

Reclaiming the Political Protection of Rights: A Defence of Australian Party Politics

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I. Introduction

More than six decades ago, Elmer Schattscheider famously observed that ‘modern democracy is unthinkable save in terms of (political) parties’.¹ The literature on the bills of rights, however, does not seem to have fully absorbed the compelling force of Schattscheider’s statement. Two distinct strands of thought can, in fact, be detected in this literature: a neglect of political parties and the role they can play in protecting rights; and a jaundiced view of political parties that views them as either indifferent to questions of rights or, worse, tending to undermine the protection of rights.

This chapter takes aims at these tendencies by, firstly, critiquing what are perhaps the key reasons for the wrongful neglect of political parties in the bills of rights literature. In doing so, it emphasises the centrality of political parties to the process of protecting rights in Australia. The second part of this chapter provides a critical examination of views that portray political parties as institutions that are indifferent or hostile towards the protection of rights and explains how political parties can advance the protection of rights in Australia.

Many of the chapter’s arguments will be illustrated by reference to the recent debates accompanying the passage of the Fair Work Act 2009 (Cth) (‘Fair Work Act’). The Fair Work Act has been chosen as a case study for two reasons. First, it is highly significant piece of legislation. Not only does it lay down the framework for Australian industrial regulation, it does so by effecting a partial reversal of changes made by the Workplace Relations Amendment (Work Choices) Act (‘Work Choices Act’); an Act that effected the most radical changes to the Australian industrial system for more than a century.² Second, opposition to the Work Choices policy and support for the Australian Labor Party’s Forward with Fairness election policy were key,

¹ E. E. Schattschneider, *Party Government* (New York: Holt, Reinhart and Winston, 1942) 1.

² See the articles in (2006) 19(2) *Australian Journal of Labour Law*.

perhaps even decisive, factors explaining the defeat of then Coalition government and the victory of the ALP Opposition.³

II. Party politics not a ‘forum of principle’?

One reason for the wrongful neglect of party politics in the bill of rights literature can perhaps be traced to Ronald Dworkin’s influential view that courts are ‘(t)he forum of principle’.⁴ According to this characterisation, courts are better suited than legislatures in determining questions of principles, that is, rights-based issues, as distinct from questions of policy.

While this characterisation simply argues for the superiority of legal over political processes in deciding these questions of rights, it seems to have transformed into something much stronger. Take, for example, the arguments made by former Australian High Court Chief Justice Sir Anthony Mason in support of a federal Charter of Rights. According to Mason, a Charter would mean that ‘principled judicial decision-making would replace political compromise’.⁵ This is all the more important, according to Mason, because parliamentarians are ‘primarily concerned with the exercise of government power and policy’ and not questions of human rights.⁶ The thrust of these arguments is not only that parliaments are less able than courts to adequately deal with questions of rights but, going even further, these institutions are not even capable of principled debate especially when it comes to questions of rights. It would follow from this extreme view that Australian party politics, being an aspect of parliamentary politics, is inept at handling questions of rights. If so, then party politics are rightfully ignored when it comes to discussions of the protection of rights.

³ See, eg, Matthew Warren, ‘IR again the issue that cost – Election 2007: Making History’, *The Australian*, 26 November 2007; Leo Shanahan, ‘Selling of WorkChoices tops blame list’, *The Age*, 26 November 2007; Peter Hartcher, ‘Witness to an execution: all Labor had to do was turn up’, *The Sydney Morning Herald*, 26 November 2007.

⁴ R. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) Chapter Two.

⁵ Sir A. Mason, “Why Do We Need a Bill of Rights?”, *NewMatilda.com*, 14 December 2005, at <http://newmatilda.com/2005/12/14/why-we-need-australian-bill-rights> (last visited 3 November 2008).

⁶ *Ibid.*

There are many difficulties with this extreme position. It rests on the problematic distinction between principles/questions of rights and power/questions of policy.⁷ Why can't parliaments and government be pursuing a *policy* of protecting *rights* and in doing so, adopt arrangements that confer *power* upon government agencies to prevent and detect abuses of rights? For example, how can this distinction make sense of the Australian Federal Government's current consultation on the protection of human rights which, according to the Government, is based on its commitment to 'the promotion of human rights—a commitment that is based on the belief in the fundamental equality of all persons'.⁸ Is this not a policy of respecting rights? Would consideration of how best to protect rights in Australia not involve the question of whether appropriate power has been conferred upon various government agencies?

The extreme position is also refuted by many examples where the political process and parliaments, in particular, have clearly debated questions of rights and principles. The debates accompanying the passage of the Fair Work Act provide a case on point. In the 2007 federal election, the industrial relations policy of the Liberal-National Coalition ('Coalition'), which then held federal office, was based on the Work Choices Act⁹ while the Opposition Australian Labor Party's ('ALP') was entitled Forward with Fairness.¹⁰ The latter policy formed the basis of the Fair Work Act which was passed in May 2009.

While Graeme Orr would correctly describe these titles as legislative slogans,¹¹ slogans do have meaning beyond their public relations value and, in this case, did signify crucial differences in principles. At the risk of oversimplification, the choice

⁷ R. Dworkin, n. 4 above, 24-25. Dworkin explains the distinction between policy and principle in this way: 'Arguments of policy try to show that the community would be better off, on the whole, if a particular program were pursued. They are, in that special sense, goal-based arguments. Arguments of principle, on the contrary, that particular programs must be carried out or abandoned because of their impact on particular people even if the community as a whole is in some way worse off in consequence. Arguments of principle are right-based': *ibid* 2-3.

⁸ See

http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsOfReference_TermsOfReference (last visited 27 May 2008).

⁹ Coalition Government, *Election 2007 Policy: Employment and Workplace Relations – Targeting Full Employment: "Go for Growth"* (2007).

¹⁰ K. Rudd and J. Gillard, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces* (April 2007).

¹¹ See G. Orr, 'Names Without Frontiers: Legislative Titles and Sloganeering', (2001) 21 *Statute Law Review* 188; G. Orr, 'From Slogans to Puns: Australian Legislative Titling Revisited', (2001) 22 *Statute Law Review* 160.

between the Coalition and the ALP positions can be understood as one between freedom from state restraint or a formal freedom to strike individual agreements on one hand, and fairness in the sense of all workplace agreements, individual or otherwise, being subject to community standards on the other. The 2nd Reading Speech to the Work Choices Bill, for example, stated that it was aimed at securing the ‘future prosperity of Australian individuals and families’ ‘by accommodating the greater demand for choice and flexibility in our workplaces’,¹² while the 2nd Reading Speech to the Fair Work Bill emphasised that the Bill was ‘based on the enduring principle of fairness while meeting the needs of the modern age’.¹³

At the centre of this debate concerning deep questions of principle was the role of collective bargaining. Under the Work Choices regime, individual bargaining was prioritised with statutory individual contracts, ‘Australian Workplace Agreements’, overriding other industrial instruments, notably awards and collective agreements.¹⁴ The Fair Work Act reverses this priority. Statutory individual contracts can no longer be offered¹⁵ with the Act stating as one of its objects that it is aimed at ‘ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements given that such agreements can never be part of a fair workplace relations system’.¹⁶ The Act further states that one of its objects is to achieve ‘productivity and fairness through an emphasis on enterprise-level collective bargaining’.¹⁷

The questions surrounding collective bargaining further demonstrate how the debates relating to the Fair Work Act were not only debates of principles but also of rights.

¹² Workplace Relations Amendment (Work Choices) Bill 2005, *House of Representatives Official Hansard*, No. 18, 2005, (Wednesday, 2 November 2005) 4 at 17.

¹³ Fair Work Bill 2008, Second Reading Speech, *House of Representatives Official Hansard*, No. 17, 2008, (Tuesday 25 November 2008) 11189 at 11189.

¹⁴ Workplace Relations Act 1996 (Cth) ss 348(2), 349 as per compilation prepared on 27 March 2006 taking into account amendments up to Act No. 153 of 2005 (Workplace Relations Amendment (Work Choices) Act 2005).

¹⁵ This is the effect of Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth) sch 1 (Workplace agreements and the no-disadvantage test) & sch 7A (Transitional arrangements for existing AWAs) (sch 1 repeals s 326 of the Workplace Relations Act 1996 (Cth) which had provided for employers to make AWAs; sch 7A notes, with respect to the continuing operation of AWAs, that ‘To avoid doubt, nothing in this Schedule permits an agreement made after the Commencement of this Schedule to be treated as an AWA’).

¹⁶ Fair Work Act s 3(c).

¹⁷ Fair Work Act s 3(f).

The ability to collectively bargain is clearly recognised by International Labour Organisation Conventions as an aspect of freedom of association;¹⁸ a matter acknowledged by the Senate committee that inquired into the Fair Work Bill.¹⁹ More than this, freedom of association is considered by the International Labour Organisation as one of the four fundamental rights at work.²⁰

III. An analytical preoccupation with the branches of government

Another reason for the wrongful neglect of political parties in the bills of rights literature is that politics is often analysed through the lens of the branches of government. This is common to analysis by legal academics and is clearly reflected in ‘dialogue’ theories of bills or charters of rights. For instance, prominent ‘dialogue’ theorists, Peter Hogg and Allison Bushell couched their understanding of ‘dialogue’ said to result from the Canadian Charter of Rights, as one between the courts and legislatures.²¹ The notion of ‘dialogue’ has also been quite influential in the Australian debates. Speaking of the Victorian Charter of Human Rights and Responsibilities,²² one academic commentator described it as providing for an ‘institutional dialogue about rights between three arms of government’.²³ Similarly, in the 2nd Reading Speech to the Charter of Human Rights and Responsibilities Bill, the Victorian Attorney-General, Rob Hulls, emphasised that the Bill is based on:

¹⁸ ILO Convention 87: Freedom of Association and Protection of the Right to Organise Convention, 1948; ILO Convention 98: Right to Organise and Collective Bargaining Convention, 1949. See, in particular, Article 4 of latter convention.

¹⁹ Senate Standing Committee on Education, Employment and Workplace Relations, *Fair Work Bill 2008 [Provisions]* (2009) para 1.16.

²⁰ *ILO Declaration on fundamental principles and rights at work*, International Labour Conference, 86th Session, Geneva, June 1998, 2, available at <http://www.ilocarib.org.tt/portal/images/stories/contenido/pdf/InternationLabourStandards/ILO%20declaration%20on%20fundamental%20principles%20and%20followup.pdf> (last visited 22 June 2009).

²¹ P. W. Hogg and A. A. Bushell, ‘The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn’t Such A Bad Thing After All)’, (1997) 35 *Osgoode Hall Law Journal* 75. For another example, see K. Roach, ‘Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures’, (2001) 80 *Canadian Bar Review* 481.

²² *Charter of Human Rights and Responsibilities 2006* (Vic).

²³ J. Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006’, (2008) 32(2) *Melbourne University Law Review* 422, 423. See also J. Debeljak, ‘Rights and Democracy: A Reconciliation of the Institutional Debate’, in T. Campbell, J. Goldsworthy and A. Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford, England: Oxford University Press, 2003) 135, 154-156.

(a) dialogue model of human rights that seeks to address human rights issues through a formal dialogue between the three branches of government while recognising the ultimate sovereignty of Parliament to make laws for the good government of the people of Victoria.²⁴

The lens of the various branches of government, however, leaves party politics largely out of the picture and, thus, provides a distorted view of Australian politics. In his major study of Australian political parties, Dean Jaensch correctly observed that:

There can be no argument about the ubiquity, pervasiveness and centrality of party in Australia. The forms, processes and content of politics – executive, parliament, pressure groups, bureaucracy, issues and policy making – are imbued with the influence of party, party rhetoric, party policy and party doctrine. Government is party government. Elections are essentially party contests, and the mechanics of electoral systems are determined by party policies and party advantages. Legislatures are party chambers. Legislators are overwhelmingly party members. The majority of electors follow party identification. Politics in Australia, almost entirely, is party politics.²⁵

In the context of the preoccupation with the branches of government and its accompanying neglect of political parties, the following observation made by Maurice Duverger decades ago bears repeating:

Knowledge of classic constitutional law combined with ignorance of the part played by parties give a false view of contemporary political regimes; acquaintance with the part played by parties combined with ignorance of classic constitutional law gives an incomplete but accurate view of contemporary political regimes.²⁶

²⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General). The Attorney-General also stated that '[t]his bill promotes a dialogue between the three arms of government — the Parliament, the executive and the courts — while giving the Parliament the final say': at 1290.

²⁵ D. Jaensch, *Power Politics: Australia's Party System* (St Leonards, NSW: Allen & Unwin, 1994) 1-2.

²⁶ M. Duverger, *Political Parties: Their Organization and Activity in the Modern State* (London, England: Methuen & Co, 1959 revised edition) 353.

The correct approach, as Duverger perceptively understood, is to understand the role played by the branches of government *and* party politics for the '(r)real separation of power . . . (is) the product of party system and constitutional setting'.²⁷

IV. A simple/simplistic view of political representation

Possibly another reason for the wrongful neglect of political parties in the literature on bills of rights lies in understanding political representation as an unmediated relationship between citizens, on one hand, and their elected representatives, on the other; an understanding fostered perhaps by the powerful but misleading mantra, 'government by the people'.²⁸

This simple view of political representation tends to write off the role of intermediary political organisations, in particular, political parties. It fails to recognise how political parties fundamentally transform the character of political representation. As Duverger remarked:

elections, like the doctrine of representation, have been greatly changed by the development of parties. There is no longer a dialogue between the elector and the representative, the nation and parliament: a third party has come between them, radically modifying the nature of their relations.²⁹

The transformative effect of political parties in mediating politics can be understood as the interaction of various functions.³⁰ Political parties have responsive functions, that is, functions aimed at these groups reflecting public opinion. Foremost, they perform an electoral function whereby political parties, in their efforts to secure voter support, respond to the wishes of the citizenry. They also have a participatory function as they offer a vehicle for political participation through membership, meetings and engagement in the development of party policy.

²⁷ Ibid, 354.

²⁸ See discussion in E. E. Schattschneider, n. 1 above, 13-16

²⁹ M. Duverger, n. 26 above, 353.

³⁰ The following functions have been distilled from various sources including G Sartori, *Parties and party systems: A framework for analysis: Volume 1* (Cambridge: Cambridge University Press, 1976) 20-23, 27; J. Blondel, *Political Parties: A Genuine Case for Discontent?* (London: Wildwood House, 1978) Chapter 2.

The relationship between political parties and the citizenry is not, however, one way. As Sartori has noted, '(p)arties do not only *express*; they also *channel*'.³¹ Alongside their responsive functions, political parties also perform an agenda-setting function in shaping the terms and content of political debates. For example, the platform of a major party is influenced by as well as influences public opinion.

Political parties further perform a governance function. This function largely relates to parties who succeed in having elected representatives. These parties determine the pool of people who govern through their recruitment and pre-selection processes. They also participate in the act of governing. This is clearly the case with the party elected to government and also equally true of other parliamentary parties as they are involved in the law-making process and scrutinise the actions of the executive government.

There are, of course, many other intermediary organisations; many of which perform one or more of these functions that have been ascribed to political parties. The media, for example, clearly performs an agenda-setting function and, to a lesser (and controversial) extent, a responsive function. Non-government organisations, like interest groups, also perform responsive and agenda-setting functions while the public service obviously has a governance function. But no other institution or group *combines* these various functions. That is why Sartori was correct to argue that '(p)arties are *the* central intermediate and intermediary structure between society and government'.³²

Specifically, in the context of *party government*, that is government by political parties, parties through their governance function are central to the operations of *responsible government* whereby the executive is held responsible to the legislature. The combination of their governance and responsive functions further means that political parties are the key mechanism for translating responsible government into *responsive government*, that is, government that is responsible to the electorate.³³ It is

³¹ G. Sartori, n. 30 above, 28 (emphasis original).

³² Ibid ix.

³³ See *ibid*, 20-23.

such responsiveness that allows us to describe a political system as one of *representative government*.³⁴ It is no understatement to say that political parties perform a constitutional role in Australian politics.

This point is even stronger with major parties, parties that are serious contenders for national government. Nancy Rosenblum has identified three defining characteristics that give major American political parties their ‘unique *normative status*’.³⁵ These characteristics, which can be seen as an elaboration of the responsive, agenda-setting and governance functions of political parties, similarly apply to the major parties in Australia.

According to Rosenblum, major parties, firstly play a role in bridging local and national citizenship. Second, major political parties are ideally inclusive and integrative. The former alludes to the process of drawing support from various and disparate groups while the latter refers to process of balancing and accommodating the wishes of the various groups as well translating these wishes into a coherent program. Third, major political parties have a function of comprehensiveness in that their policies should have a broad national agenda and not merely be based on a narrow set of issues.³⁶ These three characteristics explain why, of all membership groups, major political parties are *primus inter pares*, a first among equals.³⁷

The central mediating role of Australian political parties can be illustrated by the role of the ALP in the process leading to the enactment of the Fair Work Act. As noted earlier, the ALP’s election policy that gave rise to the Act was developed in an electoral context as an alternative to the Coalition’s Work Choices policy.³⁸ The formulation of this policy was influenced by public opposition to the Work Choices

³⁴ H. F. Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967) 233.

³⁵ N. Rosenblum, ‘Political Parties as Membership Groups’, (2000) 100 *Columbia Law Review* 813, 824 (emphasis original).

³⁶ *Ibid*, 824-825.

³⁷ *Ibid*, 826. Schattschneider has forcefully argued for the superiority of political parties over pressure and interest groups. According to Schattscheider, ‘(t)he parties are superior (to interest groups) because they must consider the problems of government broadly, the submit their fate to an election, and are responsible to the public. By every democratic principle the parties, as mobilizers of majorities have claims on the public more valid and superior to those asserted by pressure groups which merely mobilize minorities’: E. E. Schattschneider, n. 1 above, 193.

³⁸ See Coalition Government, *Election 2007 Policy: Employment and Workplace Relations – Targeting Full Employment: “Go for Growth”* (2007).

regime; opposition that partly came about as a result of the Australian Council of Trade Union's ('ACTU') 'Rights at Work' campaign.³⁹ The policy was also subject to input from the party organisation through the party platform⁴⁰ which, in turn, was the result of deliberation by party members including affiliated trade unions.⁴¹ The result of these various processes was the Forward with Fairness election policy⁴² and its implementation plan.⁴³ Upon being elected, the ALP government began drafting the Fair Work Bill; a process which involved it consulting State and Territory ministers as well as business and trade union representatives.⁴⁴ After the Bill was tabled in the Commonwealth Parliament, it was subject to an inquiry by the Senate Education, Employment and Workplace Relations Committee which received public submissions.⁴⁵ Some of the recommendations of the Committee, which had a majority of ALP Senators, were subsequently adopted as amendments to the final Bill.⁴⁶

This brief account makes obvious the mediating role of the ALP to the enactment of the Fair Work Act. Through a complex interplay of its various functions, the ALP was clearly pivotal to the process culminating in the adoption of the Act. The election policy giving rise to the Act, Forward with Fairness, resulted from its discharge of its electoral and participatory functions. The policy itself was an instance of the ALP performing an agenda-setting function. The process of drafting the Fair Work Bill also underlined the significance of the ALP's responsive function, this time through

³⁹ See K. Muir, *Worth Fighting For: inside the your rights at work campaign* (Sydney: University of NSW Press, 2008).

⁴⁰ Australian Labor Party, *National Platform and Constitution 2007* (2007) para 27.

⁴¹ On the power of trade unions within the ALP, see Kathryn Cole, 'Unions and the Labor Party' in K. Cole (ed), *Power, Conflict and Control in Australian Trade Unions* (Ringwood, Vic.: Pelican Books, 1982) where it was concluded that 'the power of unions within the ALP is far more circumscribed than is commonly believed and the process which each of the party's two sections (i.e. industrial and political wings) accommodates to the demands and needs of the other is complex and tortuous': *ibid* 100.

⁴² K. Rudd and J. Gillard, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces* (April 2007).

⁴³ K. Rudd and J. Gillard, *Forward with Fairness: Policy Implementation Plan* (August 2007).

⁴⁴ For detail, see Explanatory Memorandum to Fair Work Bill 2008, vii-viii.

⁴⁵ Senate Education, Employment and Workplace Relations Committee, *Fair Work Bill [Provisions]* (2009) available at http://www.aph.gov.au/Senate/committee/EET_CTTE/fair_work/report/index.htm (last visited 29 May 2009).

⁴⁶ For example, Senate Committee Report Recommendation 2 recommended that the Fair Work Information Statement include information on individual flexibility agreements, incorporated into s 124(2) of the final Bill; Recommendation 3 recommended that Fair Work Australia conduct investigations into the operation of individual flexibility arrangements, incorporated into s 653 of the final; and Recommendation 6 recommended that the Bill provide for a fourteen day time limit (rather than a seven day limit) for appeals against unfair dismissals to be lodged with Fair Work Australia, incorporated into s 394 of the final Bill: see Senate Education, Employment and Workplace Relations Committee, *Fair Work Bill [Provisions]* (2009) at 30, 38, 70.

the consultations that the ALP Government undertook but also through the Senate inquiry which provided an avenue for public opinion to be directly expressed to the Commonwealth Parliament. Further, the Committee's report was an example of the governance function in action as was the eventual enactment of the Fair Work Act.

V. The question of party discipline

The preceding two sections give rise to the conclusion that party politics are central to Australian politics because of the functions that Australian political parties perform. This means that translation of parliamentary sovereignty in this country into popular sovereignty crucially depends on political parties. Put in another way, Australian party politics can promote rights in the fundamental sense that they advance what Jeremy Waldron has dubbed the 'right of rights', the right to participate in public decision-making.⁴⁷

But are political parties in Australia able to advance the protection of rights beyond their contribution to the realisation of democratic rights? If, as Tom Campbell correctly argues, 'the articulation and defence of human rights ought to be a central task of any democratic process which regards the equal right of all to participate in political decision-making as fundamental',⁴⁸ can political parties positively contribute to this task? The remaining sections of this chapter will consider two sets of arguments that suggest that the answer is no. This section will consider the supposed problem of party discipline while the following section will examine the danger of 'faction' posed by political parties.

Party discipline can be understood as rules or practices that require parliamentarians belonging to parties to vote according to the policies of their parties whether they agree with them or not. This understanding of party discipline is compatible with a range of practices. For instance, it can accommodate a variety of power relations within political parties from highly centralised political parties with power concentrated in the hands of the leadership, to more decentralised organisations where

⁴⁷ J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) Chapter 11.

⁴⁸ T. Campbell, 'Democracy, Human Rights, and Positive Law', (1994) 16 *Sydney Law Review* 195, 199.

rank-and-file members having a greater say over party policies or where different branches of the party possess more autonomy.

It is not, however, the intent of this discussion to identify which types of political parties that abide by party discipline are more or less fitted to the task of protecting rights. It focuses on a prior concern: Why is party discipline considered to be *necessarily* problematic from the perspective of protecting rights?

This is not an easy question to answer because party discipline is often condemned with little elaboration. Arguably, party discipline is seen as incompatible with the deliberative duties of legislators and legislative assemblies; duties that would extend to their deliberation of questions concerning rights.

One way to assess this argument is to do so through the views of Edmund Burke, in particular, his famous speech to the Electors of Bristol.⁴⁹ This speech has been pivotal to the debate as to proper role of legislators, in particular, whether legislators should be seen as trustees or delegates. At the risk of oversimplification, legislators as trustees are to act according to their own judgments of the public interest and not to be bound by the instructions or views of the constituents who elected them. Legislators as delegates, on the other hand, are bound by the instructions (and even, according to some understandings, the views) of their constituents. Burke's speech is often seen as a powerful argument for legislators acting as trustees⁵⁰ and may seem then to provide support for the view that party discipline is contrary to the proper role of legislators.

This impression is, however, misleading as a closer analysis of Burke's views will reveal. There are three key principles in Burke's speech to the Electors of Bristol. First, parliament is a national assembly. As Burke puts it:

Parliament is not a *congress* of ambassadors from different and hostile interests; which interests must maintain, as an agent and advocate, against other agents and advocates; but

⁴⁹ E. Burke, 'Speech to the Electors of Bristol' in *The Works of the Right Honourable Edmund Burke: Volume II* (London: Oxford University Press, 1926) 159.

⁵⁰ See H. Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967).

parliament is a *deliberative* assembly of *one nation*, with *one interest*, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good resulting from the general reason of the whole.⁵¹

After noting the diverse interests of a nation, Burke further stated that '(a)ll these widespread interests must be considered; must be compared; must be reconciled if possible'.⁵²

The second principle is that elected representatives are obliged to reach their own judgments. Speaking of these representatives, Burke said:

his unbiassed (sic) opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you; to any man, or to any set of men living. These he does not derive from your pleasure; no, for from the law and the constitution. They are a trust from Providence for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.⁵³

The third principle is that elected representatives should vote according to their own judgments. Of the three principles, the scope and meaning of the third is least clear. In his speech, Burke clearly condemned 'authoritative instructions, mandates issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience'.⁵⁴ According to Burke, such instructions and mandates 'arise from a fundamental mistake of the whole order and tenor of our constitution',⁵⁵ in particular, a failure to recognise that 'parliament is a *deliberative* assembly of *one nation*, with *one interest*, that of the whole.'⁵⁶

It is unclear in these passages whether Burke is saying that elected representatives should *always* vote according to their own judgments or whether abiding by instructions and mandates are permissible so long as it is not through blind obedience

⁵¹ E. Burke, n. 49 above, 159, 165 (emphasis original).

⁵² Ibid, 159, 166.

⁵³ Ibid, 159, 164.

⁵⁴ Ibid, 159, 165.

⁵⁵ Ibid, 159, 165.

⁵⁶ Ibid, 159, 165 (emphasis original).

or clearly contrary to the conscience of the representative. Another possibility that arises from Burke's reference to parliament being a national assembly is that Burke's condemnation of instructions and mandates rested on the nature of their *source*, namely, the electors of the particular constituency that elected the representative. According to this interpretation, if the source of instructions and mandates was a national body, Burke's objection may fall away.

Is party discipline then incompatible with these principles? Far from being incompatible with the principle that parliament is a national assembly, party discipline as it relates to major parties is, in fact, essential to advancing this principle. As may be recalled, the three defining features of major parties are that they ought to bridge local and national citizenship; be inclusive and integrative and, lastly, have the function of comprehensiveness.⁵⁷ The last feature, in particular, should issue in an agenda for governing the nation. Party discipline within these parties would require their elected representatives to vote according to these national agendas and, in doing so, supports the role of parliament as a national assembly.

Further, party discipline is not incompatible with the principle that elected representatives reach their own judgments. They clearly need to do so in deciding to join a political party. There is also a strong deliberative aspect to the participatory function of political parties. This function implies that political parties are themselves sites of deliberation with members including elected representatives having to decide for themselves how they choose to participate within intra-party fora, for instance, caucus meetings.⁵⁸ Moreover, party discipline, as understood above, applies to votes but not necessarily to speech. While ALP members of the Senate Education, Employment and Workplace Relations Committee would, because of party discipline, be bound to vote according to the party line, they could, and did, in their report, recommend changes to the Fair Work Bill that diverged from the party's position.⁵⁹

⁵⁷ See discussion above accompanying nn 36-37.

⁵⁸ J. Teorell, 'A Deliberative Defence of Intra-Party Democracy', (1999) 5 *Party Politics* 363. On the deliberative potential of associations more generally, see J. Cohen and J. Rogers, 'Secondary Associations and Democratic Governance' in E. O. Wright (ed), *Associations and Democracy: The Real Utopias Project: Volume 1* (London: Verso, 1995) Chapter 1.

⁵⁹ See, for example, Senate Standing Committee on Education, Employment and Workplace Relations, *Fair Work Bill 2008 [Provisions]* (2009) Chapter 4.

In sum, there are two reasons why party discipline is not incompatible with the principle that elected representatives reach their own judgment. Party discipline is, firstly, founded upon an assumption of internal deliberation. This would clearly allow elected representatives to exercise their own judgments. Secondly, there are limits to party discipline in that it is restricted to voting and does not dictate all aspects of the behaviour of elected representatives.

Indeed, in an essay entitled ‘Thoughts on the Cause of the Present Discontents’, Burke strongly suggests that the duty of elected representatives to reach their own judgment implies an obligation to combine in political parties, groups he understood as comprising ‘a body of men united for promoting by their joint endeavours the national interest upon some particular principle in which they are all agreed’.⁶⁰

A crucial step in Burke’s reasoning is that the duty of elected representatives to reach their own judgment comes with the duty to take steps to put those judgments into effect. In his words, public duty ‘demands and requires that what is right should not only be made known, but made prevalent; that what is evil should not only be detected, but defeated’.⁶¹ In another passage, he says ‘(p)ublic life is a situation of power and energy; he trespasses against his duty who sleeps upon his watch, as well as he that goes over to the enemy’.⁶²

There is then, according to Burke, a duty to contend for positions of power.⁶³ This duty, however, could not be properly fulfilled unless elected representatives combined into groups as ‘no man could act with effect, who did not act in concert; no man could act in concert, who did not act with confidence; and no man could act with confidence, who were not bound together by common opinions, common affections, and common interests’.⁶⁴ It followed for Burke that ‘(o)f such a nature are connexions in politics; essentially necessary for the full performance of public duty’.⁶⁵ If so, and if these connections typically take the form of combining into political parties,

⁶⁰ E. Burke, ‘Thoughts on the Cause of the Present Discontents’ in *The Works of the Right Honourable Edmund Burke: Volume II* (1926) 2, 82.

⁶¹ *Ibid*, 2, 79.

⁶² *Ibid*, 2, 86.

⁶³ *Ibid*, 2, 82.

⁶⁴ *Ibid*, 2, 81-82.

⁶⁵ *Ibid*, 2, 80.

Burke's reasoning would seem imply an obligation to act through political parties and further embrace the incidents that attach through such combination, most notably, party discipline.

Of the various principles in Burke's speech to the Electors of Bristol, it is the third principle that poses the greatest challenge for party discipline. The extent to which party discipline comports with this principle will, of course, depend on the meaning ascribed to it. If the principle allows for instructions or mandates provided that they are not blindly obeyed or clearly contrary to the conscience of the elected representative, it can still accommodate party discipline especially if such discipline follows from robust internal party deliberation. If the principle rests upon an objection to instructions issuing from particular constituencies then it would not appear to be incompatible with party discipline within major parties.

The real difficulty results if the principle is that elected representatives should always vote according to their own judgments. There is no escaping the conclusion that a principle of this kind would be incompatible with party discipline in most respects. This principle, however, amounts to a profound objection to acting collectively to further political objectives. The clear advantage of collective action is strength in numbers. This advantage can only be sustained if members of a group *act as a group*. This means that members are bound by the decision of the group even when they disagree. In many ways, party discipline is simply the application of this logic to political parties.

The notion that elected representatives should always vote according to their judgments, regardless of the policies of the party which endorsed them, also comes close to expressing contempt for the decisions made by the voters. Citizens, when voting for a candidate standing on a party platform, tend to be expressing support for the policies of the party and, hence, would seem to have a legitimate expectation that the candidates, if elected, will implement party policies. It is this expectation that provides the basis for saying that an elected party has a mandate to govern according to its policies.

Party discipline is, however, necessary for a party to implement its electoral mandate. In other words, such discipline is essential to the proper discharge of the electoral function of parties. Therefore, a principle that elected representatives should always vote according to their judgments is not only hostile to party discipline but also to responsiveness to the electorate.

The case of the Fair Work Act is illustrative. The ALP Government, of course, insisted that it had a mandate to enact this Act. But so did the Liberal Party by repeatedly proclaiming that ‘Work Choices is dead’.⁶⁶ The Coalition Senators’ Minority Report to the inquiry of the Senate Education, Employment and Workplace Relations’ Inquiry into the Fair Work Bill put this in emphatic terms:

The right of the Government to abandon much of the *WorkChoices* architecture, based on its commitments in the lead up to the 2007 Federal election, is clear and beyond challenge. **Coalition senators acknowledge that *WorkChoices* is dead;** only the makeup of its successor remains to be determined.⁶⁷

If an ALP parliamentarian voted against Fair Work Bill on the ground that she believed that the policy that the ALP brought to the election was flawed, many of us would see this as a deep insult to the electorate and the political process. Moreover, in this instance, the insult is not only an affront to democratic principles but also expresses disrespect for the commitment to rights held by those who voted for the ALP. As shown earlier, the debates concerning the Fair Work Bill implicated rights through questions surrounding collective bargaining. Many of those who supported the ALP’s Forward with Fairness industrial policy would have done so in support of a greater role for collective bargaining and, most likely, for freedom of association.

Lastly, it is also worthwhile reflecting on what is likely to happen if parliamentarians were not bound to vote according to party policies but regularly cast so-called ‘conscience’ votes. The superficial appeal of ‘conscience’ votes is that they seem to contrast principled voting with the supposedly blind voting that results from party

⁶⁶ See, for example, M. Keenan, Shadow Minister for Employment and Workplace Relations, ‘Speech to the Australian Industry Group PIR’, 9 December 2009, 1.

⁶⁷ Senate Standing Committee on Education, Employment and Workplace Relations, *Fair Work Bill 2008 [Provisions]* (2009) Coalition Senators’ Minority Report, 1 (emphasis original).

discipline. This is a deeply flawed contrast. As we have now seen, voting that stems from party discipline can be the result of robust and considered deliberation.

More to the point, parliamentarians who vote according to their ‘conscience’ are not free from electoral pressures that are experienced by parliamentarians bound by party discipline. In the absence of party discipline, these pressures will, however, express themselves in different ways. Generally, these parliamentarians will tend to vote according to the wishes of those who can secure their election. They may vote according to the wishes of the voters of their particular constituencies; a path that would lead to more parochial politics. They may also vote according to the wishes of their financiers giving rise to the risk of plutocratic politics. Or they may vote according to the positions of the pressures groups that can support their re-election (or are able to threaten it). This would lead increasingly to issue-based politics rather than broad-based politics for an entire nation.⁶⁸

VI. Parties and the danger of faction

According to Madison’s famous formulation, a faction is:

a number of citizens whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.⁶⁹

From Madison’s definition, we can specify two ways in which parties risk becoming factions, thereby, undermining the protection of rights: as a minority acting for itself; and as a vehicle for majority views. These risks will be discussed in turn.

The danger of political parties becoming a minority faction stems, of course, from the self-interest and ambition that is inherent in the competition for political power. Being central to this competition, political parties, of course, squarely raise this danger. That in itself is not necessarily antithetical to the protection of rights. As Sartori acutely observed:

⁶⁸ E. E Schattschneider, n. 1 above, 196-197.

⁶⁹ J. Madison, ‘Paper No 10’ in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (New York, NY: A Mentor Book, 1961) 77, 78.

The power-seeking drives of politicians remain constant. What varies is the processing and the constraints that are brought to bear on such drives.⁷⁰

The key for Sartori is understanding that ‘parties are *functional* agencies – they serve purposes and fulfill roles’.⁷¹ Ideally, their electoral function shapes and channels their self-interest into a rivalry as to what notion of the ‘public interest’ should prevail. Elections do not simply involve competitions for political power. At their best, they involve a competition for power to *put principles or agendas into effect*. This is what Edmund Burke elegantly described as ‘a generous contention for power’; a process that can ‘be easily distinguished from the mean and interested struggle for place and emolument’.⁷² This generous contention for power reduces the danger of political parties becoming a minority faction. Madison, for example, believed this danger was ameliorated by regular votes based on the majority principle.⁷³

It is appropriate here to recall that some of the historic achievements of party government in Australia, in fact, concern the mechanisms for robust electoral competition. Amongst others, proportional representation in the Senate, the extension of franchise and compulsory voting were all the result of legislation enacted through party government. Through these achievements, Australian political parties demonstrate some capacity to self-regulate in reducing the risk of them becoming a minority faction.

What then of the danger of political parties becoming a majority faction? For Madison, ‘the superior force of an interested and overbearing majority’ might mean that ‘the public good is disregarded in the conflicts of rival parties, and that measures are (not) decided . . . according to rules of justice and the rights of the minor party’.⁷⁴ Expressing similar sentiments, Ronald Dworkin argued that ‘(m)embers of entrenched minorities have in theory most to gain from the transfer (of power to judges), for the

⁷⁰ G. Sartori, n. 30 above, 25.

⁷¹ G. Sartori, n. 30 above, 25 (emphasis original).

⁷² E. Burke, ‘Thoughts on the Cause of the Present Discontents’ n.60 above, 2, 82-83.

⁷³ J. Madison, n. 69 above, 77, 80.

⁷⁴ *Ibid*, 77, 77.

majoritarian bias of the legislature works most harshly against them, and it is their rights that are for that reason most likely to be ignored in that forum'.⁷⁵

It will follow from such views that, in a country like Australia where there is party government, political parties may, because of their majoritarian bias, neglect (or even violate) the rights of minorities. Or, to couch it in that often-used phrase, political parties raise the danger of the tyranny of the majority.

It is sometimes hard to resist the conclusion that arguments invoking the tyranny of the majority are just clichés passing off as analysis with conclusions assumed rather reasoned through. These arguments, firstly, overstate the danger of the tyranny of the majority. They do so by failing to adequately recognise that whether an electoral system produces a result in accordance with majority principle (i.e. whoever secures a majority of votes wins) clearly depends on its features. With the Australian federal parliament, for example, there is no reason to assume that the party (or parties) that control the parliament has secured the support of the majority of voters for two reasons. The Upper House, the Senate, is composed of an equal number of representatives from each State. Moreover, control of the House of Representatives requires a majority of seats but not a majority of votes. In the 2001 federal election, for example, the Coalition was elected government after winning a majority of seats even though the ALP Opposition secured 50.98% of votes on a two-party preferred basis while the Coalition parties secured 49.02%.⁷⁶

Another fundamental reason why the danger of the tyranny of the majority is overstated is that there is very rarely a cohesive majority acting with a common impulse. It is true that the application of the majority principle produces a numerical majority but this majority is usually composed of disparate and shifting elements: 'the referent "majority" is a set of *ephemeral aggregations*'.⁷⁷ As Sartori correctly argued,

⁷⁵ R. Dworkin, n. 4 above, 27-28. Various meanings can be attributed to the phrase, 'the tyranny of the majority' other than a reference to a numerical majority oppressing a minority, see G. Sartori, *The Theory of Democracy Revisited: Part One: The Contemporary Debate* (Chatham NJ: Chatham House Publishers, 1987) 133-137.

⁷⁶ See Australian Electoral Commission, *Election 2001: Election Results* (2001) at http://www.aec.gov.au/Elections/federal_elections/2001/results/index.html (last visited 26 February 2009).

⁷⁷ G. Sartori, *The Theory of Democracy Revisited*, n. 75 above, 136 (emphasis original).

the application of the majority principle does not usually produce majority rule in terms of ‘a numerical, concrete majority “ruling” in the literal and strong sense of the term’.⁷⁸

The other difficulty with arguments invoking the tyranny of the majority has support from an unlikely source. In *A Matter of Principle*, Ronald Dworkin says this:

It is no doubt true, as a very general description, that in a democracy power is in the hands of the people. But it is all too plain that no democracy provides genuine equality of political power. Many citizens are for one reason or another disenfranchised entirely. The economic power of large business guarantees special political power for its managers. Interest groups, like unions and professional organizations, elect officers who also have special power. Members of entrenched minorities have, as individuals, less power than individual members of other groups that are, as groups, more powerful. These defects in the egalitarian character of democracy are well known and in part irremedial.⁷⁹

This passage suggests that the problem facing ‘entrenched minorities’ is not the power of the majority; after all ‘(m)any citizens are for one reason or another disenfranchised entirely’.⁸⁰ Rather the problem is one of powerful minorities like large business and interest groups that have the wherewithal not only to overwhelm the ‘entrenched minorities’ but also the majority of citizens.

This account which focusses on powerful minorities is quite compelling. As Dahl puts it:

of course a majority might have the power or strength to deprive a minority of its political rights. In practice, though, I would guess that a powerful minority strips a majority of its political rights much more often than the other way around.⁸¹

It may well be that it is not the tyranny of the majority that is to be feared but rather the tyranny of powerful minorities.

⁷⁸ G. Sartori, *Parties and party systems*, n. 30 above, 17.

⁷⁹ R. Dworkin, n.4 above, 27.

⁸⁰ Ibid, 27.

⁸¹ R. Dahl, *Democracy and its Critics* (New Haven : Yale University Press, 1989) 171.

The final difficulty with arguments based on the tyranny of the majority is that they fail to properly appreciate that the views of the majority are not necessarily or even usually antithetical to the rights of vulnerable minorities. It is true that majorities can act against the rights of vulnerable minorities but it is not clear why it is assumed that they will tend to do so. On the contrary, the views of the majority, including those articulated by political parties, can clearly be imbued by a concern for vulnerable minorities.

Take, for example, the previous federal election where the ALP was elected on its Forward to Fairness industrial policy. Those that supported the ALP constituted a majority of voters⁸² and, according to conventional political wisdom, would have supported the ALP's industrial policy (or, more accurately, opposed the Coalition's Work Choices policy). This support would mean broad endorsement of the idea that workplace agreements should be subject to community standards, whether through legislative standards, collective agreements or other industrial instruments. Such endorsement implies concern for vulnerable workers who would not fare well in what Justice Higgins described as 'the higgling of the market'⁸³ where the 'pressure for bread'⁸⁴ means that workers stand in an 'usual but unequal contest'⁸⁵ with employers. This example demonstrates majority views can clearly include a concern for vulnerable minorities.

VII. Concluding remarks

This chapter has argued that political parties are not only central to the protection of rights but can also advance the protection of rights in Australia because of their functions. This is not equivalent to an unqualified endorsement of Australian party politics. 'Can' does not mean 'will' or even 'likely will'. It is obvious that Australian political parties do not naturally, let alone always, promote the protection of rights. In the end, this chapter is best seen as a ground-clearing exercise. The challenge remains to foster virtuous party politics that advances the protection of rights in Australia.

⁸² The ALP secured 52.7% of votes on a two party preferred basis: see <http://results.aec.gov.au/13745/Website/HouseStateFirstPrefsByParty-13745-NAT.htm> (last visited 4 June 2009).

⁸³ *Ex parte H V McKay* (1907) 2 CAR 1, 3.

⁸⁴ *Ex parte H V McKay* (1907) 2 CAR 1, 3.

⁸⁵ *Ex parte H V McKay* (1907) 2 CAR 1, 3.

Meeting this challenge, firstly, requires an identification of the salient aspects of the party system in Australia.⁸⁶ Second, it requires a normative framework to evaluate these aspects. Space does not permit an elaboration of this framework but the functions of parties should clearly underpin such a framework. The normative framework should not, however, rest upon these functions alone. These functions can be performed well or poorly and some criterion (or set of criteria) needs to be in place to evaluate these matters. The principles of democracy would seem to be a natural source of such criteria. Third and fourth, there needs to be a diagnosis of the strengths and limitations of current Australian party system in relation to protection of rights and an agenda for reform.

⁸⁶ See Mark Tushnet's chapter in this collection.