the High Court heard *Kruger v. Commonwealth*, involving a challenge to the constitutionality of the Aboriginals Ordinance of 1918 (as amended). This was the law that established the position of Chief Protector, whose powers included moving Aboriginal families and communities on to reservations and removing Aboriginal children from their families. The petitioners were a group of Aboriginals who had been removed from their families as children, and were now suing for compensatory damages.

The suit was denied on a whole series of grounds laid out in the opinion of Chief Justice Brennan. Brennan was willing to entertain the notion of a constitutional requirement that powers be exercised “reasonably,” but refused to find the actions of the Chief Protector (or, later, “Director”) “unreasonable” on the grounds that community standards of the time would not have led to that conclusion. Brennan also found that the grant of discretion to the Chief Protector was “in its terms absolute,” a grant of discretion itself justified by s. 122 of the Constitution’s authorization for Parliament to enact laws governing territories; as a result, the provisions of the remainder of the constitutional text (especially s. 51, defining the authority of Parliament) were inapplicable. Regardless, Brennan found that a violation

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82 *Leeth*, 174 C.L.R. at 486-87, 467.
83 *Kruger v. Commonwealth*, 146 A.L.R. 126
84 Relevant provisions of the statute, as amended at various times, included the following:
6(1) The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody; 7 The Director is the legal guardian of all aboriginals; 16(1) The Chief Protector may cause any aboriginal or half-caste to be kept within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein; 67(1) The Administrator may make regulations, not inconsistent with this Ordinance, prescribing all matters and things which by this Ordinance are required or permitted to be prescribed, or which may be necessary or convenient to be prescribed for the effectual carrying out of this Ordinance, and in particular.” The High Court, helpfully, determined that the statute as written did not authorize genocide. And as Chief Justice Brennan observed, “the erroneous formation of an opinion by the Chief Protector which purported to enliven the exercise of the power conferred by s 6 or by the removal regulations does not deny the validity of s 6 or of those regulations.” *Kruger*, 146 A.L.R. 126.
85 “[W]hen a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised. Reasonableness can be determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intention. Therefore, it would be erroneous in point of law to hold that a step taken in purported exercise of a discretionary power was taken unreasonably and therefore without authority if the unreasonableness appears only from a change in community standards that has occurred since the step was taken.” *Kruger*, 146 A.L.R. at ___, opinion of Brennan, J.
of a constitutional right did not create a private right of action for damages. Finally, confronted by an argument for an implied right to equal protection of the laws, Brennan pointed to the obvious contradiction with s 51 (xix) and (xxvi), which authorized Parliament to make different laws for the different races of persons who might come within its legislative jurisdiction.

Justice Dawson expanded on the idea that the Australian constitutional text is not a guarantor of “rights” at all. “Those who framed the Australian Constitution accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of parliament. Thus the Constitution deals, almost without exception, with the structure and relationship of government rather than with individual rights . . . . [T]he Constitution contains no general guarantee of the due process of law.”

Justice Gaudron, agreeing, quoted Harrison Moore’s assertion that “the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power,” at least outside the Territories. Gaudron also found that the text contains no guarantee of a general right of equal protection of the laws, only particular guarantees of specific kinds of equal treatment on certain bases in certain kinds of laws such as the requirement that taxation be equal among the various provinces. And like Brennan, Gaudron correctly noted that the constitutional text contains a number of provisions that explicitly contemplate differential treatment based on race, citizenship, and other characteristics. Given these elements of the text, it is difficult to take issue with Gaudron’s conclusion that “the Constitutional provisions which sanction and those which operate to prevent discriminatory laws so combine . . . that there is no room for any implication of a constitutional right of equality beyond that deriving from Ch III.”

Justice McHugh, citing Dawson’s analysis, similarly declared that “the Constitution contains no general guarantee

86 Kruger, 146 A.L.R. at ___, opinion of Dawson, J.
87 The significance of the caveat is unclear, as Gaudron did not find the Territories to be beyond the reach of constitutional rights guarantees; he simply found that no such relevant guarantees exist “In this regard, it is sufficient to note that the Constitution contemplates that territories will be governed by laws enacted by a Parliament comprised of persons elected by and responsible to the people; it most certainly does not contemplate that they are to be governed by an executive unanswerable either to the parliament or to the people.” Kruger, 146 A.L.R. at ___, opinion of Gaudron, J.
88 “Several provisions of the Constitution are expressly concerned to prevent discrimination: the power to legislate with respect to taxation is subject to the requirement that laws on that topic "not . . . discriminate between States or parts of States"; the power to legislate with respect to bounties is subject to the requirement that they "be uniform throughout the Commonwealth"; customs duties are to be uniform; trade, commerce and intercourse among the States are to be absolutely free, by which is meant free from "discriminatory burdens of a protectionist kind." And by s 117, "[a] subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State." Kruger, 146 A.L.R. at ___, opinion of Gaudron, J.
89 S 117 (guarantee of equality of treatment to all subjects of the Queen taken to imply unequal treatment for non-subjects); , s. 25 (members of a racial group that is disqualified from voting shall not be counted for purposes of determining representation)p; s. 127 (repealed 1967) providing that Aboriginals should not be counted in the census. And Gaudron did not even mention s. 51(xxvi).
of due process of law or of legal equality before or under the law”\(^{90}\); as McHugh later expanded on the principle, “the principle of the separation of powers does not limit the Parliament’s power to make substantive rules of law that, in the view of the court, treat people in an unequal or discriminatory manner.”\(^{91}\)

The arguments and conclusions of *Kruger* and *Leeth*, together, contain a strong rejection of any implied rights of due process or equal protection, as indeed they must in light of textual provisions authorizing Parliament to make laws dealing with “the people of any race for whom it is deemed necessary to make special laws” in s 51(26). These arguments, moreover, lend themselves readily to a conclusion that the Australian constitution simply does not guarantee individual rights, which would leave only the question of whether a constitution that imposes no limitations on government action in the form of rights – or a constitution that guarantees rights only in the context of judicial proceedings – can be considered genuine rather than merely putative. Justice Callinan takes something very close to this position, describing the absence of entrenched rights guarantees as an essential characteristic of British model of government that the Australian constitutional system inherited. Speaking of the “British peoples” he declares “[a]lmost without exception they had resolved, ahead of other peoples and other places, to put their trust in popularly elected politicians: it would be for them, the politicians, at their peril to decree from time to time what should be proscribed; and, to a lesser extent, to the judges, to determine what was permissible under the common law. I say to a lesser extent, because it was always within the power of the legislature to override judicial decisions.” As for concerns about majoritarian tyranny, Callinan is content to rely on the political process and an appeal to what might be called Australian exceptionalism. “Whatever validity (such a concern) may, indeed probably does have in relation to other places, it is an expression which I think should be approached with some skepticism in this country. There is no doubt that minorities do need protection . . . . but the reality in Australia is that few of its governments are elected on huge majorities, and our system of checks and balances, not invariably, but ordinarily, means that most interests are not overlooked.”\(^{92}\)

In fact, Callinan overlooks a singularly important distinction between the Australian and classic British approaches. British constitutionalism combines a reliance on unwritten conventions with a series of foundational texts – starting with the Magna Carta – that define principles of English liberty. Insofar as Australian constitutionalism is textualist, appeals to those earlier sources are arguably excluded on the grounds that they have been superseded by the adoption of a constitutional text; this was the basic argument that was offered in response to Justice Murphy. Viewed in this way, Australia’s version of parliamentary supremacy with respect to rights goes farther than the British version by virtue of the

\(^{90}\) *Kruger*, 146 A.L.R. at ___, opinion of McHugh, J. The bulk of McHugh’s opinion was devoted to explaining that constitutional guarantees had no application in the Territories.

\(^{91}\) McHugh, “Does Chapter III of the Constitution Protect Substantive as Well as Procedural Rights?”

complete absence of any rights-based restrictions on government actions, just as Australia’s version of parliamentary supremacy with respect to powers is weakened by textual commitments of authority to the Governor-General. Conversely, insofar as Australian constitutionalism depends on an appeal to conventions, those conventions are not rooted in any foundational texts if the constitutional text is taken to be authoritative in the American sense.

In fact, however, *Kruger* is remarkable in part because it appears in the midst of a series of cases that did find substantive as well as significant procedural rights (at least in those areas where s. 51 rather than s. 122 is the source of government authority). For example, in 1992 in *Chu Keng Lim v. Minister for Immigration*, a majority comprising Justices Brennan, Deane and Dawson recognized the equivalent of a right of habeas corpus. Apart from “exceptional cases,” said the court, the constitution grants “immunity from being imprisoned . . . except pursuant to an order by a court.” That outcome was still grounded in the terms of Article III, but it clearly moved beyond the guarantee of merely procedural rights to recognize one of the very traditional British liberties that Justice Murphy had been propounding earlier. And in the same year in *Lange v. Australian Broadcasting Corporation*, (discussed further below) a unanimous court recognized an implied right to freedom of expression in the constitutional guarantees of representative and responsible government.

In addition, *Kruger* stands out from contemporaneous cases in the form of its arguments as well as its reasoning. Many of the arguments in *Kruger* can be considered dicta, since a majority of the justices agreed that Parliament’s authority in the Territories is subject to far fewer limits than its authority in the Commonwealth states. But even as dicta, those arguments are interesting for the form of textualism on which they relied. By the 1990s, in cases involving rights the High Court had moved away from strict textualism to an approach that we call “Founders’ Originalism,” elevating a particular understanding of political convention above the specifics of the text in the process. The combination of Founders’ Originalism and implied rights is the hallmark of recent Australian rights constitutionalism. An examination of those two elements – the emphatic rejection of constitutional rights guarantees and the reliance on strict textualism – suggest that the reliance on textualism to reject constitutional rights guarantess in *Kruger* stands as something of an anomaly in current constitutional jurisprudence. To see why, we first briefly review the historical development of Australian constitutional jurisprudence and then turn to two key cases – *Lange* and *Sing v. Commonwealth* – to see how Founders’ Originalism in the late 1980s has affected the High Court’s understanding of substantive and procedural rights protections. It is with respect to that modern, emergent understanding that we ask the question: “does Australia have a rights constitution?”

A. *From The Engineers’ Case to Cole v. Whitfield: The Creation of Founders’*

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Originalism

In its earliest years, the High Court relied heavily on a form of originalism that looked beyond the words of the text to underlying background principles of federalism. In the Railway Servants’ Case, Chief Justice Samuel Griffith and Justices Edmund Barton and R.E. O’Connor – all ardent Federalists who had been members of the constitutional convention – confronted the question of whether the national government had the authority to regulate state employees. Griffith, writing for a unanimous court, held that the powers of Parliament were subject to implied limitations that derived from background principles of federalism. “The Constitution Act is not only an Act of the Imperial legislature, but it embodies a compact entered into between the six Australian Colonies which formed the Commonwealth . . . The rules, therefore, that in construing a Statute regard must be had to the existing laws which are modified by it, and that in construing a contract regard must be had to the facts and circumstances existing at the date of the contract, are applicable in an especial degree to the construction of such a Constitution.” The “circumstances” to which Griffith referred were the existence of separate sovereignty in the compacting states. In an earlier case when a state government had attempted to regulate the conduct of federal officials, the High Court had ruled against the states in order to preserve the sovereignty of the national government; now the court reached the opposite conclusion in order to preserve the simultaneous sovereignty of the states. “In that case the question was as to an attempted invasion of the ambit of Commonwealth authority by a State authority. The present case is the converse, but the doctrine is equally applicable.”

To support his conclusion, Griffith quoted an American case, Collector v. Day:

“In this respect, that is, in respect of the reserved powers, the State is as sovereign and independent as the general government . . . It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government.” “The argument,” wrote Griffiths, “is to our minds incontrovertible.”

The phrase “necessary implication” thus entered Australian jurisprudence by way of an American states’ rights argument. It is important to recognize that in the Railway Servants’ case the “implication” in question was

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96 Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association (1906) 4 CLR 488
97 Collector v. Day 78 U.S. 13 (1871) held that state employees’ earnings could not be taxed by the federal government as an implied incident of states’ immunity – itself an implication – from direct federal regulation. The specific holding of the case was overruled by Graves v. New York, 306 U.S. 466 (1939).
98 Id., opinion of Griffiths, C.J. The remainder of the judgment consists entirely of a recitation of American precedents for a narrow construction of a constitutional grant of power to regulate interstate commerce, drawn entirely from American precedents.
not one drawn from a provision of a constitutional text, but rather from “the facts and circumstances existing at the date of the contract,” including most crucially the sovereignty of the several states and “the great law of self-preservation.”

After World War I, the High Court abandoned both originalism and reliance on foreign jurisprudence in favor of a legalistic and fairly strict form of textualism. The case that announced the change was the landmark 1920 Engineers Case, in which the High Court revisited and overruled the Railway Servants’ Case. The High Court, now led by Isaac Isaacs, was confronted by the question of whether Parliament had the authority to fix the wages of workers employed by the several states, or whether those states enjoyed implied immunity from the authority of the national government. The states, relying on Griffith’s argument in the Railway Servants’ Case, argued that such a limitation on parliamentary authority was implied by the federal structure guaranteed in s. 107, notwithstanding the extensive and explicit authorizing language in s. 51. Rather than accept that precedent, however, the justices decided to reconsider the question. The case raised fundamental questions about the relationship between Australia’s hybrid federal and national structure, about the role of the judiciary with respect to the other branches, and about the role of precedent in High Court decision-making, to name only a few.

By a four-to-one vote, the justices rejected the states’ position and voted to overrule the Railway Servants’ Case on the grounds that implication from circumstances and background principles had no role in the interpretation of the constitutional text. The constitution, wrote Justice Isaacs, “is the political compact of the whole of the people of Australia . . . and it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed.” To rely on original understandings in the manner of Chief Justice Griffiths would create “an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution . . . . This method of interpretation cannot, we think, provide any secure foundation for Commonwealth or State action.” Isaacs also took pains to reject Griffiths earlier argument that the constitutional text had to be read in the context of the “conditions of the time.” Describing this as an argument from necessity, Isaacs insisted that the argument had no place in Australia in terms that echoed Harrison Moore’s comments of twenty years before. “[Necessity] is based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction. But possible abuse of powers is no reason in British law for limiting the natural force of the language creating them. . . . [O]nce the parties have by the terms they employ defined the permitted limits, no Court has any right to narrow those limits by reason of any fear that the powers as actually circumscribed by the language

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99 “Every power of the Parliament of a Colony which has become or becomes 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, or as at the admission or establishment of the State, as the case may be.” S. 107.
naturally understood may be abused."\textsuperscript{100}

Finally, Isaacs was at particular pains to reject comparisons to American modes of constitutional interpretation. Among others, he quoted Lord Haldane’s speech in the House of Commons on the occasion of the introduction of the bill that would become the Australian Constitution: “On this occasion we establish a Constitution modelled on our own model, pregnant with the same spirit, and permeated with the principle of responsible government. Therefore, what you have here is nothing akin to the Constitution of the United States except in its most superficial features.” As a result, Isaacs insisted that English, not American, models should govern Australian constitutional interpretation. The “golden rule” of that interpretive approach was strict textualism; in respect to the specific question of the assignment of powers to Parliament, Isaacs again quoted an English jurist, this time Lord Selborne: “If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.”\textsuperscript{101}

The \textit{Engineers' Case} stands as an authoritative rejection of appeals to implications and background principles in favor of strict textualism. There is a certain irony at work, since the argument for strict textualism itself depended on an appeal to convention in the description of the Australian constitution as “permeated with responsible government.”\textsuperscript{102} It is also the case that since the constitutional text contains few if any limitations on parliamentary power, the literalism of the \textit{Engineers' Case} is associated with arguments for an extremely powerful and centralized national government, a proposition that draws criticism from federalists to this day.\textsuperscript{103} But an attempt to depend solely on the literal meaning of a text without relying on any implied principles is impossible; Isaacs himself had followed Griffith -- and the U.S. Supreme Court -- in referring to “necessary implications,” and commentators were quick to point out the difficulty. “No rule of construction,” wrote Robert Garran in 1924, “can ignore the truth that what is necessarily implied is as much part of the Constitution as that which is expressed; the only question is, whether the implication

\textsuperscript{100} 28 C.L.R. at 133, 155.
\textsuperscript{101} 28 C.L.R. at 133, 155.
\textsuperscript{102} As Sir Anthony Mason noted on the occasion of taking the position of Chief Justice, however, the argument itself depended on an appeal to convention: “The \textit{Engineers Case} was thought, incorrectly, to banish implications from the Constitution. In fact, it upheld the principle of responsible government as a constitutional implication, with a view to distinguishing the Australian Constitution from that of the United States.” Mason also observes, however, that despite the implication of implications, in practice the Engineers Case “ushered in a period of literal interpretation of the Constitution. Literal interpretation and legalism . . . were characteristic of the Court’s constitutional interpretation for the greater part of the 20th century. Chief Justice Sir Anthony Mason, “The High Court of Australia: A Personal Impression of its First 100 Years,” 33 \textit{Melbourne University Law Review} (2003).
\textsuperscript{103} See, e.g., Brian Galligan, \textit{A Federal Republic} (1995), pg. 188: “It is quite inappropriate to interpret the Commonwealth's enumerated heads of power in a literal way irrespective of the broader federal architecture of the Constitution and regardless of the centralising effect that such a method produces.”

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In 1937, Chief Justice Dixon reconsidered the question of reasoning from implication. "Since the Engineers' Case a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written Constitution seems the last to which it could be applied. I do not think that the judgment of the majority of the court in the Engineers' Case meant to propound such a doctrine." Ten years later, Dixon specifically embraced the idea of implied limitations on Commonwealth powers inherent in the system of federalism. In Dixon's view this was not a result of divided sovereignty; states retained their claims to autonomous authority "not from the character of the powers retained by the States but from their position as separate governments in the system exercising independent functions," a necessary implication of "the very frame of the Constitution." 

The reliance on implications was also featured prominently in the landmark 1951 Communist Party case. In the Communist Party Dissolution Act of 1950 (Cth), Parliament dissolved the Australian Communist Party and its property forfeited to the government. It gave the Governor-General the power to declare other organizations as illegal, based on his determination that they were associated with or influenced by Communists, and that "the continued existence of that body would be prejudicial to the security and defence of the Commonwealth or to the executive or maintenance of the Constitution and the laws of the Commonwealth." Further, the Governor-General could declare an individual to be a Communist, a finding that would prohibit employment in either the government or in an industry declared to be vital to the national security. The case involved a great number of issues, but the crux of the majority's decision to strike down the law turned on separation of powers concerns: the legislature, the justices felt, were invading the province of the judiciary by naming the Communist Party as a subversive group and then transferring authority to the executive branch for action, rather than defining criteria for subversiveness and leaving the factual determination to a judicial proceeding which the executive would then carry out.

In Dixon's words, the critical problem was the fact that there was "no objective test of the applicability of the power" and hence no role for a court to determine the guilt or innocence of a particular party. But Dixon's objections went beyond separation of powers as a structural feature of a particular governmental design. "The power [of national defense] is ancillary or incidental to sustaining and carrying on government. Moreover it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as for example in separating

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104 Sir Robert Garran, address delivered at the University of London (1924), 40 Law Quarterly Review, 202 at 216.
105 Specifically, Dixon identified two implied limitations on the powers of Parliament: no Commonwealth legislation should affect "the exercise of a prerogative of the Crown in right of the States", and federal Parliament would not seem to be authorized "to enact legislation discriminating against the States or their agencies." West v. Minister of Taxation, (1937) 56 CLR 657, 681-82.
106 Melbourne Corporation v. the Commonwealth (1947) 74 CLR 31 at 81-3.
the judicial power from other functions of government, others of which are simply assumed. Among these I think it may fairly be said that the rule of law forms an assumption.”

The case was understood at the time to be primarily about separation of powers incident to federalism – there was no suggestion that individual states would not be permitted to enact identical laws, it was only the question of the scope of Commonwealth authority and the relations between Parliament and the courts that were at issue – but Dixon’s invocation of a background “assumption” that the constitution required “the rule of law” is in sharp contrast to Isaacs’ earlier textualism.

In yet another another landmark Dixon opinion dealing with the implications of federalism, the 1956 Boilermakers Case, the existence of responsible government was again assumed as a background convention just as it had been in the Engineers’ Case. In Dixon’s hands, however, the same convention that had served as Isaacs’ justification for strict textualism became an argument for reasoning from implication. The specific question had to do with the authority of Parliament to assign non-judicial duties to Article III courts and to create non-Article III courts that nonetheless performed judicial functions; in other words, the equivalent of American administrative law courts. Dixon found the answer in the implication – never stated in the text – that Article III’s assignment of original jurisdiction was intended to be exclusive. As a result, Parliament lacked the authority to confer original jurisdiction on non-Article III courts which, “had there been no implication from Chap. III restricting the meaning or operation of s. 51, a legislative power contained in that section might have enabled the Parliament to confer.” The implied limitation on Parliamentary authority, again, derived from the existence of a federal system of government. “The position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed.”

Dissenting, Justice Williams was willing to accept one half of the argument. “It is clear that only courts can exercise the judicial power of the Commonwealth. But there is no express provision in the Constitution that they can exercise no other powers. If there is a prohibition against their doing so it must rest on some implication in the Constitution arising from the vague concept of the separation of powers.” (William, dissenting, para. 8)

108 “The decision of the majority means that the limits of the powers distributed by the Constitution between the Commonwealth and the States will continue to be defined by an independent Judiciary, and that that fundamental position will only be relaxed in times of grave and pressing national emergency. That emergency was not seen by the Court to exist in the year 1950.” D.P. Derham, “Australian Communist Party v. The Commonwealth,” 33 Journal of Comparative Legislation and International Law, 3d series (1951): 40-49, 48; see also George Winterton, “The Significance of the Communist Party Case,” 18 University of Melbourne Law Review 630 (1992); but see also Roger Douglas, “A Smallish Blow for Liberty? The Significance of the Communist Party Case,” 27 Monash University Law Review 257 (2001).
110 Regina v Kirby, 94 C.L.R. 254, 257, opinion of Dixon, CJ. para. 12.
Williams was clearly correct, in that the idea of courts as the guardians of the “boundaries” of a federal system is precisely the concept of checks and balances on which American-style theories of separation of powers depend. Williams was also clearly correct that Dixon’s willingness to depend on the “necessary implications” of the text went far beyond Isaacs’ notion of the same concept; in particular, his derivation of specific rules from a notion of the role of the judicial branch in a federal system opened the door for a renewal of an originalist theory. On the other hand, these implications from federalism were a far cry from the discovery of implied rights guarantees. As one commentator puts it, “The constitutional text] is manifestly federalist, and thus full of federalist implications; it is not manifestly full of implied rights.”

Seventy years after the Engineers’ Case, Isaacs’ adoption of the phrase “necessary implication” would become the basis for nothing less than the beginning of a rights revolution based on the understanding that the text had originally been intended to provide representative as well as responsible government. Before that could happen, however, the High Court would need a new form of constitutional interpretation.

That mode of interpretation is Founders’ Originalism, the appeal to the original purposes and background understandings of the Founders based on the examination of historical and historiographical materials rather than any specific textual reference. Unlike the form of originalism that Griffith relied on in 1906, however, Founders’ Originalism is not limited to principles of federalist structure; conventions of responsible and representative government are available as separate sources of meaning, and materials beyond the constitutional text are available as sources on which to draw. To some extent, then, Founders’ Originalism represents the adoption of Justice Murphy’s vision of a constitutional jurisprudence informed by foundational political texts as well as Justice Dixon’s approach of reasoning from textual implications.

Founders’ Originalism can be said to have fully arrived in 1988, with Cole v. Whitfield. In Cole, the High Court was called upon to define section 92 of the constitution, which guarantees that “trade and intercourse between the federated colonies . . . shall be absolutely free.” The question was of whether this language prevented Tasmania from prohibiting the importation of undersized crayfish from South Australia. The words “absolutely free” had been a source of confusion for a long time, despite their apparent simplicity. Chief Justice Mason wrote that “no provision of the Constitution has been the source of greater judicial concern or the subject of greater judicial effort than s 92. That notwithstanding, judicial exegesis of the section has yielded neither clarity of meaning nor certainty of operation. Over the years the court has moved uneasily between one interpretation and another in its endeavours to solve the problems thrown up by the necessity to apply the very general language of the section to a wide variety of legislative and factual situations.”

CITE S. 92 had, in fact, been the basis for one of the few early cases recognizing a clearly substantive right by implication. In 1945, the High Court relied on s. 92 to strike down a law requiring a government permit to travel between states, finding that

the guarantee of free trade included an implied right of freedom of travel.\textsuperscript{113} But there was no clear understanding of whether or how far s. 92 might be taken in other areas.

The lack of agreement on the meaning of s. 92 provided the background for the admission of historical materials into the discussion. Mason initially attempted to define his approach as an objective evaluation of original understanding, and turned to an historical study of section 92 written by J.A. LaNauze.\textsuperscript{114} Mason went through LaNauze’s review of the constitutional debates in the 1897 Convention to determine the views of the “Framers,” and concluded that they had intentionally kept the language of section 92 vague. “By refraining from defining any limitation on the freedom guaranteed by s 92, the Conventions and the Constitution which they framed passed to the courts the task of defining what aspects of interstate trade, commerce and intercourse were excluded from legislative or executive control or regulation,” leaving the courts with the difficult task of engaging in “the creation of a limitation where none was expressed and where no words of limitation were acceptable.” This was the point at which an appeal to the historical record became relevant. Based on that historical understanding, Mason upheld Tasmania’s statute as consistent with the “absolutely free” flow of interstate commerce.\textsuperscript{115}

The incorporation of references to historical materials in \textit{Cole} represented a sharp break from earlier practice. Since the time of the \textit{Engineers’ Case} the assumption had been that the text spoke for itself, so that reference to records of constitutional debates and the history of the conventions were considered not just unnecessary, but inappropriate in legal argument.\textsuperscript{116} To permit appeals to those sources meant, in principle, that any background understandings of constitutional conventions, not just the requirements of federalism, might be brought into the discourse of constitutional argument. The conventions of “responsible government” are a primary example. The historical record leaves little doubt

\textsuperscript{113} \textit{Gratwick v. Johnson}, 70 C.L.R. 1 (1945). By way of contrast, consider Chief Justice Isaacs’ language in upholding a wartime regulation of flour and bread prices during World War I: “[B]y the very words of the Constitution there is vested, in the most ample and absolute terms, in the Commonwealth the full power and duty of taking every measure of defence which the circumstances may require as they present themselves to the proper organs of Government.” \textit{Farey v. Burvett}, 21 C.L.R. 433, 452 (1916).

\textsuperscript{114} The reliance on LaNauze was an interesting choice. In his leading work on Australian constitutional history, LaNauze had specifically identified a group of 40 out of the 84 members of the constitutional Convention that produced the Constitution of 1901 as the authors of the text. In the essay on the history of section 92 that Mason relied upon it was those 40 writers whose understandings and intentions LaNauze reviewed. John Andrew LaNauze, \textit{The Making of the Australian Constitution} (Melbourne 1974); LaNauze, “A Little Bit of Lawyers’ Language: The History of ’Absolutely Free’ 1890-1900,” in A.W. Martin ed, \textit{Essays in Australian Federation} (Melbourne 1969), 57. Equally interesting, no case before or after \textit{Cole} appears to have included a citation to any of LaNauze’s work. A Lexis search for “LaNauze” in the Australian legal database turns up only one citation, \textit{Cole v. Whitfield}.

\textsuperscript{115} Attention to the history which we have outlined . . . demonstrates that the principal goals of the movement towards the federation of the Australian colonies included the elimination of intercolonial border duties and discriminatory burdens and preferences in intercolonial trade and the achievement of intercolonial free trade.” \textit{Cole}

that the authors of the constitutional text intended principles of responsible government to be central to Australia’s form of government. George Winterton writes, “[T]he great majority of the delegates to the Federal Conventions intended to establish in the commonwealth responsible government under the Crown. This is not a matter of conjecture, or even implication; on countless occasions they affirmed their intention to implement responsible government.”117 The discussion at the constitutional conventions of the 1890s contain hundreds of explicit mentions of the principle, and the Founders’ intentions are quite clear. From the perspective of Founders’ Originalism, then, any argument that can be grounded in the conventions of responsible government is legitimate, and should carry considerable persuasive weight. This was precisely the move that led to a series of landmark decisions in the 1990s, in which the High Court found the first clear guarantees of individual rights implied in the overall structure of government.

The move from the “necessary implications” of textual language to an appeal to historical sources has been widely criticized, both from the bench and elsewhere.118 Justice Kirby rejects originalism outright as a form of “ancestor worship.”119 In its place, Kirby argues for a return to an objective textual approach in which the text is “set free” from its drafters. “The words remain the same. The meaning and content of the words take colour from the circumstances in which the words must be understood and to which they must be applied.”120 In a case opinion, Kirby explained that a judge’s interpretation of the text occurs entirely independently from any inquiry into the meaning that the drafters sought to create. “The meaning and intent of those who had drafted the Constitution ... [should not] ... limit subsequent developments, whether in the understanding of legal terms, a change in the meaning of language or radically different social circumstances to which the language would

118 Jeffrey Goldsworthy provides an American-style alternative to Founders’ Originalism in an approach he describes as “moderate originalism.” “[C]onsider the opening words of s 51 of the Constitution, which confers on the Commonwealth Parliament most of its legislative powers. Those words grant the Parliament power to make laws for the ‘peace, order, and good government’ of the Commonwealth with respect to the subject-matters listed. Read literally, these words would appear to limit Parliament’s powers by authorising judges to invalidate legislation that in their opinion is inimical to the peace, order and government of the Commonwealth. But when the Constitution was enacted in 1900, the words were understood by lawyers to have the opposite meaning. It had previously been decided by the Privy Council that they did not impose judicially enforceable limits on the legislative power they granted. They were used by the Imperial Parliament to confer unlimited, sovereign power with respect to the subject-matters listed.” Goldsworthy, “Interpreting the Constitution in its Second Century,” 24 Melbourne University Law Review 677 (2000). The appeal to the understanding of lawyers at the time of constitutional ratification is a classic example of original understanding, and applied to the general terms of the Preamble the outcome appears noncontentious. But where there is a direct clash between the text and what is perceived to have been the original understanding – what the constitution means rather than what it says – the appeal to moderate originalism obviously has to overcome steeper obstacles
120 Ibid., 7, 10.
apply.”121 Other justices have been willing to embrace an objective intent theory of originalism, but have attempted to maintain its connection to textualism. In 2000, Justice McHugh rejected originalism only insofar as it would justify reaching beyond the contents of the text. “The relevant intention of constitutional provisions is that expressed in the Constitution itself, not the subjective intentions of its framers or makers. It is an intention that is determined objectively.”122 In another 2000 case Chief Justice Gleeson, writing for the majority, declared that the “consideration that governs the meaning of the constitutional text is the ascertainment, with the eyes of the present generation, of the essential characteristics of the text read as a constitutional charter of government. We are not chained to the expectations of 1900.”123

“Founders’ Originalism,” as we have called it, is thus neither the same thing as Griffith’s earlier form of originalism nor of Isaacs’ textualism. Building from Dixon’s expansion of the idea of necessary implications – itself already recognized as the grounds for the discovery of procedural rights – Founders’ Originalism finds limitations on the power of government at all levels by interpreting the provisions of the text to include background understandings that prevailed at the time of the nation’s founding. The process is less one of exegesis than eisegesis: constitutional conventions of responsible and representative government are read into the text and become the basis for the recognition of constitutionally guaranteed substantive and procedural rights. In the next two section we will look at two specific examples: the discovery of substantive rights to free expression and publication, and the refusal of the High Court to accept the assertion of both procedural and substantive rights relating to the definition of citizenship.

B. Lange v. Commonwealth: Implied Rights of Free Expression

The one – and to date the only – area in which the High Court has employed Founders’ Originalism to discover unambiguously substantive constitutional rights guarantees is freedom of expression and the press, what in American terms would be called First Amendment freedoms. In Nationwide News Pty. v. Wills (1992) the High Court found that the provisions of the constitutional text that guaranteed a system of elections necessarily

implied the freedom of political communication. The derivation of necessary implications, however, was no longer clearly grounded in the textualist approach; instead, the argument depended on historical context and background principles, as demonstrated in Chief Justice Brennan’s description. “[Principles] of responsible government are constitutional imperatives which are intended – albeit the intention is imperfectly effected – to make both the legislative and executive branches of the government of the Commonwealth ultimately answerable to the Australian people. Under the Westminster model, these principles might be trespassed upon by legislation emanating from an omnicompetent Parliament but the Parliament of the Commonwealth is incompetent to alter the principles prescribed by the Constitution to which it owes its existence. It is a Constitution the text of which the people alone can change.”

From the basic commitment to responsible government and the supremacy of the constitutional text, it was a short jump to the necessary implication of a constitutional right to engage in political expression. “To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential: it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.”

The fact that no such guarantee appeared in the constitutional text presumably reflected the “imperfectly effected” character of the text’s commitment to responsible government.

Analytically, this is a tremendously important move. As we have noted, to rely on a textualist approach to the interpretation of a constitutional document that contains no limitations on state power is to invite a form of parliamentary supremacy more extreme even than that known from British practice. Brennan, however, was making a different set of moves. His argument proceeded from an assumption of the supremacy of the text, to the application of background understandings in the interpretation of that text, to the discovery of limitations on Parliament. Moreover, while this interpretive move had some similarity to those that Griffith had employed decades before, the focus on responsible government rather than federalism led to a very different set of outcomes. Instead of structural limitations on the powers of a particular level of government, Brennan was looking for individual rights guarantees that would apply equally to government at all levels without adjusting the distribution of power between the Commonwealth and the states.

The High Court’s recognition of implied limits to the explicit grant of national powers was widely recognized as something new. Throughout the decade, debates raged among the justices as the High Court found additional guarantees of freedoms that were necessarily implied by the text, read as an instrument for the guarantee of responsible or

124 108 A.L.R. 681, striking down Industrial Relations Act 1988 s 299(1)(d)(ii), which made it a criminal offense to “by writing or speech use words calculated . . . . to bring a member of the Commission or the Commission into disrepute.”
127 The phrase “imperfectly effected” resonates with what we have called the “Drafter’s Error” approach in recent American federalism cases.
representative government. In a series of majority decisions, the freedom of expression that was recognized in *Nationwide News* was extended to freedom of publication in 1994 in *Theophanous v Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd*.

The arguments in favor of new rights did not always carry the day. One of the most important cases for the development of Founders’ Originalism was the 1996 case *McGinty v. State of Western Australia*. In *McGinty*, the High Court considered a challenge to a voting apportionment system for state legislative elections, in which urban voters had less influence on the outcome of elections than those of rural voters by virtue of the greater number of voters put in urban districts. *McGinty* confronted the question of what “representative government” means. All the justices accepted the proposition that representative democracy was a “constitutional imperative” that must be applied to interpretations of the text. Chief Justice Brennan, writing for the majority, compared the case of freedom of expression by way of illustration. “‘Representative democracy’ has been used as a shorthand description of the form of government prescribed by the Commonwealth Constitution in order to explain how the freedom to discuss governments and political matters is implied in the Constitution. As ‘the people’ are to choose their elected representatives, it has been held that the people must be left free to discuss political and economic matters in order to perform their constitutional functions.”

Brennan continued to emphasize that textualism remained at the root of the search for implied limitations. “Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure.” In this connection, Brennan drew a distinction between textual and structural implications. “It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.” The distinction explicitly recognized the fact that the rights that Brennan and the other justices were finding did not bear the same relation to the text as the earlier discovered procedural rights implications of Article III. Brennan’s position also represented

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132 *Id.*
a rejection of both Griffith’s extra-textualist reliance on original understandings and Isaacs’ legalism. On the one hand, some “actual terms of the Constitution” would be required as the basis for judicial exegesis; on the other hand, once such a term was identified the interpretation of its meaning could incorporate the conventional understandings of its authors.

The distinction between structural and textual interpretation was important to the McGinty case because the term “representative democracy” does not appear in the constitutional text. The plaintiffs in McGinty claimed that s. 24’s language, requiring members of the federal House of Representatives to be “directly chosen by the people,” also applied to the states, and relied on that provision to provide the basis for an interpretation of the meaning of representative government. The argument was that the term “directly chosen” required equal representation as a matter of “accepted principles of interpretation” established in the free expression cases. But the initial claim, that s. 24 applied to the states in the first place, had no similar textual hook; if anything, that proposition ran afoul of the structural principles of federalism, particularly in light of the fact that s. 107 reserved to the states any powers not “exclusively vested in the Parliament,” which included the authority to design their electoral districts. The logic of Brennan’s lingering textualism carried the day, and by a vote of 4 to 2 the justices ruled that there was no provision in the constitutional text that implied equal weighted votes in state elections.

In 1997, in Lange v. Australian Broadcasting Corporation, the High Court finally issued a unanimous opinion. Lange asked the High Court to revisit the question of implied press freedoms that had been raised in Theophonas and Stephens. Both of those cases had resulted in plurality opinions divided among various specific issues, so that neither provided a clear precedent on the question. In Lange, the High Court clarified the issue by declaring a limitation on the ability of political officials to bring suits for libel, thus adding to the protections for political speech by establishing a rule similar to that familiar to American readers from New York Times v. Sullivan.

Writing for the unanimous court, Justice

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133 S. 24 reads as follows: “The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.”

134 S. 107 reads as follows: “Every power of the Parliament of a Colony which has become or becomes 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, or as at the admission or establishment of the State, as the case may be.” S. 107 is the equivalent of the Tenth Amendment to the U.S. Constitution.

135 The dissenters, Justices Toohey and Gaudron did not disagree with the outcome, only the reasoning. Both justices thought that the question of voter qualification was constitutionally committed to the states under s. 30. Gaudron, however, argued that in an election to which s 24 was applicable the fact of differential voting weights would constitute a constitutional violation. McGinty, 134 A.L.R. 289 (1996).

136 The comparison is imperfect. The High Court did not find a separate constitutionally guaranteed right that defeased common law remedies, instead it exercised its authority as the interpreter of Australian common law to declare an expansion of a qualified privilege. “With the establishment of the Commonwealth of Australia, as with that of the United States of America, it became necessary to accommodate basic common law concepts and techniques to a federal system of
Brennan (without citing Cole v. Whitfield) began by turning to the constitutional text and to the historical materials of the convention. “That the Constitution intended to provide for the institutions of representative and responsible government,” he declared, “is made clear both by the Convention Debates and by the terms of the Constitution itself.” As in Nationwide News, that was enough to find a constitutional protection for political communications as an implication of the textual commitment to free elections.

While the system of representative government for which the Constitution provides does not expressly mention freedom of communication, it can hardly be doubted, given the history of representative government and the holding of elections under that system in Australia prior to federation, that the elections for which the Constitution provides were intended to be free elections . . . . Communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation . . . . That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.”

Lange was complicated by the fact that it was not a suit directly against the government; instead it involved a common law suit for libel. Sections 7 and 24, said the court, “do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power.” As a result, the entire discussion of constitutional interpretation was arguably dicta. Still, it had an important effect on constitutional rights. In the second part of the opinion, the High Court exercised its prerogative as a common law court, and determined that Australian common law doctrines should be altered to comport with the necessary implications of constitutional principle. “The right to a remedy cannot be admitted . . . if its exercise would infringe upon the freedom to discuss government and political matters which the Constitution impliedly requires.”

government embodied in a written and rigid constitution. The outcome in Australia differs from that in the United States. There is but one common law in Australia which is declared by this court as the final court of appeal. In contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations.” Lange v. Australian Broadcasting Corporation, 145 A.L.R. 96 (1997). See discussion, Susanna Frederick Fischer, “Rethinking Sullivan: New Approaches in Australia, New Zealand, and England,” 34 George Washington International Law Review 101 (2002).


138 Lange, 145 A.L.R. at 106-07. See, e.g., Coleman v. Powell, 209 A.L.R. 182 (2004), upholding a Queensland law making it a crime to engage in “threatening, abusive or insulting words to any person” in a public place. Justice McHugh was the sole dissenter in the case; he argued that the law should be found invalid on the grounds that it did not make an exception for political speech.
Even as applied to legislation, the results in *Nationwide News* and *Lange* did not create a full-fledged, American style right of free expression. The freedoms that were necessarily implied by the constitution were “limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution.” As one New Zealand Supreme Court justice has rather caustically put it, “the best the High Court [of Australia] has been able to do in that direction is to discover in the Constitution, after nearly a hundred years, a hitherto unsuspected implied right – a right to defame politicians, subject to limited qualifications.”140 On the other hand, the same reasoning, with the same sort of limitations, led the High Court to discover a right of political association in 2004, and to assign itself the same role in applying that test that had been established with respect to freedom of political communication in *Lange*.141 There is good reason, in other words, to think that the process of judicial discovery of American-style First Amendment rights has not yet reached its end-point, nor is there any inherent reason why these should be the only rights guarantees that are found to inhere in the commitment to responsible and representative government or other, equally deeply held constitutional conventions that may be revealed through the application of Founders’ Originalism. Remarkably, *Cole* is not cited in any of the free expression cases; none of the justices of the High Court seemed to find any need to refer to any historical materials to determine that the purpose of the constitutional provisions concerning representation implies rights of political communication and association. Instead, the entire line of cases concerning implied rights derives from the interpretation of textual provisions, in light of an original intent to create a system of responsible and representative government. The availability of historical materials as a legitimate basis for developing originalist arguments, however, is further reason to think that the development of substantive constitutional rights


139 *Lange*, 145 A.L.R. at ____.
141 *Mullholand v. Australian Election Commission*, 209 A.L.R. 582 (2004). Like the free speech rule in Lange, the implied right of association is far more limited than its American counterpart: with only one Justice Kirby dissenting the Court held that a rule requiring a political party to have at least 500 members and prohibiting a single person being counted as a member of two parties did not burden the implied right of association; with only Justice Gleeson dissenting the Court ruled that requiring the disclosure of the names of all party members to the AEC did not burden the implied right of association; and with only Justices Gleeson and Kirby dissenting the Court ruled that the election rules did not burden the right of political communication established in Lange. An implied freedom of association as a corollary to the right of political communication had been previously suggested in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 108 ALR 577, but had not been accepted by a majority of the justices then on the court.
guarantees in Australian jurisprudence has not yet been exhausted.


The discovery of new substantive constitutional rights guarantees was only one of the consequences of the adoption of Founders’ Originalism. The possibility exists that procedural rights guarantees, too, may be revisited and given a grounding independent of the necessary structural implications of Article III. Despite Kirby’s and others’ objections to originalism, appeals to historical evidence became a staple of Australian constitutional jurisprudence following Cole. As a result, the line between procedural rights derived from constitutional structure and substantive rights implied in the constitutional text has become increasingly blurred as the High Court has turned to historical materials to illuminate background principles at work in textual provisions, thus effectively combining the effects of Cole and Lange. With respect to procedural rights, the approach of Founders’ Originalism reached something like an apex in 2004, when the High Court heard the case of Singh v Commonwealth. But the outcome of the case demonstrates embrace of Founders’ Originalism does not by any means translate directly into the embrace of new rights guarantees. Singh thus also showed something else: that Founders’ Originalism, like any other method of interpretation, is a two-edged sword that can be used to limit as well as to discover constitutional rights guarantees.

Singh involved a challenge the government’s ability to deport Tanis Singh, the Australian-born daughter of Indian parents. The government asserted its authority to act under s. 51(xix), which gave Parliament the authority to enact laws concerning “citizens and aliens.” Pursuant to that authority, Parliament had defined the conditions of citizenship, legislating that a person born in Australia after 1986 would be a citizen only if at least one parent was an Australian citizen or permanent resident, or the person had resided in Australia until the age of ten. Singh argued that the constitution gave Parliament no general power to determine the meaning of the term “aliens.” Consequently, its meaning should be determined by the courts. On the one hand, then, the challenge was procedural, and might have been handled by an extrapolation of the necessary implications of Article III. At the same time, however, the argument was framed in terms of an individual right. Even more important, the case called on the High Court to directly address the meaning of “citizenship.” The case thus posed the most fundamental constitutional questions imaginable; the historical analogies to America’s experiences in Dred Scott and the subsequent adoption of the XIVth Amendment escaped no one, nor did the fact that the High Court was once again being asked to define the scope of its own powers. Singh v. Commonwealth produced five separate opinions among the seven justices – three majority opinions and two separate dissenting opinions – each of which took a different approach. We focus on Chief Justice Gleeson’s majority opinion and the dissenting opinions of Justices McHugh and Callinan, all of which turned on the role of Founders Originalism.

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142 The Citizenship Act of 1948
Chief Justice Gleeson began with the proposition that the authority of Parliament derives from, and is limited by, the constitutional text. “Everyone agrees that the term “aliens” does not mean whatever parliament wants it to mean. Equally clearly, it does not mean whatever a court, or a judge, wants it to mean.” The reference to the limits of judicial authority drew a direct connection between originalism and the legitimacy of judicial review. “[T]he role of a court is to understand and apply the meaning of the terms, not to alter the agreement. Respect for the constitutional settlement is the primary obligation of a constitutional court. The source of this court’s power is the Constitution itself. There is no other. The role of the court stems from the meaning and effect of the terms of that instrument.” In one of the more memorable turns of phrase in any High Court opinion, Gleeson observed, “[t]he stream of judicial review cannot rise above its source.”

What was needed, therefore, was an objective source of meaning on which courts could draw in the process of applying Brennan’s mandate to seek implications in the original intentions of the framers. Gleeson – like Isaacs in the Engineers’ Case and Marshall in Marbury – found that source in the identification of the constitution as a legal document, bound by technical understandings of legal terms at the time of the constitution’s drafting. “The Australian Constitution contains many terms that have a legal meaning, and that are naturally understood and applied by courts with reference to their legal meaning . . . . The concepts which those terms signify, in the context of the Constitution, can only be identified by reference to legal usage and understanding.” But Gleeson went one important step further, adopting portions of the approach that Justice Murphy has proposed years earlier. Again and again, Gleeson pointed to instances of Australian courts looking back to texts earlier than the constitutional text – as far back as the Magna Carta – in order to determine “the operation which [the Constitution] was designed to have at the time of Federation.”

The appeal to intention remained objective, but the meaning of the text was to be determined in view of the original understanding of its terms. Study of historical materials would reveal “the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation.”

There were two specific questions to be decided. First, what was the intended meaning of the grant of authority over “aliens” in section 51; and second, what was the significance of constitution’s failure to grant any explicit power to Parliament to determine the conditions of Australian citizenship? The historical record demonstrated that the

143 Singh v Commonwealth, 209 A.L.R. 355 (2004), opinion of Gleeson CJ at paragraphs [5], [7], [10].
145 Singh, 209 A.L.R. at paras 18, 19, 22, opinion of Gleeson CJ.
146 Again, there is a distinct parallel to Marbury v. Madison, as in that question the critical question was the consequence of the omission in Article III of a grant of jurisdiction to federal courts to hear claims for mandamus against federal officials. The answer in that case had been that Congress lacked the power to confer original jurisdiction that had not been established in the text: a parallel outcome in Singe would be that Parliament lacked the power to define “citizenship,” leaving the courts to look elsewhere for the content of that definition.
omission had not been a matter of oversight. During the constitutional convention John Quick had called for the constitution to include a resolution of the question of citizenship: “We ought either to place in the forefront of this Constitution an express definition of citizenship of the Commonwealth, or empower the Federal Parliament to determine how federal citizenship shall be acquired, what shall be its qualifications, its rights, and its privileges, and how the status may hereafter be lost.” Gleeson suggested that objections to Quick’s proposals had stemmed from a fear that Parliament might be deprived of the power to exclude members of undesirable racial groups from Australia’s shores. But Gleeson ultimately found the historical record entirely unhelpful because it did not identify an affirmative purpose behind the rejection of Quick’s proposal. “It is impossible to discern in the record of the convention debates any specific reason for the rejection of Dr Quick’s ambiguous proposal. The discussion throws no light on the purpose or object of s 51(xix), except to the extent that it suggests that a broad, rather than a narrow, power with respect to aliens was in contemplation.” As a result, with respect to a person in Singh’s position, Gleeson found that “there was in 1900 no established legal requirement that she be excluded from the class of aliens. At the least, it was a matter appropriate to be dealt with by legislation.”

Siding with Gleeson, Justices Gummow, Hayne, and Heydon similarly framed the question in originalist terms, focusing on the meaning of “aliens” from as far back as 17th century England. These justices rejected both the idea of a “fixed” meaning and any attempt to ascertain the subjective intentions of the Framers. Nonetheless, after a lengthy historical review, they concluded that the term “alien” could historically have been understood to include persons in Singh’s situation, and thus that her appeal should lose. Here, what seems to have been at work was a retreat from judicial supremacy. The Court would defer to Parliament’s interpretation of the constitutional text, as long as there was any plausible argument in its favor within the system of Founders’ Originalism. Again, this variant of originalism – itself a judicial creation – appears not so much as a method for interpreting the text as a method for interpreting the conventions that themselves help shape the meaning of the text. In Singh, those conventions became an analytical meta-discourse that established principles for choosing among several permissible textual interpretations. In other words, what matters is not what the constitution says, but what it means.

147 Official Record of the Debates of the Australasian Federal Convention, Melbourne, 2 March 1898 at 1752, quoted at Singh, 209 A.L.R. at para. 289, opinion of Callinan J.
148 “Mr Isaacs thought that ‘all the attempts to define citizenship will land us in innumerable difficulties.’ He expressed concern that the proposed amendment might deprive parliament of the power of excluding people of certain specified races “who happened to be British subjects”. The subject of race was of great concern to the framers, and their views on that matter were quite different from those which now prevail.” Singh, 209 A.L.R., opinion of Gleeson, CJ at para. 31, quoting Official Record of the Debates of the Australasian Federal Convention, Melbourne, 3 March 1898 at 1788, 1797.
150 “Numerous cases decided by this court reveal that constitutional expressions may have a different operation 50 or 100 years after federation from the operation they would have had in 1901.” Id., at
Justice Kirby, also joining the majority, softened his earlier outright rejection of the originalist position. “In elucidating [the text’s] meaning, different judges of this court have made different use of the understandings of the framers and of the constitutional text, viewed from the perspective of 1901. All accept that these are relevant considerations. None pretends that they are the only relevant factors.” Kirby made three arguments, two of which had distinctly originalist elements. First, he argued that as of 1901 there were two competing conceptions of the meaning of “alienage”; second, that since 1901 changes in conditions and developments in international law required that “aliens” be given an expansive interpretation; and third, that the omission of a constitutional provision defining citizenship demonstrated a commitment of authority to Parliament. To buttress this last argument, Kirby compared section 51 to the XIVth Amendment of the U.S. Constitution. “[T]he Australian Constitution did not enshrine concepts similar to those then so recently adopted in the United States. Instead, it left the legal regulation of alienage (and of its counterpart, Australian nationality) to the Federal Parliament armed with relevant legislative powers expressed in terms of great generality. Deliberately, it omitted an express guarantee similar to that adopted in the United States. It would be contrary to the normal canons of constitutional interpretation, for this court now to insert an equivalent guarantee as implicit in the word ‘aliens’ which the Founders refrained from expressing.”

paragraph 160.


152 “Once the foregoing approach is adopted it must be acknowledged that, even in 1901, there were two major legal theories concerning the legal status of “aliens”, in the sense of “belonging to” another place or person. The birthright or jus soli theory was traditional at that time in common law countries. However, in countries of the civil law tradition, the derived nationality or jus sanguinis (right of blood) usually recognised that membership of a nation passed by descent. 390 Given the existence of these two legal systems, vying for acceptance amongst the nations of the world in 1901, it is unconvincing to suggest that the Federal Parliament in Australia was forever to be limited to the approach of birthright. Why could the parliament not adopt, wholly or in part, elements of the alternative legal approach to the issue of alienage accepted by many legal systems of the world? . . . . Further, the common law rule of birthright had already admitted its own exceptions, namely for the children of a foreign monarch, diplomats and enemy aliens. Why, of its nature, could more exceptions never develop around the notion of “aliens”? From medieval times, the English Parliament provided particular derogations from birthright in favour of the principle of descent. Why, as a matter of constitutional principle, should further exceptions be forbidden to the Australian Parliament? 392 Why should it be forbidden in the absence of a clear indication that such was the purpose of those who made the Constitution and designed its basic notions?” Singh, 209 A.L.R., opinion of Kirby [250-252.]

153 “Alienage is a status. Of their nature, notions of status tend to change over time, especially in periods of rapid social evolution such as the last century witnessed. The global circumstances of alienage have also changed. The word must respond to the disappearance from the Australian context of the British Empire. It must respond to the advent of aviation and other modes of rapid transport that make possible, in ways unthinkable in 1901 . . . . Because the Constitution must operate in the environment of international law, and because the general notion of alienage adapts to that environment, it would be astonishing if, without clearer language, Australia's constitutional power to enact federal legislation with respect to “aliens”, as broadly defined, were closed off and confined, in this respect, to specific nineteenth century notions that have been altered in several countries where they previously prevailed.” Singh, 209 A.L.R., opinion of Kirby at [255-258.]

154 Fascinatingly, Kirby insisted that in the event of future abuses, nothing in his analysis would
Justices McHugh and Callinan, dissenting, employed originalist arguments to reach the opposite conclusions. Both found that the failure to grant Parliament authority to define citizenship indicated an original intent to leave the matter to the courts for resolution according to common law principles. Like Gleeson, McHugh accepted an objective theory of original intent, but located that intent in the minds of the Founders rather than in the legal traditions with which they were presumed to be familiar. “The fundamental rule of statutory interpretation is that the meaning of an enactment is the meaning that its makers intended. . . . In the case of the Constitution, the intention is that of those who framed it. Their intention is determined objectively.” McHugh argued that the use of the term “aliens” in the constitutional text had to be understood as a constraint of Parliament’s authority to define the meaning of the term. Gleeson had made the same point, but had then turned to English legal historical materials to determine the meaning of “alien” in 1900, found those materials inconclusive, and left the resolution of the ambiguity up to Parliament. By contrast, McHugh looked to Australian colonial practice and concluded that “in the Australian colonies in 1900, the essential meaning – the connotation – of the term ‘alien’ was a person who did not owe permanent allegiance to the Crown.” Based on those earlier practices, McHugh, after a lengthy review of historical materials, found that “the irresistible conclusion is that in 1900, those who made the Constitution understood that at common law, a person born within the dominions of the British Crown was a ‘natural born British subject’ who owed permanent allegiance to the British Crown and was not an alien.” Callinan likewise relied heavily on an originalist argument, embracing the Cole principle. “The court is not only, in my opinion, entitled, but also obliged, to have regard to the convention debates when, as is often the case, recourse to them is relevant and informative.”

stand in the way of judicial intervention. “Should some future parliament attempt to push the ‘aliens’ power into extreme instances, so as to deem a person born in Australia an ‘alien’ despite parental or grand-parental links of descent and residence, this court can be trusted to draw the necessary constitutional line. Doing so is inherent in the task of constitutional interpretation.” Kirby gave no indication of the basis on which such a future High Court would exercise that authority. Singh, 209 A.L.R. at para.s 260-261, 269, opinion of Kirby..


“Section 51(xix) of the Constitution empowers the Parliament of the Commonwealth to make laws with respect to ‘aliens.’ By necessary implication or assumption, that grant of power recognizes that an alien is a person who can be identified by reference to some criterion or criteria that exists or exist independently of any law of the parliament or indeed of the Constitution itself. It is a corollary of that implication or assumption that the Parliament of the Commonwealth cannot itself define who is an alien . . . . To deny that proposition is to deny the binding effect -- indeed the legitimacy -- of the Constitution itself.” Singh, 209 A.L.R. at para.s 35-36, opinion of McHugh.

“In the Australian colonies in 1900, the essential meaning -- the connotation -- of the term ‘alien’ was a person who did not owe permanent allegiance to the Crown. And, subject to three exceptions, in 1900 and now, birth in Australia, irrespective of parentage, gave and still gives rise to an obligation of permanent allegiance to the sovereign of Australia. . . . [E]ven under a ‘progressivist’ theory of constitutional interpretation, it is hard to conceive of the essential meaning of a constitutional term being entirely displaced and another meaning substituted for it.” Singh, 209 A.L.R. at para. 38, opinion of McHugh.


McHugh, Callinan read the history of the rejection of Quick’s proposal as an indication that the convention delegates had sought to limit the powers of Parliament and leave the matter to common law rule. At its core, his argument concerned the nature of the constitution as a written text. “This is not to say that adherence to nineteenth century meanings which have become archaic will always be obligatory. But it is to say that instruments, including constitutional ones are still basically to be construed by reference to the intentions of their makers objectively ascertained.”

The arguments in Singh v. Commonwealth illustrate the contours of Founders’ Originalism that emerged from Cole and Lange, and also the variations in that approach. In Singh, all the justices employed originalist arguments based on appeals to objective evidence of original meaning. But while Gleeson looked to contemporaneous legal practice and legal history, the dissenters looked to the outcomes that the members of the convention were trying to achieve. This difference in focus led to different conclusions about what the lack of a clear citizenship clause meant. Gleeson, Kirby, and the other justices in the majority read the history of the omission of the clause meant the Framers committed the question to parliamentary definition; their inquiry, then, was whether the text established a legally binding restraint on the implied powers of Parliament. In contrast, the dissenters’ inquiry was whether the text granted Parliament the power in question. Even in this context, the majority seems to have been working from a background assumption that Parliament has powers other than those enumerated in the text.

The differences in Singh turned on the relation between constitutional convention and constitutional text. Mason’s discussion in Cole suggested that it was only his extreme frustration with the ambiguity of the constitutional text that justified the appeal to extra-textual sources of understanding. In this respect, the Australian debate echoes the American literature; the American debate, as in Cole and Singh, presumes that the text governs, so that arguments about interpretation are arguments about how the text should be read. Originalism and textualism are therefore treated as closely related, and indeed are often (wrongly) conflated.

Furthermore, few American writers adhere to a version of

160 “Parliament cannot define the scope of alienage for constitutional purposes. It was because of the risk that a power to define it presented, that the proposal of Dr Quick that the Constitution refer to and define "citizenship" foundered, and provoked the spirited opposition of Mr O’Connor which carried the day.” Singh, 209 A.L.R. at para. 310, opinion of Callinan.


162 Mason lifts a quotation of Sir Robert Garran from the Nauze article and reproduces it with evident relish: “Sir Robert Garran contemplated that a student of the first 50 years of case law on s 92 might understandably close his notebook, sell his law books, and resolve to take up some easy study, like nuclear physics or higher mathematics.” Cole v. Whitfield.

163 John Hart Ely described a “non-interpretivist” approach to constitutional interpretation that eschewed reliance on the text altogether. Ely, Democracy and Distrust, (Harvard 2001), 1-9. It is doubtful that anyone writing today would adopt such a position; the debates among American constitutionalists concern the manner of textual interpretation. This is true even among writers who favor a return to a common-law mode of reasoning in constitutional interpretation. See James Stoner, Common Law Liberty:Rethinking American Constitutionalism (Kansas 2003); Strauss, “Common Law Constitutional Interpretation,” supra.

164 See, e.g., Paul Brest, “The Misconceived Quest for the Original Understanding,” in Jack
originalism that emphasizes the subjective intent of some named group of “Framers”; instead, the favored form of originalism is “original understanding,” an approach that seeks contemporaneous understandings of the text as the starting-point for constitutional interpretation.\(^{165}\)

But the textual provisions that are being interpreted in American debates are unequivocally expressions of rights guarantees. By contrast, in the Australian case the derivation of rights constitutionalism is one step removed from textual exegesis, despite the justices’ protestations. The text refers to “elections,” the original understanding is said to be that these elections must be fair, and the modern understanding of the requirements of fairness includes freedoms of expression and publication. Put another way, the text specifies a political process, the original understanding of that process incorporates conventions of representative government, and rights of free expression are considered to be the necessary implications of representative government. Founders’ Originalism, in other words, is a theory about the necessary implications of conventions that are themselves the background principles expressed in the text. Far more explicitly than in the usual American case, the Australian debate is between appeals to the text and appeals to non-textual conventions, between textualism and originalist non-textualism.

Ultimately, where rights jurisprudence is concerned, Founders’ Originalism features American-style originalism and judicial supremacy combined with British-style parliamentary supremacy and appeals to convention, a judicial “Washminster mutation” indeed. The conflict between these two models is supposedly resolved by making conventions enforceable by courts, on the one hand, and by treating the text as a limit on the reach of those conventions rather than as the original source of constitutional meaning on the other. This description sets the stage for the final part of our discussion, which can be stated in the form of the succinct inquiry raised in the title of this article: does Australia have a (rights) constitution?

III. The Problem of Australian Constitutionalism

The problem of Australian constitutionalism is how to make sense of the relationship between text and convention within the conceptual system of Founders’ Originalism. In Part I of this series, we argued that with respect to government powers, the text of the constitution overrides conventions when they two come into conflict. The problem that we saw in that arrangement derived from the fact that those conventions, rather than the provisions of the text, express the working norms of Australian politics and the

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constitutional ethos of Australian governance with which most citizens are familiar. Since we have previously suggested that a “constitution” is properly understood as the combination of written text and convention, this means that Australia’s powers constitution is divided against itself, with little or no connection between the supremely authoritative text and governing conventions. As a result, where powers are concerned we suggested that Australia has a constitution without constitutionalism.

With respect to rights, we see the opposite; over the past two decades, the High Court has in at least some cases found implied rights based not on the text, but on a more abstract notion of what kind of government the Founders intended to construct. Here, then, we have the spectacle of a direct appeal to constitutional ethos that stands in contradiction with both text and convention; in the rights case, in other words, Australia can be said to have constitutionalism without a constitution.

One solution is to say that our definition of “constitution” is too broad, precisely by virtue of our attempt to define the term in a way that takes account of several different systems. So, one might argue, in the Australian case “constitution” should be understood to mean only the written text. In that reading, the omission of any written rights guarantees in that text means that Australia simply has no system of constitutional rights. By this argument, the High Court should reject all claims of constitutionally guaranteed rights – procedural as well as substantive -- based on the absence of rights guarantees in the text. How, after all, can the appeals to meta-principles of democratic government be legitimate, given the historical background of Founders and their reliance on common law courts and representative legislatures for the protection of their liberties? Applied to rights claims, the textualism that was displayed by the High Court during the crisis of 1974-1975 could result in the abolition of all rights jurisprudence, and a position that the Australian Constitution imposes no limits on government authority at all. As we suggested at the outset, that is a good argument for the proposition that Australia has no genuine constitution.

Conversely, one might propose that conventions operate independently of the text. In case of conflict, the principles of responsible government supersede explicit textual provisions, and the absence of textual guarantees does not prevent the assertion of a right. The problem is that this solution, too, is untenable. The High Court has always taken the position that in cases of conflict, the written text trumps other understandings, but what is the basis for that assumption? If conventions and meta-principles are independent sources of constitutional meaning, would a court be justified in ignoring the written text entirely, if it can be argued that an explicit provision is inconsistent with the higher principles of responsible or representative government? To take a not entirely fanciful example, consider the possibility of a different outcome in the McGinty case. Suppose that the High Court concludes that the traditional ideal of political equality is a core element of responsible government. If conventions operate as independent sources of constitutional meaning, could the High Court rule that the states do not, in fact, retain control over the creation of their electoral districts despite the operation of s. 107? At that point, of course, conventions are effectively treated as superior to the text. But what is the logic for the alternative position once we concede the possibility identified by Chief Justice Brennan that the Founders true constitutional commitments may have “imperfectly effected” in the text?
Moreover, it is entirely unclear on the basis of what meta-principle a different form of constitutionalism can be said to operate where rights are concerned from the one that operates with respect to powers. We have already seen, in Part I of our series, how the constitutional provisions dealing with executive power are, in normal times, ignored in favor of the conventions of responsible government. Entire sections of the constitution are, in practice, read out of the document during normal times and relied upon only in moments of crisis. But if that is the case, we need some method to determine which provisions mean what they say and which do not in other settings, as well. “If everyone accepts that the authors meant for the Constitution to say one thing but mean another with respect to executive power, why should their words be read literally with respect to legislative power?” The same question can be extended to rights guarantees, where it remains unclear why responsible government would remain the paramount convention as opposed, say, to “representative government,” “federalism,” or simply “the good of the people.” On this basis, courts choosing to rely on conventions other than responsible government would have carte blanche to revisit textual provisions that explicitly allocate legislative powers. But a change in the interpretation of legislative powers would undercut the rationale of reliance on responsible government that is at the heart of judicial recognition of rights guarantees in the first place. In other words, if Australia’s rights constitutionalism depends on a form of reasoning that derives constitutional principles directly from background principles, there needs to be a meta-principle to determine the relative priority of those background principles and gives highest priority to those principles that are the source of rights guarantees. Otherwise, the system of constitutional reasoning risks undercutting itself.

In other words, once judges feel free to rely elevate extra constitutional meta-principles over the text, the “constitution” – both its written and conventional elements -- ceases to have status as a precedential document, and therefore loses its basic character as a constitution. If there is no limit to what else the Courts could inactivate, the very foundation of stable constitutionalism begins to crack; the claim by a court – or fiction, if one prefers – that the Australian constitution guarantees rights at all becomes no more persuasive than the later claim by a different court that no such rights exist. Ironically, far from acting as a surety against judicial overreaching in the generation of rights, this is a situation in which judicial power to limit rights becomes nearly absolute. And just as was the case with respect to powers, what seems to be a stable and sensible system in periods of ordinary politics becomes something else in times of crisis. Where Australia’s powers constitution was called upon to respond to a political crisis, it turned out to rest on a strict form of textualism. Given a similar crisis situation that challenges the Australian rights jurisprudence, on what “constitution” will the High Court be able or willing to rely? Once again, one is confronted by the possibility that when it comes to matters of securing rights, Australia has a constitutionalism, but lacks any expression of those principles in a constitution.

These arguments may become clearer if we test the Australian model against the other three that we have considered here. As we have already noted, Australian rights

166 Bach, Platypus and Parliament, at 100.
constitutionalism combines elements of the American and British models, but joins them in a unique constellation. In the process, Australia’s constitutionalism is deprived of any connection with the basic legitimating claims of either of the older systems. The American reliance on the authority of the written text is the basis for asserting the relevance of originalism; without that commitment to textualism, there would be no basis for ascribing special authority to the understandings that prevailed at the time of the framers’ generation. The authority of American courts is similarly grounded in the unique character of a single, authoritative written text, as Marshall observed in his opinion in *Marbury*. The American constitution is more closely related to legislatively enacted statutes than to common law rules; that is the essential reason why Marshall was able to present the “province of the court” as a matter of limitation and restraint. Australian rights constitutionalism has none of these features, since it is at best loosely based on the provisions of the written text. As noted earlier, in comparison with even capacious textual interpretations by American judges, the reasoning of the justices of the High Court is one step further removed from its supposed source. American judges seek the necessary implications of explicit rights guarantees; Australian justices seek the necessary implications of constitutional conventions, which are themselves a function of the necessary implications of textual descriptions of the system of government.

To repeat a point made earlier, this is a mode of reasoning seen in American jurisprudence only in connection with powers jurisprudence, and primarily in connection with federalism. Australian constitutionalism follows the opposite pattern; it is textualist with regard to powers and conventionalist with regard to rights. But that is not the only difference. When analyzing government powers, American justices derive constitutional principles from the overall structure and the relationship among the clauses of the text. In the Australian rights jurisprudence, there are no textual provisions to be construed, no overall structure of rights guarantees from which to extrapolate. The comparison with the British case is no more reassuring. Here, the problem is that British constitutionalism is inherently non-originalist and antithetical to judicial supremacy. In the British conception, constitutional conventions reflect current popular understandings of proper practice, expressed through the actions of the elected legislature whose authority is sovereign. This formulation preserves the quality of supremacy that is required of a genuine constitution, even if it is not written. The Australian rights model, by contrast, denies the constitutional supremacy of the Parliament at the same time that it invokes the conventions of responsible government as the basis for constitutional norms. Essentially, the claim boils down to the assertion that past practice dictates present practice, without any medium for the transmission of that authority. Alternatively, the case can be thought of as one in which conventions of parliamentary supremacy are invoked to support judicial supremacy, an outright contradiction.

By either reading, the attempt to map Australian constitutionalism onto the British model fails just as much as the attempt to draw an analogy to American constitutional practices. Australian rights constitutionalism features a more extreme version of conventionalism than anything practiced in Britain, combined with a more extreme version of originalism than anything that is ordinarily seen in the United States, and Australia's
constitutional text plays a lesser role in rights constitutionalism than either the American constitutional text or the foundational texts of British constitutionalism. This situation, moreover, is precisely the converse of that which we discovered in our examination of Australia’s powers constitution, which is governed by a form of textualism more extreme than anything seen in American constitutional practice. The Australian “hybrid,” it appears, is composed of elements that would be unrecognizable to their supposed originators.

Does Israel provide a third model into which the Australian case might fit better? At first glance this seems the most dissimilar case, since there is no parallel in Australian constitutionalism to Israel’s constitutional statutes, and no Israeli parallel to Australia’s single constitutional text. In other important ways, however, the cases appear similar. As in the Australian case, there is a history of relying on both written textual provisions and unwritten understandings. The Israel Supreme Court, in particular, drew on founding values to find the basis for rights guarantees prior to 1992, a theory with close parallels to Founders’ Originalism. At the same time, again as in the Australian case, the workings of the Israeli system depend to a large extent on laws enacted by Parliament itself, a version of parliamentary supremacy that eschews the necessity of finding an external basis for parliamentary authority in the first place. Thus there are significant parallels between pre-1992 Israeli constitutionalism and Founders’ Originalism.

Since the watershed year of 1992, Israeli jurisprudence has relied on super-statutes enforceable by courts and not subject to alteration by ordinary democratic processes. Thus Israel may look the inverse of Australia; a constitutional system in which rights guarantees are grounded in a written text subject to judicial enforcement, while powers of government remain to some degree subject to ordinary legislation and convention. It is also noteworthy that a great number of questions about the distribution of powers in the Israeli system have never been authoritatively answered, either by the Israel Supreme Court or by the enactment of Basic Laws. Perhaps Israel has simply yet to have the kind of crisis that would require a clarification of the system of governmental powers. By contrast, Australia’s colonial history and federated system made it obvious that a specification of the authority of the Governor-General and Parliament would be required from the outset, a proposition that was put to the test during the double dissolution and dismissal controversy of 1975.

As a result, while the Israeli model comes the closest to representing a variation on a common theme with the Australian system, ultimately the differences between the two cases render the similarities nugatory insofar as we are concerned with answering the question “does Australia have a rights constitution?” Australia remains unique in having a written constitution but unwritten rights guarantees. The closest parallel is between Australian rights constitutionalism and pre-1992 Israeli rights constitutionalism. But of course, prior to 1992 the most notable feature of Israeli rights constitutionalism was its almost total lack of development. That situation, in turn, was attributable by the failure to arrive at an acceptable constitution in 1949, and the relatively short period of forty years that had elapsed thereafter. Moreover, during the period between 1949 and 1992 the Israeli Knesset was operating under a mandate to craft constitutional guarantees. Australia, by contrast, has had a written constitution since 1901, and the omission of rights guarantees in that text was never understood to be the result of a temporary arrangement.
The comparison with Israel, even more than the comparisons with the U.S. and U.K., demonstrate that in a very real sense, with regard to guarantees of rights Australia has no constitution. The justices’ discoveries of necessary implications have no referents; the rights of expression and assembly are implications of conventions that themselves have never been accorded constitutional status. There is no American-style constitutional law of rights to which the High Court can appeal; there is no British-style set of conventions that can be asserted to have constitutional status, precisely because there is a constitutional text that defines a system of constitutional law with respect to powers; and there is no equivalent to Israel’s Basic Laws enacted by Parliament that can be viewed as self-binding commitments entrusted to courts for enforcement.

At the same time, however, the High Court’s actions have very clear resonance with deeply held beliefs and understandings about the nature of responsible democratic government. Whatever uncertainty there may be about the role and authority of judges in the Australian system, there is no evidence of a move toward rescinding the expression of rights guarantees in cases like Lange. And the method of Founders’ Originalism, while it certainly has its critics, fits squarely within a prevalent understanding of the role of Australian courts.

This is what we mean by saying that where rights jurisprudence is concerned, Australia presents the peculiar case of a well-developed constitutionalism unaccompanied by a constitution. Ordinarily, we would expect this to be an unstable combination. The question that immediately arises is why this situation is acceptable to most Australians. Various efforts to reform the Australian system have failed, including a 1999 referendum that proposed the establishment of a more directly republican system of government, and while there are many legal commentators who call for the creation of an Australian Bill of Rights there is no great public support for the project. Particularly in light of the controversies that have emerged concerning the Howard government’s participation in the War on Terror, why is there not greater concern – even destabilizing or deligitimizing concern – about the absence of any clear constitutional basis for the assertion of individual rights? The issue becomes more dangerous when one considers this description of Australian rights constitutionalism in light of our earlier analysis of Australia’s powers constitution. Read together, our two articles lead to the conclusion that Australia has two different, incommensurate, incomplete constitutions: a rights constitutionalism without a constitution, and a constitution of powers unsupported by constitutionalism. The instability or inadequacy of either one of these designs is exacerbated by the existence of the other, as no mechanism or set of meta-principles exists to keep one from seeping into the other.

Why, then, is there not greater public concern? We suspect the key to the lack of broad public concern is the same as it was in 1902, when Harrison Moore declared that the American “spirit of distrust” was inappropriate for Australia.¹⁶⁷ That is, we suspect that non-Aboriginal Australians accept the absence of any constitutional basis for individual rights because they view their government as fundamentally benevolent and trustworthy.

This is essentially the same explanation that we proposed for widespread acceptance of a dichotomy between what the constitution “says” and “means” with respect to powers. There, we proposed that Australians put up with a non-constitution is that they rely on the culture of “mateness” and assume, despite historical evidence to the contrary, that there will never (again) be really deep political conflicts of the kind that constitutions are supposed to resolve. With regard to rights, the same attitude prevails. The problem, of course, is that in the event an Australian government does act in ways that the populace find unacceptable infringements on their traditionally understood rights, the only remedy to repair the deficiencies in the Australian constitution will be to amend the text. That project is one far more easily undertaken in times of ordinary politics than mid-crisis, as no less a political scientist than Niccolo Machiavelli warned.\textsuperscript{168}

\textsuperscript{168} “I think it may be true that fortune is the ruler of half our actions, but that she allows the other half or teheabouts to be governed by us. I would compare her to an impetuous river hat, when turbulent, inundates the plains, casts down trees and buildings, removes earth from this side and places it on the other . . . yet though it is of such a kind, still when it is quiet, men can make provision against it by dykes and banks, so that when it rises it will either go into a canal or its rush will not be so wild and dangerous.” Machiavelli, \textit{The Prince} (New York 1950), 91.