

LEGISLATIVE OVERSIGHT OF A BILL OF RIGHTS: THE AMERICAN PERSPECTIVE

ABSTRACT

In recent years, whenever a federal bill of rights is proposed for Australia, the example of the United States and particularly the ‘judicial activism’ of the US Supreme Court are usually cited as reasons to shoot down the proposal. However early US history, prior to American adoption of a federal bill of rights actually supports legislative rather than judicial oversight of rights issues. This little known history would seem to be in keeping with modern proposals for a federal bill of rights in Australia today, which usually emphasise parliamentary rather than High Court oversight of rights issues. However, the early American experience also provides a caution against the ‘dialogue model’ which is the most popular proposal for an Australian bill of rights in recent times. This is due to structural and federalism difficulties the dialogue model would likely create.

I INTRODUCTION

Every few years, in the course of the debate on whether or not Australia should adopt a Commonwealth bill of rights, other countries are frequently referred to as examples of what has worked and what has not. The most vilified example tends to be the United States. Indeed, while the debating parties disagree on many things, even some of the most ardent proponents of a bill for rights for Australia acknowledge that the entrenched US Bill of Rights — however popular it may be in America — is not a good example to emulate in Australia.¹ One of the most

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¹ For example, George Williams, one of the strongest proponents of a bill of rights for Australia, has argued that ‘[w]e should jettison the US model and any idea of a constitutional bill of rights.’ George Williams, *A Charter of Rights for Australia* (University of New South Wales Press, 2007) 87–8. In their recent book, *Bills of Rights in Australia*, Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon acknowledge that ‘[t]he recent history of human rights in national legal systems reveals a movement away from the US-style bill of rights, which gives significant power to the judiciary’. Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon (eds), *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009) 51.

frequently repeated reasons against adopting an entrenched bill of rights is that such a bill gives the judiciary far too much power to make policy decisions that are more properly left in the realm of the legislature. In 1985, the Queensland government expressed the concept quite well:

The vast majority of the issues dealt with by a Bill of Rights reflect particular views of political, economic and social questions and are not, as such, matters requiring legal interpretation. The Judiciary is thus placed, in interpreting the provisions of a Bill of Rights, in the position to make determinations upon questions which should more properly be left to Parliament and the political process to determine. This results in the entire Judiciary becoming subject to political partisanship with a consequent decline in its effectiveness and standing in the general community. Respect for the general legal system thus declines once a Bill of Rights is enacted.²

It is therefore usually assumed that the US experience offers little positive support for the adoption of a bill of rights in Australia, particularly one which focuses on parliamentary rather than judicial oversight of rights. However, this article asserts one important way in which the US experience is, in fact, one of the best supports for parliamentary rather than judicial oversight of a bill of rights in Australia. In order to see this, it is necessary to go back in US history to a time when the US was in roughly the same position that Australia is in today — that of having a national constitution, but no national bill of rights. It was James Madison who initially drafted the federal bill of rights in the US, and pushed it through a reluctant Congress. Madison's views regarding the best way to protect rights were surprisingly more in line with the Australian preference for parliamentary rather than judicial protection of rights — even though he drafted the judicially enforced entrenched bill of rights himself. However, it was only political expediency and the disagreement of his peers that led Madison to act as he did.

Part II of this article will explain why and how the US Bill of Rights came into existence when it did and the negative views James Madison held toward a bill of rights. This is significant because historians have noted that if it were not for Madison, the US Bill of Rights may not have come into existence, or at least would certainly not have come about as soon as it did.³ Part III will explain Madison's unique and oft-forgotten solution to the question of how a national government can best protect rights through the legislative veto and Council of Revision. Part IV will discuss the relevance to Australia of these American perspectives.

² Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *A Bill of Rights for Australia?* (1985) 6.

³ See, eg, Kenneth R Bowling, 'A Tub to the Whale: The Founding Father and Adoption of the Federal Bill of Rights' (1988) 8 *Journal of the Early Republic* 223, 223–4. Robert Rutland asserts the Bill of Rights would still have been passed, but a little later in time. Robert A Rutland, 'The Bill of Rights at 200 Years: Bicentennial Perspective: The Trivialization of the Bill of Rights: One Historian's View of how the Purposes of the First Ten Amendments have been Defiled' (1990) 31 *William and Mary Law Review* 287, 287.

II JAMES MADISON'S VIEWS OF A BILL OF RIGHTS

At the very first session of the new US Congress in 1789, Madison proposed a bill of rights. His proposal was met with opposition from many of his contemporaries. They felt that diving immediately into constitutional amendments of this sort was inappropriate at such an early stage of the government when more pressing matters needed to be dealt with.⁴ They considered Madison's strange fixation with a bill of rights as an unusual obsession.

However, Madison's motive for submitting the proposed amendments was extremely pragmatic. During the state ratification debates of the previous year regarding the new constitution, it had been necessary to promise that a bill of rights would be added to the document if ratification were achieved. Without this promise, the Constitution would not have been ratified.⁵ But this is not all. Regardless of this promise, many opponents of the Constitution were calling for a new constitutional convention. Their intent went beyond adding language to protect rights; rather, they had structural changes in mind as well.⁶

Hence, Madison saw the adoption of a bill of rights not only as fulfilment of a ratification promise, but most importantly as being essential to guarantee the ongoing existence of the new federal government. He and other 'federalists' or 'constitutionalists' knew that the new government was still in its infancy and still had many enemies. If a second constitutional convention were held, those enemies may succeed at inserting the structural amendments and corrections they thought were necessary.⁷ Madison believed that a second convention of this type would be a disaster, since opponents of the Constitution would make significant structural changes, altering the whole form of government. As he stated in his speech proposing the Bill of Rights:

I should be unwilling to see a door opened for a re-consideration of the whole structure of the government, for a re-consideration of the principles and the substance of the powers given; because I doubt, if such a door were opened, we should be very likely to stop at that point which would be safe to the Government itself.⁸

⁴ 1 *Annals of Congress* 446 (Joseph Gales) (1789, House of Representatives).

⁵ Drew R McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge Press, 1989) 89.

⁶ Carl T Bogus, 'The Hidden History of the Second Amendment' (1998) 31 *University of California at Davis Law Review* 309, 362–3; Leonard Levy, *Origins of the Bill of Rights* (Yale University Press, 1999) 39.

⁷ Bogus, above n 6, 262–3; Levy, above n 6, 39.

⁸ 1 *Annals of Congress* 450 (Joseph Gales) (1789, House of Representatives) Madison's speech presenting the proposed Bill of Rights was given in the House of Representatives on June 8, 1789. See also 1 *Annals of Congress* 448–59. (Joseph Gales) (1789, House of Representatives).

Hence, Madison's 'obsession' with a bill of rights was motivated by a desire to protect the structure he and others had worked so hard to obtain at the Constitutional Convention in 1787. It was a very pragmatic course of action by an astute politician. It is interesting to note that Canada's motivation for its 1982 *Canadian Charter of Rights and Freedoms* was quite similar.⁹ Faced in the early 1980s with possible withdrawal of Quebec from the Canadian union, the Trudeau government pursued the bill of rights charter revision as a way to demonstrate 'unity building' across Canada.¹⁰ Hence, the entrenched bills of rights in these two countries primarily came about for reasons that had little to do with rights.

Of course, this is *not* a situation that Australia faces today. It is beyond any question that the American and Canadian motives for adopting their entrenched bills of rights are simply not the same as the motives which exist in Australia today. However, recognising Madison's true motive in submitting the US Bill of Rights helps explain one of the most unusual anomalies in the history of government. This is the fact that Madison personally disliked and distrusted bills of rights and thought they were largely ineffective and pointless.

In light of this, it is no surprise that in drafting his proposed amendments, Madison carefully chose only those generalised statements that would not cause contention in the short run, and which would almost certainly be adopted.¹¹ His goal was to avoid rehashing the fundamental principles on which the new government was based while it was in its infancy. However, Madison's true dislike of a bill of rights frequently came out. He referred to the very Bill of Rights that he had prepared as a mere 'declaration of certain fundamental principles,'¹² and as a rather pathetic 'parchment barrier' that would not necessarily protect rights at all. Indeed, Madison was not the only one who thought that a bill of rights was more illusory than real. Samuel Livermore, a representative from New Hampshire, stated that his constituents would see the Bill of Rights as no 'more than a pinch of snuff; they went to secure rights never in danger.'¹³ Congressman Fisher Ames carried the point further. He stated that the Bill of Rights was 'a prodigious great dose for a medicine. But it will stimulate the stomach as little as hasty-pudding. It is rather

⁹ *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*').

¹⁰ For a detailed discussion of this process, see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publishing, first published 1989, 1994 ed).

¹¹ See Letter from James Madison to Samuel Johnston, June 21, 1789, in Gaillard Hunt (ed), *The Writings of James Madison* (Putnam's Sons, 1787–1790) vol 5, 409–10. Madison stated that 'nothing of a controvertible nature ought to be hazarded' in the amendments so as to increase the chances of passing a Bill of Rights. See Letter from James Madison to Edmund Pendleton, June 21, 1789, in Gaillard Hunt (ed), *The Writing of James Madison* (Putnam's Sons, 1787–1790) vol 5, 406.

¹² Letter from James Madison to Ambrose Madison, June 24, 1788, cited in Hunt, above n 11, 226–7.

¹³ 1 *Annals of Congress* 805 (Joseph Gales) (1789, House of Representatives).

food than physic. An immense mass of sweet and other herbs and roots for a diet drink.’¹⁴

Some scholars have asserted that Madison initially disliked bills of rights, but later came to be in favour of them.¹⁵ However, this is simply not consistent with Madison’s own statements. As late as 1821, more than 30 years after he wrote the Bill of Rights and four years after he had departed from the political stage, he referred to the Bill of Rights as ‘those safe, if not necessary, and those politic if not obligatory, amendments introduced in conformity to the known desires of the Body of the people.’¹⁶

For Madison, a bill of rights was of little importance. However, because the bill of rights was so strongly favoured by many, he frequently made statements that showed marginal support (or at least tolerance) of a bill of rights. Simply put, Madison did not think a bill of rights was necessary, but he was willing to put up with one if he had to. He stated:

My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment... I have favored it because I supposed that it might be of use, and if properly executed could not be of disservice.¹⁷

Having placated by this statement those who staunchly favoured a bill for rights, Madison went on to explain why he did not think a bill of rights to be worth the trouble and indeed why it might be dangerous. One of the most significant reasons for him was that

experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every state. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current.¹⁸

¹⁴ William B Allen, *The Works of Fisher Ames* (Liberty Fund Inc, 1983) vol 1, 643.

¹⁵ See, eg, Robert L Jones, ‘Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance’ (2012) 27 *Journal of Law and Politics* 459; Stanley Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788-1800* (Oxford University Press, 1993) 61; Leonard Levy, *Seasoned Judgments: The American Constitution, Rights and History* (Transaction Publishers, 1995) 9.

¹⁶ Letter from James Madison to John G Jackson, December 27, 1821, in Hunt, above n 1, vol 9, 75.

¹⁷ Letter from James Madison to Thomas Jefferson, October 17, 1788, in Hunt, above n 11, vol 5, 271.

¹⁸ *Ibid* 271–2.

In other words, Madison viewed a bill of rights as a mere ‘parchment barrier’ that was easily circumvented by the legislature. It created a dangerous illusion that rights were now protected, even though the legislature often felt free to ignore these guarantees. The reason legislatures would do this was simple and obvious to Madison, although not as apparent to others. It had to do with factions, a subject he eloquently addressed in *The Federalist* Number 10.¹⁹ A faction was a group of citizens with a common interest, but with little regard for the rights of those who opposed them.²⁰ When the faction consisted only of a minority of a community, the majority held it in check. However, when the faction was in the majority, then it would often abuse the rights of the minority.

Hence, Madison stated that ‘[w]hen a majority is included in a faction, the form of popular government ... enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.’²¹ On another occasion, he said that

wherever the real power in a government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.²²

In sum, Madison did not view a bill of rights as being a very effective way of guaranteeing rights when the majority trampled on them. Most of the new American states had a state bill or declaration of rights.²³ But state bills of rights were sometimes ignored due to factions in the legislature. Madison had personally seen this happen in Virginia. In 1785, after the Virginia Bill of Rights had been adopted and was supposedly serving to protect the rights of the people, a majority in the legislature tried to pass a bill that would use tax money to pay the clergy. This was a clear violation of the new Bill of Rights, which the majority of Virginia legislators were only too happy to ignore. Madison strongly opposed this new bill.²⁴

Federalism was a new concept at this point. The structure of concurrent state and federal jurisdiction over the populace was a new experiment. Based on what he had

¹⁹ Benjamin Fletcher Wright (ed), *The Federalist: The Famous Papers of the American Government* (Barnes & Nobles Books, 1961) 129–36.

²⁰ *Ibid* 130.

²¹ *Ibid* 132.

²² Letter from James Madison to Thomas Jefferson, October 17, 1788, in Hunt, above n 11, vol 5, 272 (emphasis altered).

²³ Bills of Rights for most of the states in this era can be found in: Francis Thorpe (ed), *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, Colonies Now or Heretofore Forming the United States* (Washington Government Printer, 1909), and William F Swindler, *Sources and Documents of United States Constitutions* (Oceana Publications, 1973).

²⁴ Madison’s ‘Memorial and Remonstrance’ against this bill is found at: Hunt, above n 11, vol 2, 183–91.

seen, Madison believed that most abuses of rights would be by the states. He had less concern for abuses of rights by the federal government, due to the severe limitations on its power in the Constitution. Hence, Madison viewed a bill of rights at the federal level as being of little value because it would apply only to what was at that time a small federal government, and would not protect individual citizens from abuses of power by states.²⁵ In Madison's view, what was chiefly needed was a way for the federal government to protect citizens from abuse of rights by the states. As historian and scholar William L Miller stated, Madison 'believed that the states were more likely to violate civil liberties than was the new federal union — a prediction that history has surely proved to be correct.'²⁶

Madison also expressed another concern about bills of rights. This was that listing certain rights as protected could create the illusion that rights not on the list could be controlled and violated at will by the government. When Madison presented his proposed bill of rights to Congress in 1789, in his discussion of the pros and cons of having a bill of rights, this was the strongest argument against having one that he cited:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. *This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system.*²⁷

Madison was not the only founder with this concern. Alexander Hamilton in the Federalist No 84 stated that a bill of rights could be dangerous because it would 'contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.'²⁸ Representative James Jackson of Georgia also noted that

[t]here is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government.²⁹

²⁵ Since passage of the 14th Amendment, most of the federal bill of rights has been 'incorporated' to apply directly to the states. A description of this process can be found in: Joseph A Melusky and Whitman H Ridgway, *The Bill of Rights: Our Written Legacy* (Krieger Publishing Company, 1993), 29–31.

²⁶ William L Miller, *The Business of May Next: James Madison and the Founding* (University of Virginia Press, 1994) 254.

²⁷ 1 *Annals of Congress* 456 (Joseph Gales) (1789, House of Representatives) (emphasis added).

²⁸ Wright, above n 19, 535.

²⁹ 1 *Annals of Congress* 460 (Joseph Gales) (1789, House of Representatives).

Madison proposed what ultimately became the 9th Amendment to deal with this problem. This amendment states that ‘the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.’³⁰ Accordingly, unenumerated rights would still be protected, and any implication that unlisted rights could be controlled by government was assumed to be overcome. Unfortunately, however, this amendment has been little used. In modern US history, rights have usually been implied by way of the due process clause of the 14th Amendment rather than by using the 9th Amendment as originally intended.³¹

III MADISON’S VIEWS ON THE BEST WAY TO PROTECT RIGHTS

Whatever his misgivings about the Bill of Rights, Madison firmly believed there *was* a direct and effective way to protect individual rights from state abuses. This method was so vital to his thinking that he proposed it at the commencement of the Constitutional Convention in 1787. This was no afterthought, or language written merely to satisfy the whims of those clamouring for a bill of rights or threatening a second constitutional convention. Rather, it was fundamental to Madison’s whole plan of government. It consisted simply of this: that the federal legislature would retain an absolute power to veto all acts by the state legislatures violative of rights.³² Hence, rights protection would primarily be structurally provided by the federal legislature, or Congress.

This concept was proposed by Madison at the very start of the Constitutional Convention in 1787, years before the Bill of Rights was adopted. The sixth resolution of his Virginia Plan stated that the National Legislature should have the power ‘to negative all laws passed by the several States contravening, in the opinion of the National Legislature the articles of Union’.³³ Obviously, such a power could be very broad, since almost anything could come within the National Legislature’s opinion. Later, during the debates, Madison confirmed this broad view when he stated that

an indefinite power to negative legislative acts of the states [was] absolutely necessary to a perfect system. Experience had evinced a constant tendency in the states to ... [among other things] oppress the weaker party within their jurisdictions.³⁴

³⁰ *United States Constitution* amend IX.

³¹ See Melusky and Ridgeway, above n 25, 29–31.

³² For an informative discussion of Madison’s thoughts regarding the legislative veto, and why a bill of rights was not an effective instrument, see Robert A Goldwin, *From Parchment to Power: How James Madison used the Bill of Rights to save the Constitution*, (American Enterprise Institute, 1997) 59, 65; see also Jack N Rakove, ‘James Madison and the Bill of Rights’, *This Constitution: A Bicentennial Chronicle* (Washington DC) (1988) 4.

³³ Hunt, above n 11, vol 3, 19. The Virginia Resolutions, although originating from the mind of Madison, were proposed to the Convention by Virginia Governor Edmund Randolph on May 29, 1787.

³⁴ Hunt, above n 11, vol 3, 121.

This statement demonstrates clearly that for Madison a legislative veto was the chief instrument to protect individual rights and would be far more effective than a written bill of rights.³⁵

One may wonder why Madison had such a distrust of state legislatures, yet was willing to put so much trust in the federal Congress. The reason was once more in relation to federalism and the check it provided to factions, which he considered to be the greatest source of threats to individual rights. Simply put, it was not at all strange for factions to take control of smaller state governments, but it was far less likely that they would assume control of the legislature of a large government, drawing its membership from a diverse group of states. Madison stated that '[t]he influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States'.³⁶ This is because of the greater diversity to be found where there is a 'greater number of citizens and extent of territory'.³⁷ Hence, the very size of a large republic would be the most effective tool for controlling the factions that arose within it.

But Madison was also a pragmatist and knew that even with the severe limitations on its power described in the Constitution, that federal Congress might still abuse the rights of the people. That is why the eighth resolution of his 'Virginia Plan' proposed the formation of a 'council of revision', which would be composed of the chief executive — the President of the United States — and 'a convenient number of the National Judiciary' who would have 'authority to examine every act of the National Legislature before it should operate,' with the power to veto any congressional act.³⁸ The veto could be overcome by Congress re-passing the law. This was the predecessor of the veto power, which was changed by the constitutional convention to rest solely with the President.³⁹

What Madison wanted was a mechanism whereby violations of rights could be stopped before they took effect. Again, for Madison, the only way the legislative veto power by the federal Congress over state acts could be effective was for it to be unlimited. He said:

in order to give the negative this efficacy, it must extend to all cases. A discrimination [ie partial or limited legislative veto power] would only be a fresh source of contention between the two authorities [the federal and state governments] ... This prerogative of the General Government is the great pervading principal that must controul the centrifugal tendency of the States; which, without it, will

³⁵ Alexander Hamilton also favoured a federal veto power over questionable state acts. However, he felt that federally appointed state governors would be the best ones to exercise this power, rather than the federal Congress. Hunt, above n 11, vol 3, 196, 207.

³⁶ Jacob E Cooke (ed), *The Federalist* (Wesleyan University Press, 1961) 64.

³⁷ *Ibid* 63.

³⁸ Hunt, above n 11, vol 3, 19.

³⁹ *United States Constitution*, Art 1, § 7, para 2.

continually fly out of their proper orbits and destroy the order and harmony of the political system.⁴⁰

It must be remembered that this was 1787, long before the incorporation doctrine of the 14th Amendment allowed the federal Bill of Rights to be enforced in all the states, and long before the ‘commerce power’ was interpreted so expansively that the federal Congress could impose legislation on all the states. When the federal Bill of Rights was first enacted, it was understood that it would only apply to the federal government and would not reach state abuses.⁴¹ For Madison, the best way to deal with such state abuses was through the national legislature. It was Madison’s colleagues in the constitutional convention that switched his legislative veto to judicial oversight by the Supreme Court, rather than Congress and changed his council of revision to a veto power in the executive only. These changes occurred over Madison’s objections.

Many members of the constitutional convention did not agree with Madison’s proposed legislative veto. The small states objected that the larger number of representatives from the larger states might use the federal veto power as a tool to bully the small states.⁴² Many also wondered how the national legislature could review all state laws. As James Mason said, ‘[a]re all laws whatever to be brought up? Is no road nor bridge to be established without the Sanction of the General Legislature?’⁴³

Ultimately the convention changed the negative proposal significantly, but did not utterly abolish it. Instead, the delegates specified certain limits to state power within the body of the Constitution, in art 1, s 10. If the states defied these limits, the federal judiciary could then declare their acts unconstitutional, or, failing that, the Congress would take action by passing a federal law. As stated by Governor Morris, ‘a law that ought to be negatived will be set aside in the Judiciary department and if that security should fail; may be repealed by a National law.’⁴⁴ In essence, Madison’s legislative veto was replaced with a judicial veto. An entrenched system of rights protection was born, to be enforced by the judiciary. This was directly contrary to Madison’s thinking that the legislature was the best body to protect individual rights — which mirrors the thinking of many who favour a bill of rights in Australia today.

After the convention, Madison revealed to Thomas Jefferson his thoughts regarding the failure of the delegates to agree to his legislative veto, and their replacement of it with a judicial veto, which he considered to be inferior. Madison stated:

⁴⁰ Hunt, above n 11, vol 3, 122.

⁴¹ The Supreme Court so ruled in *Barron v Baltimore*, 32 US 243 (1833).

⁴² Hunt, above n 11, vol 3, 125–6. This point was raised by Gunning Bedford of Delaware.

⁴³ Hunt, above n 11, vol 4, 287. It is significant that Mason’s example had to do with a rights issue—a ‘taking,’ or exercise of the power of eminent domain, to take private property to build a public road or bridge.

⁴⁴ Hunt, above n 11, vol 3, 449.

a constitutional negative on the laws of the States seems equally necessary to secure individuals against encroachments on their rights ... A reform therefore which does not make provision for private rights, must be materially defective. The restraints against paper emissions, and violations of contracts are not sufficient. Supposing them to be effectual as far as they go, they are short of the mark.⁴⁵

In sum, Madison believed the convention had missed the best way to protect rights. This was the legislative veto which would have given the national legislature power to take swift action against any state attempting to defy rights and a council of revision which would provide a watchdog over possible rights violations by Congress. While these proposals by Madison are almost forgotten today, for him they were essential parts of the plan for a new federal government.

Of course, the judicial and presidential vetoes were still in place and the federal legislature as a rights safeguard was as well. Publicly, Madison noted these and cited them as safeguards, since he knew the system that had been created was still better than the alternative. Hence in the *Federalist* No 51, Madison stated that because of the division of government between states and the federal power, and the further divisions of power within each government, society was ‘broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.’⁴⁶

But privately, Madison was still not satisfied. In the convention debates after the legislative veto was rejected, Madison said of the judicial veto:

The jurisdiction of the supreme Court must be the source of redress. So far only had provision been made by the plan against injurious acts of the States. His own opinion was, that this was sufficient. *A negative on the State laws alone could meet all the shapes which these could assume. But this had been overruled.*⁴⁷

Hence, Madison acknowledged to his contemporaries in the convention that the judicial veto had to be ‘sufficient,’ even though the legislative veto (which he thought would be much better) had been overruled. However, he continued to lament the loss of a legislative veto in his private correspondence with Jefferson. A judicial veto power, although better than nothing, was problematic. He stated:

It may be said that the Judicial authority, under our new system will keep the States within their proper limits, and supply the place of a negative on their laws.

⁴⁵ Letter from James Madison to Thomas Jefferson, October 24, 1787, in Hunt, above n 11, vol 5, 27 (emphasis added).

⁴⁶ Wright, above n 19, 358.

⁴⁷ Hunt, above n 11, vol 4, 443–4 (emphasis added).

The answer is, that it is more convenient to prevent the passage of a law than to declare it void after it is passed.⁴⁸

In so saying, Madison raised the very policy-making issue that opponents of entrenched bills of rights raise today. Judicial intervention in questions of rights can only come *after* a violation has occurred. We must wait for someone to be hurt, then ask the courts to remedy the matter. In so doing, courts are aware that their decisions are not limited to the case at hand, but will be considered binding law on all similarly situated persons in the future. They are also aware that their decision has the potential to override legislation, since the bill of rights is considered superior to legislation. In short, under such a system, the risk was ever present that courts might depart from the law to make policy decisions better left to the legislature. Madison disliked such a structure. For him it was abundantly obvious that the best branch of government to protect rights was the federal legislature.

Indeed, on another occasion, Madison commented pointedly about the dangers of judicial activism in respect to threatened rights. This comment was made in 1799, as part of his response to the *Alien and Sedition Acts of 1789* ('*Alien and Sedition Acts*') which were enacted during the presidential administration of John Adams. These Acts allowed the president to deport 'dangerous' aliens, and criminalised certain criticisms of the government.⁴⁹ This naturally implicated the 1st Amendment right of free speech. Because the authority to enact such Acts was hard to find in the written Constitution, some justified them on the basis that the Constitution impliedly incorporated the British common law, and that the Acts were made under the authority of the common law. While many states had adopted the common law in their jurisdictions, it had never been adopted as binding on the federal government. Accordingly, Madison strongly disagreed with the assertion that the *Alien and Sedition Acts* could be supported by the common law, and concluded that 'the common law never was, nor by any fair construction ever can be, deemed a law for the American people.'⁵⁰ Madison was particularly firm that the Supreme Court should not interpret the common law as support for a constitutional right. He stated:

whether the common law be admitted as of legal or of constitutional obligation, it would confer on the judicial department a discretion little short of a legislative power ... [they would] decide what parts of the common law would, and what would not, be properly applicable to the circumstances of the United States. A discretion of this sort has always been lamented as incongruous and dangerous

⁴⁸ Letter from James Madison to Thomas Jefferson, October 24, 1787, in Hunt, above n 11, vol 5, 26–7. James Wilson from Pennsylvania expressed a similar sentiment during the 1787 Convention, stating that '[t]he firmness of judges is not of itself sufficient. Something further is requisite. It will be better to prevent the passage of an improper law, than to declare it void when passed.' Hunt, above n 11, vol 4, 287.

⁴⁹ For a detailed description of the *Alien and Sedition Acts* see John Chester Miller, *Crisis in Freedom: The Alien and Sedition Acts* (New York, 1951).

⁵⁰ Hunt, above n 11, vol 6, 380–1.

... the power of the judges over the law would, in fact, erect them into legislators, and ... it would be impossible for the citizens to conjecture, either what was or would be law.⁵¹

Jefferson also was greatly concerned with judicial activism of this sort. In 1819 he expressed concern regarding the decisions of ‘unelected’ judges who would view the Constitution as ‘a mere thing of wax ... which they may twist and shape into any form they please.’⁵²

IV THE RELEVANCE TO AUSTRALIA

From the above, it can be seen that Madison’s ideas support the belief held by many Australians that the legislature, rather than the judiciary, is the entity best equipped to deal with rights questions. As such, the American experience may be cited as support for the legislative oversight of rights issues that is espoused by many in Australia today.

However, the relevance of the American example does not end there. The American experience also suggests that problems may arise from a *statutory* bill of rights such as has frequently been proposed for Australia. Difficulties may result due to structural and federalism issues that are unique to Australia. Each of these issues are discussed in turn.

A The Structural Problem

As can be seen from Madison’s proposal for a parliamentary rather than a judicial veto of rights violations, parliamentary oversight of rights questions appears at heart to be an entrenched constitutional-structural issue. This is so because any change regarding which governmental body has oversight of rights issues may alter the constitutionally entrenched relationship between Parliament and the judiciary. However, most proposals for a national bill of rights in Australia today call for a statutory bill of rights, rather than formal amendment of the *Australian Constitution*. The model that has probably been the most discussed in Australia today is the ‘dialogue’ form of bill of rights, which many feel is the most likely to be adopted. This method originated in the United Kingdom with the *Human Rights Act 1998* (UK), and variation of it has been adopted in Victoria and the Australian Capital Territory.⁵³ However, as Madison’s views and the American example illustrate, a statutory attempt to alter the constitutional relationship between the legislature and the judiciary is problematic.

⁵¹ Ibid 378, 380–1.

⁵² Paul Leicester Ford, *The Writings of Thomas Jefferson* (Putnam’s Sons 1803–1807) vol 12, 137.

⁵³ *Human Rights Act 1998* (UK). See also *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

In the recent discussion about whether to pursue adoption of a bill of rights by the Labour government in 2009–2010, the Human Rights Consultation Committee concluded that the statutory dialogue model was the best alternative for Australia.⁵⁴ Under this ‘dialogue’ form of bill of rights, which has been adopted in the ACT and Victoria, the bill of rights is a statutory enactment rather than a constitutional amendment. The statute contains the further restriction that the judiciary may not invalidate statutes which violate rights. Rather, courts are to interpret all statutes compatibly with rights. If the courts feel they cannot provide such an interpretation because the legislation is contrary to the statutory bill of rights, they may then issue a ‘Certificate of Incompatibility’, which is only an opinion for the legislature to consider. This is said to open a ‘dialogue’ on the matter between the branches of government. However, it is left solely to Parliament to change laws that could violate rights.⁵⁵

While such a proposal may be appealing, it is nonetheless difficult for a mere statute to alter the constitutionally entrenched structure of judicial review that is followed in Australia today. Accordingly, it would appear that a statutory bill of rights provides only a non-structural solution to a structural problem, and is based on the assumption that mere legislation can somehow bypass judicial review provided for in the Constitution. Because of this, judicial behaviour may continue as it has, regardless of any statutory attempt to change things. While Australia has a rich tradition of holding the judiciary to well defined paths,⁵⁶ tradition alone may not be enough to preserve the separation between the branches of government if a statutory bill of rights is enacted.

Indeed, the recent case of *Momcilovic v The Queen*⁵⁷ highlights this structural problem by demonstrating that a statutory bill of rights may not fully be respected by the courts, regardless of the intent of the drafters of such an act. Three out of seven justices on the High Court stated that the ‘Declaration of Inconsistent Interpretation’ provided for in Victoria’s statutory bill of rights was invalid in their view because it impairs the institutional integrity of the courts.⁵⁸ However, if one more justice had joined this group, the very purpose of the Victorian Act would have been threatened. Furthermore, two other

⁵⁴ Human Rights Consultation Committee, Parliament of Australia, *National Human Rights Consultation Report* (2009) 15. The Committee’s Findings: <<https://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx>>. However, in April 2010, the Labor government indicated that it would not be pursuing a bill of rights for Australia at the present time.

⁵⁵ The ‘dialogue’ method is discussed in greater detail in Byrnes, Charlesworth and McKinnon, above n 1, 51–4.

⁵⁶ See *Singh v Commonwealth* (2002) 222 CLR 322 for a discussion of this tradition.

⁵⁷ (2011) 245 CLR 1 (*Momcilovic*).

⁵⁸ The justices so holding were Gummow, Hayne and Heydon JJ. The justices noted that it was not the High Court but the Victorian Supreme Court which had its ‘institutional integrity’ impaired pursuant to the Kable principle. However, a similar impairment could be found in respect to a statutory bill of rights for all of Australia if one were enacted. See *Momcilovic* (2011) 245 CLR 1, 97 [188], 123 [280], 184 [456].

justices felt that issuance of such a statement by a court could be valid, but that the Court of Appeal's issuance of such a statement in that specific case was erroneous.⁵⁹ Hence, a majority of the court indicated that a 'Declaration of Inconsistent Interpretation' was inappropriate in the case.

Closely related to the structural problem faced by a statutory bill of rights in Australia today is a potential federalism and constitutional problem under s 109.

B Federalism and the Constitutional Problem under s 109

Federal oversight of state rights issues was a major concern for James Madison, as we have seen above. The relationship between the federal government and the states in a federal government such as the United States and Australia is always a delicate matter, and is in a constant state of flux. Proposals for an Australian bill of rights today have the potential of altering the relationship between the states and the federal government. Section 109 of the *Australian Constitution* says that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' Some feel that this clause will be invoked no matter how carefully a Commonwealth statutory bill of rights is crafted to avoid it. Hence, they feel it will be impossible to keep the federal government from interfering with the states, which clearly impacts federalism in Australia. While the Senate in Australia was created and designed to protect the states within the federal system, the structure of the dialogue method and s 109 may still allow the federal Parliament far greater power to override state decisions, thereby injuring the independence of the states.

Mere verbiage in a bill of rights act intended to deal with this federalism problem may simply not be enough. For example, the 2009 proposal by the National Human Rights Consultation Committee asserted that a statutory bill of rights should apply only to federal acts. However, scholar Anne Twomey pointed out that even with such language, the High Court could still decide that s 109 is implicated if it so wanted. This is because there would be an obvious inconsistency any time a state law violated rights protected under the federal statutory bill of rights.⁶⁰ Indeed, as Hayne J observed in *Momcilovic*, it would be wrong

to conclude that it is for the federal legislature to determine for itself whether or to what extent s 109 is engaged with respect to any particular law of the Commonwealth. Resolution of the question must rest with the judicial branch by its application of accepted principles.⁶¹

Hence, notwithstanding any language in a bill of rights to the contrary, a bill of rights may be interpreted by the High Court as being applicable to the states through s 109.

⁵⁹ The justices so holding were Crennan and Kiefel JJ. See *Momcilovic* (2011) 245 CLR 1, 240 [658].

⁶⁰ National Human Rights Consultation Report, above n 54, 305.

⁶¹ *Momcilovic* (2011) 245 CLR 1, 133 [313].

Examples of seemingly successful statutory bills of rights in other countries do not prevent this conclusion, since in most cases they do not have the same federal structure as Australia. As Gummow J said in *Momcilovic*:

the human rights systems established in the United Kingdom, Canada, South Africa, New Zealand and Hong Kong ... present imperfect analogues. None of them involves legislation of a state or provincial legislature in a federal structure with a rigid constitution.⁶²

Indeed, the possibility of judicial enforcement of a Commonwealth bill of rights to the states under s 109 is bolstered by Australia's obligation due to its ratification of the *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').⁶³ Australia has a duty under its treaty ratification to implement these treaties across Australia, including in all the states, not just the federal government.⁶⁴ An example illustrates this concern. In 1992, Nicholas Toonen submitted a 'communication' to the Human Rights Committee in Europe, under the ICCPR that Australia had acceded to in the prior year. Toonen complained that Tasmania's criminal code outlawing homosexual behaviour violated his right of privacy. The Committee agreed, but of course it had no jurisdiction to enforce its decision.⁶⁵ However, the Keating government in Canberra then enacted the *Human Rights (Sexual Conduct) Act 1994* (Cth). This federal law said that any law in Australia which created an 'arbitrary interference with privacy' was void, regardless of whether the law was enacted by 'the Commonwealth, a state or a territory.'⁶⁶ The unquestioned intent was to override Tasmania's law by using s 109 of the Commonwealth Constitution.⁶⁷ Of course, in this example it was the Commonwealth Parliament, not the High Court that took this point of view regarding s 109. However, as noted above

⁶² (2011) 245 CLR 1, 83 [146]. Canada is the only country named by Gummow J with a federal structure similar to Australia. Canada had a statutory bill of rights for a short period of time, but subsequently enacted an entrenched bill of rights which remains in force to this day. See Mandel, above n 10.

⁶³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1967) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993, UNTS 3 (entered into force 3 November 1976) ('ICESCR').

⁶⁴ Article 50 of the ICCPR states that '[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.' ICCPR, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1967). An identical provision is found in Article 28 of the International Covenant on Economic, Social and Cultural Rights ICESCR, opened for signature 16 December 1966, 993, UNTS 3 (entered into force 3 November 1976). These provisions are binding on all ratifying states, such as Australia.

⁶⁵ Williams, above n 1, 49.

⁶⁶ *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4.

⁶⁷ Williams, above n 1, 49.

by Hayne J's comment on s 109 in *Momcilovic*, the High Court may also interpret s 109 broadly in like fashion.⁶⁸

Protecting the system of federalism in Australia is a real concern for many today. A recent Senate Committee report on federalism reported that

In the 110 years since its inception, federalism in Australia has come under growing pressure ... Perhaps not surprisingly, this has created tensions in federal state relations and been a factor in undermining the power and authority of the states and territories to be true partners in the federation.⁶⁹

The Committee noted that the single factor which has most significantly undermined federalism in Australia has been pro-Commonwealth decisions of the High Court.⁷⁰ The Committee observed that if such 'expansive interpretations' of the High Court continue, the resulting growth in federal power 'would further undermine the Constitutional balance struck at the time of federation between the states and the federal government.'⁷¹ For this reason the Law Council of Australia recently stated that 'there is growing consensus across politics, business and the community that there needs to be a reallocation of powers in the Australian Federation.'⁷² The Senate Committee then urged that issues relating to federalism 'should be widely debated among Australians,'⁷³ and that it 'encourages more extensive academic research to be undertaken on the subject with a view to formulating policy proposals that might be referred to a constitutional convention for possible constitutional change.'⁷⁴ This statement indicates that, once again, structural change may be needed to safeguard the states. However, a statutory bill of rights does not provide such a structural change.

V CONCLUSION

The American experience — at a time when it had no bill of rights — is in keeping with the desire of many in Australia for legislative, rather than judicial, oversight of rights issues. However, the American experience also highlights some potential problems that may arise under a purely statutory bill of rights. Careful thought will need to be given to ways in which these problems may be overcome in Australia. Some method of constitutional entrenching of parliamentary oversight of rights may be needed. If this can be achieved, Australia will show the world a better way to deal with rights.

⁶⁸ See above n 58.

⁶⁹ Senate Select Committee on Reform of the Australian Federation, Parliament of Australia, *Australia's Federation: an agenda for reform* (2011) 18 [1.63].

⁷⁰ *Ibid* 28 [2.25].

⁷¹ *Ibid*.

⁷² *Ibid* 26 [2.19].

⁷³ *Ibid* 28 [2.28].

⁷⁴ *Ibid* 29 [2.29].

