

CONSERVATIVE CONSTITUTIONAL RIGHTS IN 1940s AUSTRALIA

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In contemporary Australia, there is a clear and well-established political divide over constitutional rights. For those on the left, protecting human rights from legislative interference typically represents one of their grandest ambitions for law reform, while for those on the right, constitutional rights are generally seen as a dangerous threat to existing legal, political and social institutions. This article revisits a seminal moment in Australian debates over constitutional rights to unearth their markedly different past. Investigating the origins of rights in the Curtin Labor government's constitutional reforms of the early 1940s reveals something striking: they owed at least as much to conservative, liberal and Catholic actors determined to contain the perceived dangers in Labor's expansive postwar program of social democracy as they did to a left-wing politics of human rights. This article provides the first comprehensive account of the neglected conservative, liberal and Catholic mobilisation that led to the emergence of constitutional rights in the Curtin government's proposed constitutional reforms of the early 1940s. Recovering this history forces a reckoning with prevailing perceptions of constitutional rights as a progressive project.

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I INTRODUCTION

Among progressive Australians, the lament is depressingly well rehearsed: Australia is now the only liberal democracy without a national bill of rights.¹ When the original *Constitution* was drafted at the end of the 19th century, its liberal and conservative authors preferred to put their faith in the well-worn British traditions of parliamentary sovereignty, responsible government and the common law, as well as a comparatively strong local commitment to representative democracy, as the best guarantees of liberty.² They were not, for the most part, enamoured of Parliament-constraining rights provisions enforced by courts.³ While Australia's foundational scepticism towards protecting rights through judicial review was unremarkable then, it has become exceptional now. Since the Second World War, constitutional rights — by which I mean judicially enforceable guarantees, enshrined in either a constitution or special legislation that protect rights from infringement by legislatures — have spread around the world.⁴ Indeed, bills of rights and their like have become a basic marker of political modernity for new and old nation-states alike.⁵ But Australia continues to buck this global trend towards juristocracy.⁶ In its ongoing refusal to enact national constitutional rights protections — and notwithstanding some

¹ See, eg, The Greens, *Your Charter, Your Rights: Embedding Basic Rights and Freedoms for All Australians* (Policy Initiative, 2018) 1; George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (UNSW Press, 4th ed, 2017) 14; Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Discussion Paper, August 2019) 13.

² Haig Patapan, 'Competing Visions of Liberalism: Theoretical Underpinnings of the Bill of Rights Debate in Australia' (1997) 21(2) *Melbourne University Law Review* 497, 499–501 ('Competing Visions'); Williams and Reynolds (n 1) 17. But see George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) ch 2.

³ Patapan, 'Competing Visions' (n 2) 499–501; Williams and Hume (n 2) ch 2. For a critical history of the connections between colonial democracy and Indigenous dispossession, see generally Ann Curthoys and Jessie Mitchell, *Taking Liberty: Indigenous Rights and Settler Self-Government in Colonial Australia, 1830–1890* (Cambridge University Press, 2018).

⁴ Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (Oxford University Press, 2020) ch 4. I am adopting a broader definition of the constitutional domain than just what is contained in 'written constitutions'. On constitutional rights protections pursued through legislation, see generally Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

⁵ Philip Alston, 'A Framework for the Comparative Analysis of Bills of Rights' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999) 1, 1–3.

⁶ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004) 1.

important developments in several sub-national jurisdictions and the courts — Australia maintains its comparative ‘reluctance about rights.’⁷

The main reason is clear. Even though those on Australia’s political left have for decades regularly sought to establish nationwide constitutional constraints on the capacity of Australian legislatures to infringe human rights, all such efforts have been successfully opposed by those on the political right.⁸ For individuals and organisations broadly of a left-wing persuasion, including those in the Australian Labor Party (‘ALP’) and the Greens, securing rights against legislative interference through a bill of rights typically represents one of their grandest ambitions for law reform — the highest institutional embodiment of a progressive, internationalist human rights politics.⁹ By contrast, for actors broadly on the right, including those in the Liberal and National parties and socially conservative organisations like the Catholic Church, constitutional rights are generally seen as a dangerous threat to existing legal, political and social institutions.¹⁰ Conservatives are not opposed to human rights per se. Indeed, right-wing mobilisations to uphold certain rights — especially free speech and religious freedom — have been some of the most visible rights campaigns of the past decade.¹¹ What conservatives widely oppose is a particular means of protecting rights: legal instruments that would empower the courts to supervise the rights-compliance of legislation duly enacted by Parliament.¹²

⁷ The phrase is from Hilary Charlesworth, ‘The Australian Reluctance about Rights’ in Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law and Human Rights and Equal Opportunity Commission, 1994) 21 (‘The Australian Reluctance’). On constitutional rights developments at the sub-national level and in the courts, see Dylan Lino, ‘Are Human Rights Enough (in Australia)?’ (2019) 41(2) *Sydney Law Review* 281, 289–90.

⁸ Brian Galligan, ‘Australia’s Rejection of a Bill of Rights’ (1990) 28(3) *Journal of Commonwealth and Comparative Politics* 344, 352–62 (‘Australia’s Rejection’); Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 27–33.

⁹ See Lino, ‘Are Human Rights Enough (in Australia)?’ (n 7) 288–90. For some exceptions, see Byrnes, Charlesworth and McKinnon (n 8) 42.

¹⁰ See, eg, Julian Leaser and Ryan Haddrick (eds), *Don’t Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre, 2009). See also Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009) 68–9; Paul Kildea, ‘The Bill of Rights Debate in Australian Political Culture’ (2003) 9(1) *Australian Journal of Human Rights* 65, 75, 77.

¹¹ See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the Operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and Related Procedures under the Australian Human Rights Commission Act 1986 (Cth)* (Report, 28 February 2017); ‘Religious Discrimination’, *Attorney-General’s Department* (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/religious-discrimination>>.

¹² Kildea (n 10) 77.

While decades of debate have established constitutional rights in Australia as a lofty, left-wing aspiration opposed by those on the political right, this article revisits a seminal moment in Australian debates over constitutional rights to unearth their markedly different past. That moment, generally taken by scholars as the beginning of the post-Federation political struggle over constitutional rights, is the Curtin Labor government's abortive endeavour in the early 1940s to create new constitutional protections for free speech and religious freedom.¹³ These proposed constitutional rights formed part of a major program of constitutional reform designed to facilitate Labor's social-democratic vision of postwar reconstruction. That constitutional agenda took shape in late 1942 with the government summoning a Constitutional Convention of federal and state political leaders to settle on a reform plan. It concluded in August 1944 with the resounding defeat of the government's reform proposals at a referendum.¹⁴

Investigating the origins of rights in Labor's constitutional reforms of the early 1940s reveals something striking: they owed at least as much to conservative, liberal and Catholic actors determined to contain the perceived dangers in Labor's expansive postwar program of social democracy as they did to a left-wing politics of human rights. In this article, I show that constitutional rights to freedom of speech and religion as they rose to national prominence in the early 1940s have origins in conservative, liberal and Catholic advocacy (which, for convenience, I collectively describe as conservative).¹⁵ Taken up belatedly

¹³ Ibid 67–8; Galligan, 'Australia's Rejection' (n 8) 348–9; Byrnes, Charlesworth and McKinnon (n 8) 26–7; Williams and Reynolds (n 1) 97–8; David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford University Press, 2010) 128. See Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009) 143.

¹⁴ For a detailed account of these developments, see Stuart Macintyre, *Australia's Boldest Experiment: War and Reconstruction in the 1940s* (NewSouth Publishing, 2015) 137–42, 253–70 ('Australia's Boldest Experiment').

¹⁵ I label particular actors 'conservative' and 'right wing' or 'progressive' and 'left wing' based on widely accepted understandings at the relevant historical moment as to where those actors sat on the national political spectrum. Applying this approach to the political actors in the 1940s, I see the ALP being more on the left-wing or progressive side of that political spectrum, with the United Australia Party ('UAP') and the Country Party more on the right-wing or conservative side of the spectrum. Positioning the Catholic Church is more complicated, but, overall, I think the label 'conservative' is justified. This approach avoids getting into more contentious debates over what (if anything) is the intrinsic content of particular political or ideological traditions. More importantly, this approach helps to highlight how understandings of what counts as conservative and progressive have changed over time. In adopting this approach, I have taken inspiration from Duncan Bell, 'What Is Liberalism?' (2014) 42(6) *Political Theory* 682. On the challenge of finding appropriate labels ('liberal', 'conservative', 'anti-Labor', 'non-Labor') for the political right in Australian history, see Judith Brett, *Australian Liberals and the*

and reluctantly by Labor largely in response to conservative pressure, constitutional rights were peripheral to and in tension with a more dominant constitutional project that claimed a much deeper left-wing pedigree. That alternative project envisioned releasing the national government from federalism-based limitations on its capacity to regulate the national economy and to thereby civilise capitalism.¹⁶ For Labor, rights were at best a sideshow and at worst an obstacle to the constitutional main event of substantially expanding the Commonwealth Parliament's power — a reform seen as the means necessary for realising a social-democratic program of economic planning, an expanded welfare state and increased public ownership of industry.¹⁷

This article provides the first comprehensive account of the neglected conservative, liberal and Catholic mobilisation that led to the emergence of constitutional rights in the Curtin government's proposed constitutional reforms of the early 1940s. The article substantially extends an often-cited, but unexplored, aside made in 1963 by constitutional scholar Geoffrey Sawer, who suggested that the Curtin government's incorporation of the rights provisions 'was in part intended to reassure those who feared the socialist implications of the wider powers.'¹⁸ By uncovering these formative conservative influences on the emergence of the rights guarantees, this article challenges scholarship that puts a nascent progressive human rights politics, personified in the figure of Labor Attorney-General HV Evatt, at the centre of the story.¹⁹ Against scholarship highlighting the rights provisions as the signal feature or even the sole reforms of the 1944 referendum, this article emphasises the belated inclusion and relative marginality of rights within a more far-reaching constitutional agenda of

Moral Middle Class: From Alfred Deakin to John Howard (Cambridge University Press, 2003) 1–7. Judith Brett opts for 'liberal' but acknowledges the relevance of 'conservative', 'anti-Labor' and 'non-Labor'.

¹⁶ Lino, 'Are Human Rights Enough (in Australia)?' (n 7) 287–8.

¹⁷ See LF Crisp, *The Australian Federal Labour Party 1901–1951* (Longmans, Green and Co, 1955) 252–5; Macintyre, *Australia's Boldest Experiment* (n 14) 137–9, 253–70.

¹⁸ Geoffrey Sawer, *Australian Federal Politics and Law: 1929–1949* (Melbourne University Press, 1963) 172 ('*Australian Federal Politics and Law*'). See also Charlesworth, 'The Australian Reluctance' (n 7) 25; Kildea (n 10) 73; Byrnes, Charlesworth and McKinnon (n 8) 27; Bailey (n 13) 143; Macintyre, *Australia's Boldest Experiment* (n 14) 258. See generally Patapan, 'Competing Visions' (n 2) 509.

¹⁹ See Galligan, 'Australia's Rejection' (n 8) 348–9; Kildea (n 10) 86–7; Bailey (n 13) 145; Macintyre, *Australia's Boldest Experiment* (n 14) 45–6; Peter Crockett, *Evatt: A Life* (Oxford University Press, 1993) 134–6, 142–6; Jenny Hocking, 'Post-War Reconstruction and the New World Order: The Origins of Gough Whitlam's Democratic Citizen' (2007) 53(2) *Australian Journal of Politics and History* 223, 226–8, 230; John Murphy, *Evatt: A Life* (NewSouth Publishing, 2016) 202; Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018) ch 10.

social-democratic governmental empowerment.²⁰ The article also builds on an emerging historiography of human rights, to date mostly focused on Europe, that has emphasised the central roles played by conservative, neoliberal and Christian actors from the 1930s onwards in the promotion of human rights.²¹

Part II of the article traces the politics of constitutional rights from Federation through to the 1940s. I show how, throughout the early decades of Federation, constitutional rights were mostly irrelevant within Australian constitutional politics. Rather, those politics were dominated by struggles over federalism, which were in turn largely partisan proxy wars about the extent to which the *Constitution* should confer power on the national government to implement Labor's social-democratic platform.²² By the early 1940s, however, the ground was laid for a politics of constitutional rights as a result of wartime developments at home and abroad.

In Part III, I demonstrate the peripheral and belated place of constitutional rights within Labor's constitutional reform program of the early 1940s. Rather than seeking to impose new limits on governmental power through constitutional rights, at the centre of the Curtin government's constitutional reforms was a program to greatly enlarge Commonwealth power by doing away with existing constitutional, especially federal, limits. That agenda continued the struggles over federalism and the barriers it posed to social democracy that had typified national constitutional politics since Federation. Despite the undoubted influence of rights-sympathetic Attorney-General Evatt on the shape of the reforms, judicially enforceable guarantees of freedom of speech and

²⁰ See, eg, Hocking (n 19) 226–7, 230; Justice Murray R Wilcox, *An Australian Charter of Rights?* (Law Book, 1993) 211–12. For more accurate accounts of the significance of the constitutional rights provisions, see Kildea (n 10) 67–8; Byrnes, Charlesworth and McKinnon (n 8) 26–7; Macintyre, *Australia's Boldest Experiment* (n 14) 253–70; Patapan, 'Competing Visions' (n 2) 509.

²¹ See, eg, Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press, 2015) 3–4, 8, 15, 27–8, 43, 53–8, 63–4, 91–4, 115–27, 151, 158, 160–1, 172; Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press, 2017); James Chappel, *Catholic Modern: The Challenge of Totalitarianism and the Remaking of the Church* (Harvard University Press, 2018) chs 3–4 ('*Catholic Modern*'); Sarah Shortall, 'Theology and the Politics of Christian Human Rights' (2018) 79(3) *Journal of the History of Ideas* 445; Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso, 2019); Sarah Shortall and Daniel Steinmetz-Jenkins (eds), *Christianity and Human Rights Reconsidered* (Cambridge University Press, 2020); Anna Saunders, 'Animated by the European Spirit': European Human Rights as Counterrevolutionary Legality' in Kathryn Greenman et al (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press, 2021) 367, 379–80. In Australia, see Jon Piccini, *Human Rights in Twentieth-Century Australia* (Cambridge University Press, 2019) 26–30.

²² Brian Galligan, 'Federalism's Ideological Dimension and the Australian Labor Party' (1981) 53(2) *Australian Quarterly* 128, 133–8 ('Federalism's Ideological Dimension').

religion were entirely absent from the proposals Labor initially publicised in late 1942 in the lead-up to the 1942 Constitutional Convention. Constitutional rights were likewise missing when Labor returned to constitutional reform in late 1943, a move that would result in the 1944 referendum. The emergence of constitutional rights can only be explained by turning to forces outside the Curtin government and, indeed, largely outside the left.

As I show in Part IV, among the most influential forces in the emergence of the constitutional rights provisions were politicians and other actors of liberal and conservative persuasions. Many roundly attacked Labor's proposals to extend postwar social democracy through an expansion of Commonwealth power on the basis that these plans posed a threat to the liberties secured under the existing constitutional order. Some liberals and conservatives went further than this, pressing for the inclusion of new constitutional rights, most notably freedom of speech and the press, to better protect individual freedom from a newly empowered Commonwealth government.

Part V of the article demonstrates that, alongside liberals and conservatives, the other major influence on the emergence of the rights provisions, especially the new constitutional protection for religious freedom, came from Catholic ranks. Influenced by transnational currents in political Catholicism that sanctified the rights and dignity of the human person against totalitarian — and particularly communist — incursions, prominent Catholic clergy and media loudly advocated for greater constitutional protections of religious freedom in order to preserve the prerogatives of the family and Catholic institutions. It was only in response to all of this pressure from conservative political and religious actors that the Curtin government moved to institute new constitutional protections for freedom of speech and religion.

Recovering this history forces a reckoning with prevailing perceptions of constitutional rights as a progressive project. In highlighting how constitutional rights can be wielded against left-wing projects of social and economic reform, this article shows that, to make sense of the politics of juristocracy, we must at least pay attention to which rights are being protected (and which are not) and who benefits from that protection (and who does not). More fundamentally, this article shows how constitutional rights as a political program can be mobilised in competition with — even in opposition to — potentially more radical constitutional agendas. To be sure, we should not uncritically valorise the aspirations for constitutional and social change of earlier generations, permeated as they so often were with settler colonialism, racism, patriarchy and countless other injustices and exclusions, blindspots and

dangers.²³ Nevertheless, for those committed to reshaping public power towards progressive ends today, the story of the emergence of constitutional rights in Australia prompts a reconsideration of the exalted status of rights — and the relative absence of social-democratic demands — within left-wing programs of constitutional reform.

II CONSTITUTIONAL RIGHTS FROM HISTORICAL IRRELEVANCE TO WARTIME PROJECT

From the drafting of the *Australian Constitution* in the 1890s and throughout most of the 20th century's first half, few individuals or organisations took up the cause of constitutional rights in Australia. Indeed, during this period, the idea of subjecting the political branches of government to judicial supervision for their compliance with constitutionally enshrined individual rights garnered little political notice.²⁴ The original *Constitution*, which came into force in 1901, contained a few scattered provisions applicable to the new national government that would have some rights-protecting effect.²⁵ But while the drafters — largely conservatives and liberals — undoubtedly cared about the protection of certain kinds of individual rights, they generally preferred to put their faith in British traditions of parliamentary sovereignty, responsible government and the common law, alongside a comparatively expansive version of representative democracy, as the best means for securing those rights.²⁶

When it came to some rights, especially protections from racial discrimination, the framers were positively contemptuous, and they drafted the *Constitution* with the express intention of enabling Australian Parliaments to pass

²³ See, eg, Humphrey McQueen, *A New Britannia* (University of Queensland Press, 4th ed, 2004); Edna Ryan and Anne Conlon, *Gentle Invaders: Australian Women at Work* (Thomas Nelson, 1975) ch 5; Marilyn Lake, *Progressive New World: How Settler Colonialism and Transpacific Exchange Shaped American Reform* (Harvard University Press, 2019). See generally Ann Curthoys and Andrew Markus (eds), *Who Are Our Enemies? Racism and the Australian Working Class* (Hale and Iremonger, 1978).

²⁴ See above nn 2–3.

²⁵ See especially *Constitution* ss 41, 51(xxxi), 80, 116. On the drafting history of these provisions, see Williams and Hume (n 2) ch 2; Haig Patapan, 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25(2) *Federal Law Review* 211, 220–6; Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28(1) *Federal Law Review* 125, 127–30; Simon Evans, 'Property and the Drafting of the Australian Constitution' (2001) 29(2) *Federal Law Review* 121; Beck (n 19) chs 5–8.

²⁶ Patapan, 'Competing Visions' (n 2) 499–501; Williams and Hume (n 2) ch 2; Curthoys and Mitchell (n 3) chs 2, 4, 9.

racially discriminatory laws.²⁷ This disdain for racial equality reflected foundational political commitments, shared across the political spectrum, to consolidate a settler-colonial polity in which dispossessed Indigenous peoples would soon die out, and a White Australia would closely regulate the few non-white immigrants permitted to enter.²⁸

The foundational irrelevance of constitutional rights within Australian constitutional politics persisted throughout most of the 20th century's first half. Across the political divide from left to right, it was rare to see people calling for rights to be given special constitutional protection.²⁹ That is not to say that political actors in this era were uninterested in rights and liberties themselves. On the political right, strands of liberal and conservative philosophy and policy showed strong solicitude for liberty and individual rights.³⁰ But liberal and conservative actors generally did not see the need to expressly constitutionally enshrine individual rights and protect them from political interference through judicial review, satisfied as they were with the safeguards provided by the existing constitutional order.³¹ A broadly similar stance on constitutional rights was adopted by those in the ALP and the wider labour movement as well as other progressive social movements.³² Though they were by no means averse to campaigns for the protection of individual rights and liberties, progressive movements — including those campaigning for the interests of workers, women, radical dissidents and Indigenous people — overwhelmingly saw influence

²⁷ Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (UNSW Press, 2002) 25; John M Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"' (1996) 42(1) *Australian Journal of Politics and History* 10, 10, 13, 18.

²⁸ John Williams and John Braden, 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19(1) *Adelaide Law Review* 95, 105–6, 118–19; Dylan Lino, 'Indigenous Recognition' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 243, 244–7.

²⁹ See above nn 2–3.

³⁰ See, eg, David Kemp, *A Democratic Nation: Identity, Freedom and Equality in Australia* (Miegunyah Press, 2019) 14–15 ('*A Democratic Nation*'); AA Staley and JR Nethercote, 'Liberalism and the Australian Federation' in JR Nethercote (ed), *Liberalism and the Australian Federation* (Federation Press, 2001) 1, 2; Peter Tiver, 'The Ideology of the Liberal Party of Australia: A Sketch and Interpretation' (1976) 11(2) *Politics* 156, 157.

³¹ See above nn 2–3. See also Staley and Nethercote (n 30) 2; PG Tiver, 'Political Ideas in the Liberal Party' (PhD Thesis, Australian National University, July 1973) ch 2.

³² See, eg, Marilyn Lake, *Getting Equal: The History of Australian Feminism* (Allen & Unwin, 1999) 19–30, 40–5, 49–53, 57–8, 72–6 ('*Getting Equal*').

over governments and Parliaments, not judicial supremacy through constitutional rights, as the ultimate means of protecting their interests.³³

For much of the 20th century, the struggle animating Australian constitutional politics at the national level was not over constitutional guarantees of individual rights; it was a struggle over federalism.³⁴ And battles over federalism, as Sawyer put it in 1948, tended in practice to ‘develop into arguments between socialists and anti-socialists.’³⁵ On the political left, the ALP’s major constitutional project from the early years of Federation was to loosen or even break the shackles that federalism imposed on national programs to tame capitalism.³⁶ Labor’s few stints in national government up to 1950 were all marked by failed efforts to enlarge Commonwealth legislative power over social and economic life.³⁷ For the liberal–conservative parties, defending federalism and resisting their Labor opponents’ supposed socialist zeal for centralisation and expanded government would become articles of faith.³⁸ When in power nationally, liberal–conservative parties often honoured this federalist creed in the breach, pursuing various strategies for expanding Commonwealth power, including formal constitutional amendments.³⁹ Such efforts to extend Commonwealth power, though conflicting with liberal–conservative federalist impulses, typically were attended by significant party division, were pursued for short-

³³ See, eg, Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Rights: A Documentary History* (Allen & Unwin, 1999) (*The Struggle for Aboriginal Rights*); Lake, *Getting Equal* (n 32) 19–30, 40–5, 49–53, 57–8, 72–6; James Waghorne and Stuart Macintyre, *Liberty: A History of Civil Liberties in Australia* (UNSW Press, 2011) 66–7. For early uses of rights language among the labour movement, see Piccini (n 21) 31–5.

³⁴ At the state level, the most significant constitutional battles were over state Upper Houses, whose undemocratic and conservative nature led to ALP efforts to abolish or reform them: see Bruce Stone, ‘Bicameralism and Democracy: The Transformation of Australian State Upper Houses’ (2002) 37(2) *Australian Journal of Political Science* 267.

³⁵ Geoffrey Sawyer, *Australian Government Today* (Melbourne University Press, 1948) 46.

³⁶ While Labor’s anti-federalism stance predominated, the party was not always consistent or united in its opposition to federalism. State Labor governments and party branches in particular had considerable reason to defend the constitutional status quo, since their very existence depended on the continuation of federalism: Crisp (n 17) ch 12; Andrew Parkin and Vern Marshall, ‘Frustrated, Reconciled or Divided? The Australian Labor Party and Federalism’ (1993) 29(1) *Australian Journal of Political Science* 18, 20–6.

³⁷ Crisp (n 17) ch 12.

³⁸ A formative moment was the 1911 referendum: see generally Kemp, *A Democratic Nation* (n 30) 178–80. See also Peter Loveday, ‘The Liberals’ Image of Their Party’ in Cameron Hazlehurst (ed), *Australian Conservatism: Essays in Twentieth Century Political History* (Australian National University Press, 1979) 239, 255–8; Campbell Sharman, ‘Federalism and the Liberal Party’ in JR Nethercote (ed), *Liberalism and the Australian Federation* (Federation Press, 2001) 287, 287–8, 293–5.

³⁹ See, eg, Aaron Wildavsky, ‘The 1926 Referendum’ in *Studies in Australian Politics* (FW Cheshire, 1958) 1, 7–8, 11–16, 90–4.

term political advantage and involved more limited reforms than those promulgated by Labor.⁴⁰

After four decades of neglect, constitutional rights first emerged to national prominence during the Second World War with the Curtin Labor government's failed 1944 attempt to insert new judicially enforceable protections of free speech and religious freedom into the *Constitution*.⁴¹ The rights provisions formed part of a larger program of constitutional reform designed to facilitate the government's plans for postwar reconstruction.⁴² First taking shape in late 1942, including through a Constitutional Convention, Labor's constitutional agenda culminated in proposed constitutional amendments put to a referendum in August 1944, when they were decisively defeated.⁴³ Strongly reflecting Labor's traditional efforts to overcome federal obstacles to implementing its political program, the proposed amendments would have expanded the Commonwealth Parliament's powers in 14 different areas, including employment, companies, monopolies, prices, production and distribution of goods, national works, health, and Aboriginal affairs.⁴⁴ These powers were to expire five years after the war ended, although Labor hoped that future constitutional revision would produce permanent arrangements.⁴⁵ Alongside the 14 new powers, the proposed amendments also incorporated over the same five-year period two rights provisions: protection against Commonwealth and state laws that infringed freedom of speech and expression, and an extension to the states of the *Constitution's* existing guarantee of religious freedom.⁴⁶ A final inclusion would have constitutionally entrenched the powers of each House of Parliament to disallow delegated legislation.⁴⁷

An important context for the emergence of the constitutional rights provisions was a broader wartime ideological campaign among the leading Western powers, especially the United States ('US'), promoting the ideals of liberty and

⁴⁰ See, eg, *ibid*; Conrad Joyner, 'WM Hughes and the "Powers" Referendum of 1919: A Master Politician at Work' (1959) 5(1) *Australian Journal of Politics and History* 15; Sawyer, *Australian Federal Politics and Law* (n 18) 82–4.

⁴¹ See Constitution Alteration (Post-War Reconstruction) 1944 (Cth) ('Post-War Reconstruction Alteration Bill').

⁴² Lino, 'Are Human Rights Enough (in Australia)?' (n 7) 287–8. See also Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 135–8 ('*Politics of the High Court*').

⁴³ Macintyre, *Australia's Boldest Experiment* (n 14) 137–42, 253–70.

⁴⁴ Post-War Reconstruction Alteration Bill (n 41) cl 2.

⁴⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1944, 143 (Herbert Vere Evatt, Attorney-General).

⁴⁶ Post-War Reconstruction Alteration Bill (n 41) cl 2.

⁴⁷ *Ibid*.

freedom against fascist authoritarianism and aggression. In his famous 1941 ‘Four Freedoms’ speech, US President Franklin D Roosevelt had prominently emphasised the need for freedom of speech and expression, freedom of worship, freedom from want and freedom from fear ‘everywhere in the world’.⁴⁸ These principles were to underpin a US-led world order that was ‘the very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb’.⁴⁹ Similar themes rang through the 1941 ‘Atlantic Charter’, drafted by Roosevelt and Winston Churchill as a statement of ideals for a postwar world under the peaceful sign of Anglo-American supremacy rather than ‘Nazi tyranny’.⁵⁰ It was a vision that sought to globalise US and British ideals of liberty and welfarism as a fighting creed during and after the war, securing in the process the peacetime primacy of the US with the United Kingdom as junior partner.⁵¹ The Curtin government drew on both documents to provide rhetorical support and concrete content for its proposed constitutional changes.⁵² That the amendments incorporated constitutional protections for freedom of speech and religious freedom reflected their debt to the Four Freedoms.⁵³

The constitutional rights provisions also emerged at a moment when the US model of rights-based constitutionalism was beginning to globalise — a diffusion of US cultural power alongside the birth of American geopolitical hegemony.⁵⁴ As influential media magnate and policy intellectual Henry R Luce would

⁴⁸ Franklin D Roosevelt, ‘Annual Message to Congress’ (State of the Union Address, United States Congress, 6 January 1941) 20–1 <<https://www.fdrlibrary.org/four-freedoms>>, archived at <<https://perma.cc/JU2R-AB8F>>.

⁴⁹ Ibid 21. See also Elizabeth Borgwardt, *A New Deal for the World: America’s Vision for Human Rights* (Harvard University Press, 2005) 48–53; Jeffrey A Engel (ed), *The Four Freedoms: Franklin D Roosevelt and the Evolution of an American Idea* (Oxford University Press, 2016) 26–7, 198–9; Stephen Wertheim, *Tomorrow, the World: The Birth of US Global Supremacy* (Belknap Press, 2020) 87–90, 105.

⁵⁰ ‘The Atlantic Charter’ [1946–47] *Yearbook of the United Nations* 2, 2. See also Borgwardt (n 49) 50–3; Wertheim (n 49) 112–14.

⁵¹ Borgwardt (n 49) 48–53; Wertheim (n 49) 87–90.

⁵² See, eg, Constitution Alteration (War Aims and Reconstruction) 1942 (Cth) cl 2 (‘War Aims and Reconstruction Alteration Bill’); HV Evatt, *Post-War Reconstruction: A Case for Greater Commonwealth Powers* (1942) 115–16 (‘Post-War Reconstruction’).

⁵³ Galligan, ‘Australia’s Rejection’ (n 8) 348–50; Macintyre, *Australia’s Boldest Experiment* (n 14) 45. On the Curtin government’s use of rights language to support its plans for postwar reconstruction, see Piccini (n 21) 35–7.

⁵⁴ Ashı Bılı and Aziz Rana, ‘Constitutionalism and the American Imperial Imagination’ (2018) 85(2) *University of Chicago Law Review* 257, 264–8, 270. See also Duncan Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850–2000’ in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006) 19, 67–71.

declare in his famous 1941 article heralding the arrival of the ‘American century’, US internationalism would henceforth comprise ‘a sharing with all peoples of our *Bill of Rights*, our *Declaration of Independence*, our *Constitution*.’⁵⁵ Such projects of constitutional ‘sharing’ — involving varying degrees of voluntariness on the part of recipient states — would only fully get under way in the decades after the Second World War.⁵⁶ The Australian move to incorporate new rights provisions in its *Constitution* in the early 1940s was a precocious, if ultimately unsuccessful, example of the spread of American rights-oriented constitutionalism. For proponents of the rights provisions, the *United States Constitution* was a frequent touchstone and inspiration. Upon incorporating the rights provisions into the referendum Bill in Parliament, Attorney-General Evatt made clear that the provisions were inspired by the US model, from whose First Amendment both provisions directly borrowed.⁵⁷ With Australia now ‘look[ing] to America’, as Prime Minister John Curtin famously indicated in late 1941, as the great power best able to secure its defence, the rights provisions can be seen as a corresponding example of Australia looking to a culturally ascendant America as a model for its constitutional arrangements.⁵⁸

If the cause of rights-based constitutionalism in Australia was given a boost by wartime developments abroad, that cause also found fertile ground amidst conditions at home, where mobilisation for the war effort had seen government controls over economic and social life reach an unprecedented intensity. By the time of the 1944 referendum, the Commonwealth government had instituted extensive controls in the economic realm, including over prices and incomes,

⁵⁵ Henry R Luce, ‘The American Century’ (1999) 23(2) *Diplomatic History* 159, 168. See also Wertheim (n 49) 80–6.

⁵⁶ George Athan Billias, *American Constitutionalism Heard round the World, 1776–1989: A Global Perspective* (New York University Press, 2009) ch 10.

⁵⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 1944, 1343, 1393, 1403 (Herbert Vere Evatt, Attorney-General). In explaining the anticipated effects of the rights provisions, Evatt gave a detailed account of US First Amendment doctrine and cases: at 1393–9, 1404–7.

⁵⁸ See also David Day, ‘27 December 1941: Prime Minister Curtin’s New Year Message’ in Martin Crotty and David Andrew Roberts (eds), *Turning Points in Australian History* (UNSW Press, 2009) 129, 129, 132. Of course, many dimensions of Australia’s original *Constitution*, most especially those relating to federalism, were also the product of earlier acts of ‘looking to America’. As Evatt explained in parliamentary debate, the *Constitution*’s original guarantee of religious freedom in s 116 had also borrowed language from the First Amendment: Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 1944, 1403 (Herbert Vere Evatt, Attorney-General).

production, overseas finance and trade, consumption, and employment.⁵⁹ These measures, many of which were ramped up once the Curtin government came to power in late 1941, included the rationing of food and clothing, as well as ‘manpower’ controls that saw the compulsory redeployment of civilians into occupations deemed essential to the war effort.⁶⁰ Government censorship of the press was also undertaken from the moment of Australia’s entry into the war and sparked numerous public rows over free speech and press freedom.⁶¹ War-time regulations also prohibited political activities and organisations seen to hamper the war effort, which led to the banning of communist and fascist organisations, and several Jehovah’s Witness churches, alongside prosecutions of numerous individuals.⁶² That virtually all of these restrictive wartime measures were imposed by executive regulation rather than parliamentary enactment made them liable to the charge that people’s liberties were being trampled by unaccountable bureaucrats.⁶³ The extensive economic, social and political measures adopted by Australian governments during the war made the cause of personal freedoms concrete and immediate.⁶⁴

III CONSTITUTIONAL RIGHTS AS MARGINAL AFTERTHOUGHT IN LABOR’S POSTWAR PROGRAM

Despite Labor’s inclusion of constitutional rights in the 1944 referendum, the rights provisions were marginal to the government’s central constitutional goal, which was to substantially expand Commonwealth power, especially over economic matters. That objective was fundamentally consistent with the ALP’s traditional constitutional politics of enlarging federal power as the means to social justice. During the war, the government had been able to use the Commonwealth Parliament’s power over defence in s 51(vi) of the *Constitution* as the

⁵⁹ See generally SJ Butlin, ‘War Economy, 1939–1942’ in *Australia in the War of 1939–1945* (Australian War Memorial, 1955) series 4, vol 3; SJ Butlin and CB Schedvin, ‘War Economy, 1942–1945’ in *Australia in the War of 1939–1945* (Australian War Memorial, 1977) series 4, vol 4.

⁶⁰ Butlin (n 59) chs 7, 14; Butlin and Schedvin (n 59) chs 2, 11, 14.

⁶¹ See generally John Hilvert, *Blue Pencil Warriors: Censorship and Propaganda in World War II* (University of Queensland Press, 1984).

⁶² Roger Douglas, ‘Law, War and Liberty: The World War II Subversion Prosecutions’ (2003) 27(1) *Melbourne University Law Review* 65, 74–93; Paul Hasluck, ‘The Government and the People, 1939–1941’ in *Australia in the War of 1939–1945* (Australian War Memorial, 1952) series 4, vol 1, 599–601.

⁶³ See generally Commonwealth, *Manual of National Security Legislation: As in Force on 1st August, 1944* (5th ed, 1944) vols 1–2.

⁶⁴ For civil liberties campaigning in this period, see Waghorne and Macintyre (n 33) chs 2–3.

basis for imposing far-reaching controls over all facets of economic and social life.⁶⁵ As the government anticipated the contraction of this constitutional authority in peacetime, the necessity of formal constitutional change to realise Labor's program loomed once more and became one of the government's most pressing political tasks.⁶⁶

Under the banner of postwar reconstruction, the government's main objective was to obtain new constitutional powers to implement its program of extensive economic planning, increased public ownership of industry (including through selective nationalisation), and an expanded welfare state.⁶⁷ As Jon Piccini has demonstrated, the language of human rights was part of the Curtin government's justificatory armature for these proposals, but it was invoked principally in support of the task of constructing an Australian social democracy through enlarged federal power rather than to protect against state incursions into private life.⁶⁸ The Australian situation represented a microcosm of a much broader phenomenon of mid-century social-democratic orthodoxy among wealthy Western states, where human rights played at best a supporting ideological role that helped to justify and extend the welfare state.⁶⁹ And, as in other places, Australia's welfarist vision was deeply exclusive, expanding social protections on the foundations of settler-colonialism, a White Australia and patriarchal hierarchies.⁷⁰

Even so, for an Australian labour movement not traditionally enamoured of court-enforced limits on governmental power, the constitutional protections of free speech and religious freedom proposed by the Curtin government in the 1944 referendum appear at first glance to signal an important ideological shift in left-wing constitutional politics. No longer single-mindedly focused on expanding national legislative power, Labor would now embrace a progressive, internationalist legalism by making room in its program for judicially enforceable, constitutional protections of individual rights.

⁶⁵ Galligan, *Politics of the High Court* (n 42) 118–34.

⁶⁶ Macintyre, *Australia's Boldest Experiment* (n 14) 137–8.

⁶⁷ *Ibid* 137–9, 253–70; Crisp (n 17) 252–3. See Galligan, *Politics of the High Court* (n 42) 135–8.

⁶⁸ Piccini (n 21) 30–7.

⁶⁹ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press, 2018) ch 2.

⁷⁰ See, eg, Tim Rowse, *Indigenous and Other Australians since 1901* (UNSW Press, 2017) 10, 95–8; Andrew Jakubowicz, 'The State and the Welfare of Immigrants in Australia' (1989) 12(1) *Ethnic and Racial Studies* 1; Cora V Baldock and Bettina Cass (eds), *Women, Social Welfare and the State in Australia* (Allen & Unwin, 1983). For comparative analysis, see, eg, Gurminder K Bhambra and John Holmwood, 'Colonialism, Postcolonialism and the Liberal Welfare State' (2018) 23(5) *New Political Economy* 574; Ann Orloff, 'Gender in the Welfare State' (1996) 22 *Annual Review of Sociology* 51, 62, 67.

Apparently confirming a turn by Labor to rights-based juristocracy is the centrality of Labor's liberal-minded Attorney-General Evatt to the emergence of constitutional rights in Labor's constitutional reforms of the early 1940s. As discussed later in detail,⁷¹ Evatt's actions would prove crucial in the government's decision to incorporate the rights protections into its constitutional reform plans. Following a relatively undistinguished stint in the New South Wales Parliament and a much more distinguished legal career culminating in his appointment as the youngest-ever Justice of the High Court, Evatt made the shift to federal politics in 1940 and became Attorney-General the following year.⁷²

A committed member of the ALP from his youth, and its ill-fated national leader in the 1950s when the party split over communism, Evatt had a deep and longstanding belief in a legalistic, social liberalism, which probably outweighed his labourist and socialist commitments.⁷³ During his tenure as a High Court Justice in the 1930s, Evatt had shown solicitude for traditional civil liberties in his judgments.⁷⁴ Returning from a 1938 visit to the US where he had met with President Roosevelt and lectured at Harvard, Columbia and other universities, Evatt extolled the importance of Australia's relationship with the US and the value of constitutional rights — such as freedom of speech and the press, and freedom of association — in guarding against 'tyrannical dictatorship'.⁷⁵ In 1940, eyeing a move from the judiciary into federal politics, Evatt penned a long opinion piece, titled 'Democracy Is in Danger Here!', which advocated for the constitutional enshrinement of 'elemental democratic rights' modelled on the US example, including religious freedom, freedom of speech, freedom of the press, and the right of association.⁷⁶ Later in his political career, as Minister for External Affairs, Evatt would be an enthusiastic and influential proponent of an 'international bill of rights', whose initial institutionalisation took the form of the 1948 *Universal Declaration of Human Rights*.⁷⁷ In Evatt's ambitious vision, an international bill of rights ought to have imposed an obligation on

⁷¹ See below Parts IV(B), V(B).

⁷² Murphy (n 19) 70, 90–1, 182.

⁷³ Ibid 45–9, 74–5, 154–5; Peter Beilharz, 'The Young Evatt: Labor's New Liberal' (1993) 39(2) *Australian Journal of Politics and History* 160, 162, 166.

⁷⁴ Leslie Zines, 'Mr Justice Evatt and the Constitution' (1969) 3(2) *Federal Law Review* 153, 168–71. See Murphy (n 19) 100–2.

⁷⁵ 'Judge Sees Danger: Warns of Attack on Free Speech', *Daily Telegraph* (Sydney, 27 December 1938) 2; Murphy (n 19) 124–7.

⁷⁶ Justice Herbert Vere Evatt, 'Democracy Is in Danger Here!', *The Sun* (Sydney, 17 March 1940) 1.

⁷⁷ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948). See also Annemarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946–1966* (Federation Press, 2005).

states parties to enshrine it in their own constitutions and should have also been enforceable by an International Court of Human Rights.⁷⁸ And in the 1950s, faced with the Menzies Liberal government's efforts to ban the Communist Party, Evatt would successfully lead the civil-libertarian charge against the Menzies government's actions, first in a legal challenge in the High Court, and then in the court of public opinion during the 1951 referendum.⁷⁹

And yet in the Curtin government's original plans for constitutional change — developed and articulated by Evatt himself in 1942 — constitutional rights were wholly absent, whereas the scope of Commonwealth legislative power would have been effectively unlimited.⁸⁰ In early October 1942, Evatt had proposed a constitutional reform program for postwar reconstruction that the government would put to a Constitutional Convention which would include representatives from the state governments and the federal government and non-government parties.⁸¹ The centrepiece of the original 1942 proposal was not a list of 14 powers with a five-year sunset clause; it was a standing power for the Commonwealth Parliament to undertake 'all measures which in the declared opinion of the Parliament will tend to achieve economic security and social justice.'⁸² In addition to the scope of this extremely broad power being effectively non-justiciable, the power was also declared to be immune from other constitutional constraints: it could be wielded 'notwithstanding anything contained elsewhere in this *Constitution*', presumably including any constitutional rights protections.⁸³ The outcome of such changes would, in effect, have been a regime of Commonwealth parliamentary sovereignty unburdened by judicial review and the constraints of federalism.

In the original 1942 constitutional reforms, free speech and religious freedom along with the other Four Freedoms were included not as new judicially enforceable constitutional rights but as new bases for Commonwealth legislative power. Rather than limiting Commonwealth governmental power, the 1942 proposals would have increased it by enabling the Commonwealth

⁷⁸ Devereux (n 77) 145–7, 180–8.

⁷⁹ George Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case' (1993) 15(1) *Sydney Law Review* 3, 20–5; Frank Bongiorno, 'Herbert Vere Evatt and British Justice: The Communist Party Referendum of 1951' (2013) 44(1) *Australian Historical Studies* 54, 54, 59–66.

⁸⁰ On the tension between Evatt's attachment to civil liberties and his support for governmental power, see Bongiorno (n 79) 57–9.

⁸¹ Macintyre, *Australia's Boldest Experiment* (n 14) 137–8.

⁸² War Aims and Reconstruction Alteration Bill (n 52) cl 2.

⁸³ *Ibid.*

Parliament to legislate for the protection of the Four Freedoms.⁸⁴ Of course, Parliament might have used these powers to limit the actions of the states or the Commonwealth executive.⁸⁵ Evatt also claimed that the powers would operate by implication to constrain the other legislative powers of the Parliament, so that the Parliament could make no laws that infringed any of the Four Freedoms, but that interpretation was very unlikely.⁸⁶ In summary, then, Labor's original template for constitutional reform was in keeping with its traditional program of expanding Commonwealth power as the best constitutional avenue for pursuing social justice.

On the eve of the Constitutional Convention in late November 1942, the government had a change of heart, proposing to the Convention a modified set of reforms that now incorporated a constitutional protection for freedom of speech and the press that would bind both the Commonwealth and state Parliaments and an extension to the states of the *Constitution's* existing religious freedom protections.⁸⁷ Of greater significance at the time, Labor whittled down its bold opening gambit of something approaching pure parliamentary sovereignty to a more modest, but still significant, list of specific powers that would now be subject to judicial review.⁸⁸ By the end of the Convention, the participants had agreed on a list of 14 new powers that would be conferred on the Commonwealth Parliament for a five-year period after the war.⁸⁹ But instead of coming about through formal amendments to the *Constitution*, these powers were to be referred to the Commonwealth by state Parliaments under s 51(xxxvii) of the *Constitution*.⁹⁰ Since this mechanism did not enable the

⁸⁴ Ibid.

⁸⁵ Evatt, *Post-War Reconstruction* (n 52) 84.

⁸⁶ Ibid 84–5. Evatt's claim was at odds with the broad, textualist approach to interpreting the scope of heads of power that was adopted by the High Court in *Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 142, 145 (Isaacs J for Knox CJ, Isaacs, Rich and Starke JJ), 161–2 (Higgins J) ('*Engineers' Case*'). As Evatt J himself had said in *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 706, the *Engineers' Case* (n 86) established that 'each subject matter in sec 51 must be regarded as a separate subject matter' generally unconstrained by other heads of power.

⁸⁷ 'Constitution Move Upsets Govt's Opponents', *Daily Telegraph* (Sydney, 25 November 1942) 5; 'New Constitutional Bill Drafted: Parliament's Powers Curbed', *The Sydney Morning Herald* (Sydney, 25 November 1942) 6 ('New Constitutional Bill Drafted').

⁸⁸ 'Constitution Move Upsets Govt's Opponents' (n 87) 5; 'New Constitutional Bill Drafted' (n 87) 6.

⁸⁹ Post-War Reconstruction Alteration Bill (n 41) cl 2.

⁹⁰ *Record of Proceedings: Convention of Representatives of the Commonwealth and State Parliaments on Proposed Alteration of the Commonwealth Constitution* (1942) 152–4 ('*Record of Proceedings*'); 'Convention Adopts Draft Bill for States: To Pass Law within Three Months', *The Canberra Times* (Canberra, 3 December 1942) 2.

states to ‘refer’ constitutional rights protections to the Commonwealth, the provisions on free speech and religious freedom fell by the wayside.⁹¹

As the Constitutional Convention’s agreed proposal for the state Parliaments to temporarily refer 14 powers to the Commonwealth foundered in several states, the Curtin government in late 1943 decided to proceed with a constitutional referendum on the matter — and as with the government’s original 1942 proposals, constitutional rights were entirely missing.⁹² Having announced its proposed constitutional reforms in December 1943 and introduced them into Parliament in February 1944, the government only moved to insert rights provisions into the referendum proposals on 9 March 1944.⁹³ While there was fierce debate in Cabinet over the scope of the constitutional reforms that the government would put to a referendum, that debate focused not on whether to include rights protections, but on whether to pursue fully unfettered Commonwealth legislative power — as called for in the ALP platform — or the more limited set of temporary legislative powers approved by the Constitutional Convention.⁹⁴ It was the latter option that won out.⁹⁵ In late January 1944, Evatt told an esteemed audience at the Summer School of the Australian Institute of Political Science that, while he continued to favour the incorporation of rights guarantees into the *Constitution*, the appropriate time for their inclusion would be a future moment of wholesale and permanent constitutional revision rather than the present project to temporarily enlarge federal power.⁹⁶ But in early March, Evatt and the government reversed course, deciding to include new constitutional protections for free speech and religious freedom, as well as

⁹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1944, 1152–3 (Herbert Vere Evatt, Attorney-General).

⁹² Macintyre, *Australia’s Boldest Experiment* (n 14) 254–5.

⁹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1944, 1153–4 (Herbert Vere Evatt, Attorney-General).

⁹⁴ ‘Powers Decision Delay: Cabinet Section Makes Bid for Wide Transfer’, *Daily Telegraph* (Sydney, 8 December 1943) 4; ‘Referendum Early Next Year: Cabinet Clash on Scope of Powers Vote’, *Daily Telegraph* (Sydney, 9 December 1943) 5; Macintyre, *Australia’s Boldest Experiment* (n 14) 255–6.

⁹⁵ Post-War Reconstruction Alteration Bill (n 41) cl 2.

⁹⁶ HV Evatt, ‘Reconstruction and the Constitution’ in DAS Campbell (ed), *Post-War Reconstruction in Australia* (Australasian Publishing, 1944) 238, 286. See also ‘Dr Evatt Puts Case for Review of Constitution’, *The Canberra Times* (Canberra, 1 February 1944) 2. Evatt made the same point in his second reading speech on the referendum legislation: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1944, 143 (Herbert Vere Evatt, Attorney-General).

constitutional entrenchment of the powers of each House of Parliament to disallow delegated legislation.⁹⁷

The marginal place of the rights provisions within the Curtin government's reform proposals, and their belated incorporation into those proposals, reflected the fact that judicially enforceable constitutional rights had few passionate partisans within the parliamentary or industrial wings of the labour movement. For those on the political left at this time, the overwhelming focus of their constitutional politics at the national level remained on the traditional goal of removing obstacles to the exercise of federal power rather than imposing new constraints through constitutional rights. Just a week before the 1942 Constitutional Convention began, a special national conference of the ALP endorsed the government's far-reaching original constitutional reform proposals and made no mention of the need for new constitutional rights.⁹⁸ Shortly after the government announced in late 1943 its decision to press ahead with a referendum, the ALP national conference endorsed the government's 14-powers plan with no one speaking out on the absence of constitutional rights from the proposal.⁹⁹

A similar position — namely, indifference towards constitutional rights coupled with enthusiasm for expanded Commonwealth power — prevailed among those involved with progressive social movements of the era. For instance, within the left-leaning Australian Council for Civil Liberties, despite some wanting to launch a wartime campaign for a bill of rights, the Council ultimately did not see this as a worthwhile priority, preferring to protect civil liberties by lobbying politicians.¹⁰⁰ At the same time as Council members mostly disavowed constitutional rights, many of the Council's key figures were

⁹⁷ Minutes of Meeting of Full Cabinet (National Archives of Australia Series A2703/77, Canberra, 9 March 1944) 1–2; Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1944, 1153–4 (Herbert Vere Evatt, Attorney-General).

⁹⁸ Australian Labor Party, *Official Report of Proceedings of Special Commonwealth Conferences Held at Melbourne on Monday, November 16, 1942 and Monday, January 4, 1943* (Industrial Printing and Publicity, 1943) 16–17, 37 ('1942–43 Special Commonwealth Conferences').

⁹⁹ Australian Labor Party, *Official Report of Proceedings of the 16th Commonwealth Conference* (Industrial Printing and Publicity, 1943) 34–5 ('16th Commonwealth Conference').

¹⁰⁰ Waghorne and Macintyre (n 33) 48, 66–7. Compare the contrasting positions on constitutional rights from two Council members: Maurice Blackburn, 'Guarantees of Freedom', *The Age* (Melbourne, 19 November 1942) 2; Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 1944, 1399–1400 (Frank Brennan). Both were also Labor Members of Parliament, although Maurice Blackburn had recently been expelled for his participation in the Australia–Soviet Friendship League: Susan Blackburn Abeyasekere, 'Blackburn, Maurice McCrae (1880–1944)' *Australian Dictionary of Biography* (Web Page, 2006) <<https://adb.anu.edu.au/biography/blackburn-maurice-mccrae-5258>>, archived at <<https://perma.cc/Z97R-STC9>>.

vocal proponents of enlarged Commonwealth legislative power and supported the Curtin government's efforts to this end.¹⁰¹

To take up another example, proponents of Indigenous rights and welfare had long demanded federal control of Indigenous affairs, not constitutional rights protections, as the key constitutional mechanism for securing social justice for Aboriginal and Torres Strait Islander people.¹⁰² That demand bore fruit in Labor's program of constitutional reform for postwar reconstruction, with Indigenous affairs included as one of the new bases of Commonwealth legislative power in both the 1942 Constitutional Convention and the 1944 referendum proposals.¹⁰³ Progressive agitation for federal control over Indigenous affairs would only grow louder in the following decades, culminating in the 1967 referendum and its expansion of the Commonwealth Parliament's power in respect of Indigenous affairs.¹⁰⁴

An important exception was the women's movement, some members of which unsuccessfully pressed the Curtin government to include in its constitutional reforms of the early 1940s a guarantee of equality between men and women. In the lead-up to the 1942 Constitutional Convention, several feminist activists, including avowed socialist Jessie Street, wrote to Prime Minister Curtin urging, without success, that a constitutional guarantee of women's equality be included in the reforms.¹⁰⁵ The exclusion of women from the 1942 Constitutional Convention galvanised feminists into more assertive action, including the convening of the inaugural Australian Women's Conference ('AWC') in November 1943.¹⁰⁶ Spearheaded by Street as President of the United

¹⁰¹ See Waghorne and Macintyre (n 33) 58–9, 63.

¹⁰² This is a theme evident in documents collected in Attwood and Markus, *The Struggle for Aboriginal Rights* (n 33) pt I. See generally John Maynard, *Fight for Liberty and Freedom: The Origins of Australian Aboriginal Activism* (Aboriginal Studies Press, 2007); Fiona Paisley, 'Federalising the Aborigines? Constitutional Reform in the Late 1920s' (1998) 29(2) *Australian Historical Studies* 248, 252, 256–7; Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2nd ed, 2007) ch 2 ('The 1967 Referendum').

¹⁰³ See War Aims and Reconstruction Alteration Bill (n 52) cl 2; *Record of Proceedings* (n 90) 154; Post-War Reconstruction Alteration Bill (n 41) cl 2. See generally Charlie Fox, 'The Fourteen Powers Referendum of 1944 and the Federalisation of Aboriginal Affairs' (2008) 32 *Aboriginal History* 27.

¹⁰⁴ See generally Attwood and Markus, *The 1967 Referendum* (n 102).

¹⁰⁵ Stuart Macintyre, 'Women's Leadership in War and Reconstruction' [2013] (104) *Labour History* 65, 73 ('Women's Leadership'); Macintyre, *Australia's Boldest Experiment* (n 14) 187–9; Heather Radi (ed), *Jessie Street: Documents and Essays* (Women's Redress Press, 1990) 129–30. See generally Jessie Street, *Jessie Street: A Revised Autobiography*, ed Lenore Coltheart (Federation Press, 2004).

¹⁰⁶ Macintyre, 'Women's Leadership' (n 105) 74. See generally Zora Simic, 'A New Age?: Australian Feminism and the 1940s' (2006) 32(1) *Hecate* 152.

Associations of Women, the AWC produced the *Australian Woman's Charter* ('*Woman's Charter*'), a lengthy list of resolutions seeking reforms encompassing all aspects of political, economic and social life.¹⁰⁷ Among them was a call that the forthcoming referendum include a constitutional amendment providing 'that women shall be entitled to equal rights, status and opportunity with men' and 'that any sex discrimination embodied in any laws or regulations be invalid'.¹⁰⁸ On 1 March 1944, a week before Cabinet's decision to incorporate the rights provisions into its revised constitutional reforms, Street led a deputation of 13 women from the AWC to present the *Woman's Charter* to the government. Received by Evatt (who was a friend of Street's) and other Ministers, the deputation pressed for the referendum to include an equal rights amendment, but on this point they were rebuffed.¹⁰⁹ At most, feminist agitation for an equality guarantee may have indirectly encouraged the government by offering a kind of ambient support for judicially enforceable constitutional rights, albeit rights of a different kind than those subsequently adopted by the government.

From this history, two broad conclusions can be drawn. First, constitutional rights were a peripheral add-on to Labor's constitutional reform proposals of the early 1940s, which were centrally concerned with the expansion of Commonwealth government power to support a far-reaching postwar social-democratic program. Secondly, the Curtin government was a reluctant convert to the cause of judicially enforceable constitutional rights, since they were absent from the reforms it initially proposed ahead of the 1942 Constitutional Convention and later ahead of the 1944 referendum. While Evatt's influence was undoubtedly pivotal in the eventual inclusion of the rights provisions both in 1942 and 1944, their absence from the government's original proposals suggests that Evatt was either unable or unwilling to convince his fellow Ministers that they should be included in the first instance.

What still demands explanation is why the Curtin government belatedly decided to incorporate constitutional rights into its reform plans, first on the eve of the 1942 Constitutional Convention and then by amending its referendum legislation in March 1944. Evatt's impact as the government's liberal-minded Attorney-General may have been necessary to both developments, but it was certainly not sufficient, given the absence of constitutional rights from the

¹⁰⁷ Australian Women's Conference for Victory in War and Victory in Peace, *Australian Woman's Charter* (1943) ('*Woman's Charter*'). See also Lake, *Getting Equal* (n 32) 190–8. See generally Simic (n 106).

¹⁰⁸ *Woman's Charter* (n 107) 6; Lake, *Getting Equal* (n 32) 195.

¹⁰⁹ 'Deputation Seeks New Deal for Women of Australia', *The Mercury* (Hobart, 2 March 1944) 7; 'Woman's Charter: Deputation to Canberra', *The Cairns Post* (Cairns, 10 March 1944) 5; Lake, *Getting Equal* (n 32) 190. See Street (n 105) 173.

government's original reform proposals. In both cases, the explanation for the government's incorporation of constitutional rights can be found in what may seem today to be an unlikely place: pressure from liberal-conservative forces and Catholics.

IV THE LIBERAL-CONSERVATIVE ORIGINS OF THE RIGHTS PROVISIONS

A pivotal factor contributing to Labor's incorporation of constitutional rights into its reform proposals, both in the 1942 Constitutional Convention and in the 1944 referendum legislation, was pressure from politicians and other actors of liberal and conservative persuasions. Below, I explore the 1942 Constitutional Convention and the 1944 referendum proposals in turn. Much of the liberal and conservative pressure for rights was negative: rather than positively advocating for constitutional rights, many liberals and conservatives simply attacked the government's constitutional proposals for the danger they supposedly posed to individual liberty secured under the existing constitutional order. Liberal-conservative concerns about rights and freedom were often entangled with criticisms that the reforms were an untoward wartime plot designed to clear the way for socialism and a unitary state. Some influential liberal and conservative actors in politics, the media and civil society went beyond negative attacks on Labor's constitutional proposals and advocated for the outright incorporation of new constitutional rights, especially freedom of speech and the press. This liberal and conservative advocacy for free speech protections was most vocal during the 1944 referendum debate.

A The 1942 Constitutional Convention

Labor's belated inclusion of constitutional rights into its 1942 constitutional reform plans was in significant part a reaction to widespread attacks on the government's original reform proposals from liberal and conservative politicians. Between the government's announcement in early October 1942 of its sweeping original plans for a virtually sovereign Commonwealth Parliament and its retreat in late November to a more limited suite of reforms that now included new constitutional protections for free speech and religious freedom, liberal and conservative attacks on the original plans as threatening individual liberty were unrelenting. Most visible among the liberal-conservative critics were

politicians at the state level.¹¹⁰ The prominence of state politicians was unsurprising given that the non-Labor parties at the federal level were in disarray, the states had the most to lose from an expansion of Commonwealth powers, and state Premiers and Opposition Leaders were prospective participants in the Constitutional Convention slated for November.¹¹¹

Liberal and conservative critics in 1942 did not for the most part press for the incorporation of new constitutional rights to address their concerns, seeking instead the retention of existing constitutional restraints — like judicial review and limits on federal power — that were said to protect individual rights. Some, like former United Australia Party (‘UAP’) Prime Minister Robert Menzies, forthrightly asserted a Diceyan faith that rights were deeply embedded in the spirit of the Australian people; written constitutional guarantees of rights were at best an alien superfluity and at worst a distorting perversion.¹¹² That said, even Menzies seems to have entertained a constitutional freedom of association, presumably in response to government moves towards compulsory unionism.¹¹³

For Sir Henry Manning, a leading member of the Liberal Opposition in New South Wales, the fact that the reforms would remove the individual right to seek judicial review of Commonwealth legislation was an egregious shortcoming. ‘Out of such a system’, he proclaimed, ‘dictatorships must arise against which the placard of the four freedoms would be a poor consolation to the victims.’¹¹⁴ The Leader of the Nationalist Opposition in Tasmania, Henry Baker, saw in the reforms an intention ‘to sweep aside all restraints upon complete dictatorial powers in the Commonwealth.’¹¹⁵ In the result, ‘[n]o guarantee of civil or religious liberty remains, so that any majority in the Federal Parliament

¹¹⁰ See, eg, ‘Constitution Changes: Sir H Manning’s Criticism’, *The Sydney Morning Herald* (Sydney, 14 October 1942) 6 (‘Constitution Changes’); ‘Threat to States: Sweeping Powers in New Federal Bill’, *The Mercury* (Hobart, 22 October 1942) 7 (‘Threat to States’); ‘Proposed Amendment to Constitution: Joint Meeting of State Houses Debates Plan’, *The Age* (Melbourne, 11 November 1942) 3 (‘Proposed Amendment to Constitution’).

¹¹¹ On the non-Labor parties’ federal disarray, see Ian Hancock, *National and Permanent? The Federal Organisation of the Liberal Party of Australia 1944–1965* (Melbourne University Press, 2000) 10–23; Ulrich Ellis, *A History of the Australian Country Party* (Melbourne University Press, 1963) ch 22, 261–3.

¹¹² *Record of Proceedings* (n 90) 25–6 (RG Menzies); ‘Menzies on Proposals for Free Speech, Press, Truth’ (Sydney, 29 November 1942) 18.

¹¹³ *Record of Proceedings* (n 90) 30 (RG Menzies). For Menzies’ contemporaneous critiques of compulsory unionism as a violation of freedom of association, see his speech on the topic from August 1942: Robert Gordon Menzies, *The Forgotten People and Other Studies in Democracy* (Angus and Robertson, 1943) ch 24 (‘The Forgotten People’).

¹¹⁴ ‘Constitution Changes’ (n 110) 6.

¹¹⁵ ‘Threat to States’ (n 110) 7.

may destroy the very liberty for which we are fighting.¹¹⁶ Clifden Eager, the unofficial leader of the UAP in Victoria's Legislative Council, denounced the reforms for paving the way to a postwar continuation of 'bureaucratic government', failing to provide constitutional guarantees of the Four Freedoms and destroying the existing constitutional protection of religious freedom.¹¹⁷ Eager celebrated the government's eventual decision to include constitutional protection of freedom of the press within its revised reform proposals, given the press's important role in 'inform[ing] and educat[ing] public opinion on right lines'.¹¹⁸

An especially prominent opponent of the constitutional reforms was Victorian Premier and Country Party leader Albert Dunstan, who inveighed against the reforms' threat to 'the rights of the people, as safeguarded in the *Commonwealth Constitution*'.¹¹⁹ Brandishing a legal opinion by an eminent barrister, Dunstan warned that the potential constitutional consequences of the reforms included the abolition of private property rights, the overriding of the existing constitutional guarantee of religious freedom, heavy regulation of the consumption and production of goods, the abolition of unionism and the expropriation of produce and land.¹²⁰ If the reforms were passed, Dunstan said, 'we would soon find a Government ... exercising the powers of a dictatorship in Australia'.¹²¹

During the Constitutional Convention in November 1942, Dunstan unsuccessfully advocated for supplementing the government's proposed constitutional rights — which he supported — with two further rights guarantees, both of which appear to have been designed to further an anti-Labor agenda.¹²² One guarantee would have secured an employment preference for returned soldiers.¹²³ This measure would have constitutionalised a standard policy demand

¹¹⁶ Ibid.

¹¹⁷ 'Proposed Amendment to Constitution' (n 110) 3.

¹¹⁸ Victoria, *Parliamentary Debates*, Legislative Council, 25 November 1942, 1863–4 (CHA Eager). See also 'Freedom of the Press', *The Age* (Melbourne, 26 November 1942) 2.

¹¹⁹ Victoria, *Parliamentary Debates*, Joint Meeting of the Legislative Council and the Legislative Assembly, 10 November 1942, 15 (AA Dunstan, Premier).

¹²⁰ Ibid 16–17 (AA Dunstan, Premier). See also 'Premier Chary of Federal Bill: Sees "Dictatorship"', *The Herald* (Melbourne, 10 November 1942) 3 ('Premier Chary of Federal Bill').

¹²¹ Victoria, *Parliamentary Debates*, Joint Meeting of the Legislative Council and the Legislative Assembly, 10 November 1942, 15 (AA Dunstan, Premier). See also 'Premier Chary of Federal Bill' (n 120) 3.

¹²² These same rights were given further support at the Constitutional Convention by Tasmanian UAP Senator Burford Sampson: *Record of Proceedings* (n 90) 156 (B Sampson).

¹²³ Ibid 60 (AA Dunstan).

among those on the liberal and conservative sides of politics.¹²⁴ It was also deeply controversial within the labour movement, since it threatened to undermine employment opportunities for unionised workers and contradicted the commitment in Labor's platform to the institution of an employment preference for union members.¹²⁵ Another provision would have stipulated that no one in Australia 'should be under any disability by virtue of the fact that he is or is not a member of any association, class or party'.¹²⁶ This last provision, protecting 'freedom of conscience, particularly in relation to freedom of association', was designed to be a constitutional guarantee against compulsory unionism.¹²⁷ The spectre of compulsory unionism had been raised by wartime arrangements instituted by the Curtin government that gave preference to unionists in government employment and purchasing.¹²⁸ And barely one week before the Constitutional Convention, a special national conference of the ALP had resolved that the Party's platform should be amended to endorse compulsory unionism and that the government should be encouraged to implement compulsory unionism by regulation.¹²⁹

Another significant figure attacking the rights-endangering nature of the Curtin government's proposals was Thomas Playford, the South Australian Premier and leader of the Liberal and Country League. While Playford raised doubts about the need for new Commonwealth legislative powers to protect freedom of speech and religion — both freedoms, he said, were already well secured — he denounced the expansion of Commonwealth powers on the basis that they 'could be used to take from the individual every right and ... freedom he now possesses'.¹³⁰ Moving a motion in the South Australian Parliament against the constitutional reforms, Playford said that if the reforms were passed, 'every safeguard in the *Constitution* for the rights of individuals and the rights

¹²⁴ Sawyer, *Australian Federal Politics and Law* (n 18) 137–8.

¹²⁵ Stephen Garton, *The Cost of War: Australians Return* (Oxford University Press, 1996) 90–1; Australian Labor Party, *Official Report of Proceedings of the Special Commonwealth Conference Held at Melbourne on 18th and 19th June, 1940* (Industrial Printing and Publicity, 1940) 8 ('1940 Special Commonwealth Conference'). See also Sawyer, *Australian Federal Politics and Law* (n 18) 138. The Curtin government would ultimately accede to non-Labor pressure for solid preference: at 139, 168–9; Macintyre, *Australia's Boldest Experiment* (n 14) 296–8.

¹²⁶ *Record of Proceedings* (n 90) 60 (AA Dunstan).

¹²⁷ *Ibid*; 'No Move Here for Enforced Unionism', *The Herald* (Melbourne, 30 December 1942) 2.

¹²⁸ Jim Hagan, *The History of the ACTU* (Longman Cheshire, 1981) 182, cited in Tim Rowse, 'Curtin and Labor's Full Employment Promise' (Seminar Paper, Curtin University Library, 25 March 2003) 2.

¹²⁹ *1942–43 Special Commonwealth Conferences* (n 98) 18, 35.

¹³⁰ 'Premier Opposes Referendum: Motion for Parliament This Session', *The Advertiser* (Adelaide, 17 October 1942) 5 ('Premier Opposes Referendum').

of States would cease to have effect, including protections of private property and the right to appeal to the High Court.¹³¹

Evatt was clearly paying attention to the rights-based attacks on the government's proposals and acknowledged their influence on the government's eventual decision to incorporate new judicially enforceable guarantees of freedom of speech and the press, and religious freedom. Evatt's initial public responses to the rights-based criticisms of the government's proposals were defensive, and often misrepresented the substance of the government's original Four Freedoms proposals or tacitly amended them so that they sounded like they offered much stronger rights protections.¹³² Eventually, on the eve of the Constitutional Convention in late November 1942, Evatt announced the government's revised constitutional proposals.¹³³ Alongside the inclusion of the new constitutional rights, the changes also included a narrower list of specified Commonwealth powers, the unequivocal restoration of judicial review, and a retreat from effective parliamentary sovereignty.¹³⁴ As Evatt explained after introducing the modified proposals at the 1942 Constitutional Convention, the government had taken 'careful note of constructive criticism with a view to the removal of objections', concluding that the two new judicially enforceable rights provisions were 'much safer' than what had been originally proposed.¹³⁵ As discussed later, pressure from Catholic quarters would also exert an important influence on the government's inclusion of constitutional rights, especially on religious freedom.¹³⁶

All in all, the government's inclusion of new constitutional rights protections ahead of the 1942 Constitutional Convention was not so much a direct concession to liberals' and conservatives' demands for new rights as it was a reactive and adaptive effort to counter liberal and conservative critiques about the government's threat to existing rights. The government's decision to go

¹³¹ South Australia, *Parliamentary Debates*, House of Assembly, 5 November 1942, 1168, 1170–1 (T Playford, Premier). See also "'Big States Likely to Run Australia": Premier's Reasons against Constitution Amendment', *The Advertiser* (Adelaide, 6 November 1942) 5.

¹³² See, eg, 'Evatt Replies to SA Premier: Constitution Plan', *The News* (Adelaide, 19 October 1942) 4; 'Constitution Bill: Guarantees for Freedom', *The West Australian* (Perth, 23 October 1942) 4; 'Evatt Warns on Anarchy Danger', *The Sun* (Sydney, 26 October 1942) 2; 'Winning the Peace: Uniform Planning Essential', *The Sydney Morning Herald* (Sydney, 27 October 1942) 4. Cf 'Compromise on Constitution Change: Govt Forestalls State Opposition', *Daily Telegraph* (Sydney, 24 November 1942) 7.

¹³³ *Record of Proceedings* (n 90) 7–8 (HV Evatt).

¹³⁴ 'Constitution Move Upsets Govt's Opponents' (n 87) 5; 'Federal Post-War Plans: Mr Curtin Stresses Urgency', *The Sydney Morning Herald* (Sydney, 25 November 1942) 9 ('Federal Post-War Plans'); *Record of Proceedings* (n 90) 11–12.

¹³⁵ *Record of Proceedings* (n 90) 7–8 (HV Evatt); 'Federal Post-War Plans' (n 134) 9.

¹³⁶ See below Part V.

beyond the restoration of extant constitutional protections of rights and create two new ones was likely driven in part by Evatt's liberal–legalist impulses. In the subsequent debates over the 1944 referendum proposals, liberal and conservative actors would expressly call for new constitutional rights and thereby exercise a more direct influence on the ultimate shape of the reform proposals.

B *The 1944 Referendum*

Liberal and conservative agitation was an important factor contributing to the incorporation of the rights protections into the 1944 referendum proposal, as it had been in 1942. Unlike in the Constitutional Convention, where the strong representation of state politicians gave them considerable influence, ahead of the referendum it was Commonwealth politicians who exerted more influence, since the Commonwealth Parliament was the body that had to sign off on the referendum legislation. Below, I discuss the impact of federal non-Labor politicians, especially Menzies and Percy Spender, on the adoption of the rights provisions. I also emphasise the importance of mainstream newspapers, most notably Sydney's *Daily Telegraph*, and the Constitutional Association of New South Wales.

As in 1942, a major line of criticism from non-Labor politicians was that the proposed extension of Commonwealth powers would pave the way to socialism — or worse — and produce a corresponding trampling of individual rights. Prominent among these critics was Menzies, who in 1944 was UAP Opposition Leader. A towering figure in Australian politics, Menzies had earlier lost the Prime Ministership in 1941, and then the UAP leadership, which he would reclaim in late 1943. He would go on to found the Liberal Party shortly after the 1944 referendum, partly buoyed by the success of liberal and conservative opposition to Labor's constitutional proposals.¹³⁷ All of this was a prelude to his reinstatement as Prime Minister in 1949, an office he would hold for an unprecedented 16 years.¹³⁸ Throughout the 1940s, Menzies would endeavour to push back against the collectivist, social-democratic tide by renewing Australian liberalism with the reassertion of commitments to individual freedom, personal initiative and responsibility, the national interest over class divisions, and capitalism as an engine for economic dynamism and prosperity.¹³⁹

¹³⁷ Graeme Starr, *The Liberal Party of Australia: A Documentary History* (Heinemann Education, 1980) 66–7.

¹³⁸ See generally Starr (n 137).

¹³⁹ See generally Menzies, *The Forgotten People* (n 113). See also Judith Brett, *Robert Menzies' Forgotten People* (Melbourne University Press, 2nd ed, 2007) 24, 44–5, 61–2, 67–8, 70–1, 131; David

In Menzies' lengthy parliamentary speech on the proposed 1944 referendum legislation, his concerns about the threat Labor's social-democratic constitutional plans posed to individual liberty were at the fore. Having critiqued Labor's proposed powers for enabling far-reaching postwar controls over economic life, including through nationalisation, Menzies proposed a motion that

no amendment should be approved which would authorize the socialization of industry, the undue centralization of administration, or the maintenance of such laws as unnecessarily interfere with the liberty of citizens to choose their own means of living and to exercise their rights as free people.¹⁴⁰

For Menzies, the constitutional protection of individual rights against threats from Labor in power was to be achieved not through express guarantees but indirectly through the classical institutions of Australian liberalism: a judicially enforced federalism and a muscular responsible government.¹⁴¹ On federalism, Menzies approvingly alluded to Thomas Jefferson's libertarian justification of federal government:

[T]he way to have good and safe government is not to trust it all to one, but to divide it among the many ... What has destroyed liberty and the rights of men in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body ...¹⁴²

It was such a rationale which saw Menzies call for Labor's proposed new Commonwealth powers to be narrowed so as to offer 'sufficient protection to the citizen.'¹⁴³ In debating the Bill in Parliament, Menzies also stressed the dangers to individual liberty from the expansion of the administrative state and concomitant diminution of Parliament. According to Menzies, 'for the private citizens to-day life does not consist so much in submitting to the rule of law as in submitting to the rule of officials.'¹⁴⁴ Accordingly, Menzies moved that

Kemp, *A Liberal State: How Australians Chose Liberalism over Socialism 1926–1966* (Miegunyah Press, 2021) chs 11–12, 14.

¹⁴⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 February 1944, 468 (Robert Menzies).

¹⁴¹ For Menzies' views on constitutional rights, see above nn 112–113 and accompanying text. See also 'Menzies Hits at "Useless Pledges"', *The Courier-Mail* (Brisbane, 26 July 1944) 4. For a later statement, see Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell, 1967) ch 4.

¹⁴² Commonwealth, *Parliamentary Debates*, House of Representatives, 23 February 1944, 450 (Robert Menzies).

¹⁴³ *Ibid* 468 (Robert Menzies).

¹⁴⁴ *Ibid* 467 (Robert Menzies).

Parliament's existing powers to disallow legislation made by the executive under delegated authority be constitutionally entrenched for the purposes of post-war reconstruction.¹⁴⁵

While Menzies' demand for a more limited set of Commonwealth powers failed, his proposal for the constitutional enshrinement of Parliament's powers of disallowance was incorporated by the government into the referendum proposal.¹⁴⁶ On incorporating the disallowance provision and the rights guarantees into the referendum Bill, Evatt said the government was responding to concerns such as Menzies' about 'the liberty of citizens ... to exercise their rights as free people.'¹⁴⁷ With the referendum's eventual defeat, Menzies saw in the result vindication for 'the traditions of human freedom and ordered liberty', and a popular affirmation that 'the necessary coercions of wartime have not blunted the people's perception of their rights.'¹⁴⁸

But if Menzies' belief in the adequacy of federalism and responsible government to protect individual rights represented the conventional view of liberals and conservatives, other non-Labor politicians pressed the government for the incorporation of outright constitutional rights protections, especially for freedom of speech.¹⁴⁹ To be sure, this was not necessarily a majority position on the non-Labor side, and in parliamentary debate several UAP members questioned the necessity and wisdom of entrenching constitutional rights on the basis that freedom was already adequately secured in Australia.¹⁵⁰ Nevertheless, shortly after the referendum Bill was introduced into Parliament, the UAP and Country Party formed a subcommittee to develop amendments to the government's proposals.¹⁵¹ Alongside controls on the delegation of powers to executive

¹⁴⁵ Ibid 468–9 (Robert Menzies).

¹⁴⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1944, 1153 (Herbert Vere Evatt, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 1944, 1343 (Herbert Vere Evatt, Attorney-General); Post-War Reconstruction Alteration Bill (n 41) cl 2.

¹⁴⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 1944, 1343 (Herbert Vere Evatt, Attorney-General).

¹⁴⁸ 'People Still Jealous of Rights: "Vote a Protest," Says Mr Menzies', *The Argus* (Melbourne, 21 August 1944) 3.

¹⁴⁹ See, eg, 'Guarantee of Free Speech Sought', *Daily Telegraph* (Sydney, 11 February 1944) 5.

¹⁵⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1944, 1207–8 (John McEwen); Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1944, 1222 (Dame Enid Lyons).

¹⁵¹ 'Guarantee of Free Speech Sought' (n 149) 5. See also 'Amendment of Constitution: Bill for Referendum Introduced', *The Advertiser* (Adelaide, 11 February 1944) 5; 'Socialisation Is Not Powers Issue — Dr Evatt', *The Courier-Mail* (Brisbane, 12 February 1944) 5; 'Free-Speech Appeal to Members', *Daily Telegraph* (Sydney, 23 February 1944) 7.

officials, the subcommittee also was anxious to provide a constitutional guarantee of free speech.¹⁵²

Among the non-Labor forces publicly pressing for the inclusion of a free-speech guarantee in the *Constitution*, the most significant parliamentary intervention came from Spender.¹⁵³ A King's Counsel and former Treasurer and Minister for the Army during the Menzies UAP Government in 1940–41, Spender was forced out of the imploding UAP in early 1944 for refusing to follow other Opposition Members of Parliament in resigning from the Curtin government's Advisory War Council.¹⁵⁴ He would later succeed Evatt as External Affairs Minister under Menzies' Liberal government in 1949, serve as Australia's Ambassador to the US and become President of the International Court of Justice, where he would notoriously cast the deciding vote in favour of South Africa in the 1966 *South West Africa Case*.¹⁵⁵ As one biographer put it, Spender was an 'Australian between Empires', one especially attracted to the emerging American imperium.¹⁵⁶ In Roosevelt's Four Freedoms he saw 'a new *Magna Carta*'.¹⁵⁷ An independent-minded liberal, Spender was also unusual among non-Labor politicians in favouring a massive expansion of the Commonwealth Parliament's power, up to and including the abolition of the states.¹⁵⁸ He was

¹⁵² 'Guarantee of Free Speech Sought' (n 149) 5; 'Free-Speech Appeal to Members' (n 151) 7.

¹⁵³ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 February 1944, 470–1 (Percy Spender). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 8 March 1944, 1099 (Joseph Abbott); Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1944, 1194 (Sir Earle Page). For expressions of support for constitutional rights protections by non-Labor MPs after the government had flagged its intention to incorporate the rights guarantees into its Bill, see Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1944, 1176 (Rupert Ryan); Commonwealth, *Parliamentary Debates*, House of Representatives, 14 March 1944, 1257–8 (Bernard Corser), 1260 (Arthur Coles), 1268 (George Bowden); Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 1944, 1401 (Sir Earle Page).

¹⁵⁴ David Lowe, *Australian between Empires: The Life of Percy Spender* (Pickering & Chatto, 2010) 81.

¹⁵⁵ *Ibid* 1, 5–6. See especially *South West Africa (Ethiopia v South Africa) (Second Phase) (Judgment)* [1966] ICJ Rep 6 ('*South West Africa Case*'). On Spender's role in the *South West Africa Case* (n 155), see Lowe (n 154) 167–70; Victor Kattan, "'There Was an Elephant in the Court Room": Reflections on the Role of Judge Sir Percy Spender (1897–1985) in the *South West Africa Cases* (1960–1966) after Half a Century' (2018) 31(1) *Leiden Journal of International Law* 147.

¹⁵⁶ Lowe (n 154).

¹⁵⁷ *Ibid* 90.

¹⁵⁸ *Ibid* 110. He would later moderate this position: at 103.

the only anti-Labor MP to vote in favour of the referendum Bill in Parliament, and he actively campaigned for a 'Yes' vote during the referendum campaign.¹⁵⁹

As the price of his support for the referendum Bill, Spender called on the Curtin government to incorporate a constitutional guarantee of free speech — a demand which, Evatt acknowledged, influenced the government's decision to add such a guarantee to its referendum proposal.¹⁶⁰ In making this demand, Spender drew heavily on the American example, whose *Constitution* contained various 'express provisions for the preservation of rights in relation to the liberty of the subject'.¹⁶¹ While Spender also endorsed the criminal procedure rights in the *United States Constitution's* Fourth and Fifth Amendments, it was the First Amendment's protection of freedom of speech and the press that he pressed for inclusion in the *Australian Constitution*.¹⁶² Spender's desire to constitutionalise such rights protections stemmed from his concerns about the far-reaching nature of wartime regulations and the prospect that their restrictions on individual liberties might be continued after the war.¹⁶³ Like Menzies, Spender also sought to constitutionally entrench parliamentary supervision of delegated legislation, but Spender's proposal was even more hostile to the administrative state: rather than simply entrenching Parliament's power to disallow delegated legislation, Spender's proposal would have required that every exercise of legislative authority by the executive be given positive parliamentary approval.¹⁶⁴

Outside of Parliament, another important source of pressure for constitutional rights, especially freedom of speech and the press, came from mainstream newspapers. Although Australia's leading newspapers were not reliably partisan — indeed, the Curtin government had a relatively good relationship with the press — they were predominantly liberal-conservative in ideological

¹⁵⁹ WJ Waters, 'The Opposition and the "Powers" Referendum, 1944' (1969) 4(1) *Politics* 42, 47, 51.

¹⁶⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 February 1944, 470–1 (Percy Spender); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1944, 1154 (Herbert Vere Evatt, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 1944, 1343 (Herbert Vere Evatt, Attorney-General). See also Lowe (n 154) 98.

¹⁶¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 February 1944, 471 (Percy Spender).

¹⁶² *Ibid* 470–1 (Percy Spender).

¹⁶³ *Ibid* 470 (Percy Spender).

¹⁶⁴ *Ibid*.

orientation.¹⁶⁵ Their advocacy for a constitutional guarantee of free speech must be understood against the backdrop of government controls over the press during wartime — rigorous censorship, an ill-fated regime of enforced corrections for factual errors, the rationing of newsprint — and the pushback from newspapers that those controls generated.¹⁶⁶ For the newspapers, constitutional protection for free speech, and press freedom in particular, was not simply an important matter of principle; it was also a shield to protect their own power, autonomy and business interests.¹⁶⁷

Ahead of the referendum Bill's passage through Parliament, a number of newspapers, mostly based in Sydney, advocated strongly for constitutional rights protections to be included.¹⁶⁸ Shortly after the Bill was introduced, for instance, the tabloid *Truth* warned its readers in an editorial that the referendum proposal was 'fraught with danger', concluding that '[t]he proposed extended powers would only be safe if we were protected against the possibility of a Fascist revolution.'¹⁶⁹ Accordingly, alongside constitutional restrictions on the lawmaking powers of the executive and criminal procedure guarantees, *Truth* called 'above all' for a constitutional protection of free speech.¹⁷⁰ Sydney's *The Sun* likewise editorialised strongly in favour of including in the referendum proposal a constitutional guarantee of freedom of speech and the press, arguing that '[i]t is difficult to understand why these fundamental principles of British democratic belief have not been included, because bureaucracy tends to destroy them.'¹⁷¹ *The Sydney Morning Herald* also came out in support of a free-speech guarantee in the *Constitution* on the basis that, with 'totalitarian thought'

¹⁶⁵ Caryn Coatney, 'Curtin's Circus: The Prime Minister and Canberra News Correspondents, 1941–1945' (PhD Thesis, Curtin University, March 2011) 1; Henry Mayer, *The Press in Australia* (Lansdowne Press, 1964) 146–8. See also Hilvert (n 61) 8.

¹⁶⁶ See generally Hilvert (n 61); Denis Cryle, "'Rousing the British-Speaking World": Australian Newspaper Proprietors and Freedom of the Press, 1940–1950' (Conference Paper, Australian Media Traditions Conference, 22–23 November 2007) 1–10.

¹⁶⁷ See Hilvert (n 61) 176.

¹⁶⁸ On press support for these provisions after they were announced, see Bridget Griffen-Foley, "'Four More Points than Moses": Dr HV Evatt, the Press and the 1944 Referendum' [1995] (68) *Labour History* 63, 68, 72.

¹⁶⁹ 'Federal Powers Bill Is Fraught with Danger', *Truth* (Sydney, 13 February 1944) 12.

¹⁷⁰ *Ibid.*

¹⁷¹ Editorial, 'A Gap in the Powers Bill', *The Sun* (Sydney, 11 February 1944) 1. See also Editorial, 'Freedom of Speech and Press', *The Sun* (Sydney, 11 February 1944) 3; Editorial, 'No More Commissars after the War', *The Sun* (Sydney, 15 February 1944) 1; Editorial, 'Freedom May Be Filched', *The Sun* (Sydney, 21 February 1944) 4; Editorial, 'Safeguards of Civic Freedom', *The Sun* (Sydney, 10 March 1944) 1.

creeping into Australian politics, ‘the time is past when we can confidently assume that the foundations of our democracy will never be challenged.’¹⁷²

Among the newspapers, the most relentless and vocal advocate for the constitutional enshrinement of a free-speech guarantee was Sydney’s *Daily Telegraph* under the strong editorship of the liberal and independent-minded Brian Penton. Difficult to pigeonhole politically, but with closer ideological and personal affinities with the non-Labor parties, Penton was a fierce critic of the trade unions, resolutely internationalist including in espousing racial tolerance, and, above all else, deeply liberal in social and political outlook.¹⁷³ He had a strong interest in American culture and politics and adopted an ‘intensely pro-American stance’ in the *Daily Telegraph* during the early 1940s.¹⁷⁴ He was also a great admirer of Evatt, whose move to politics in 1940 was strongly encouraged and supported by the *Daily Telegraph* and was seen by Penton (according to his biographer) ‘as perhaps the most auspicious event in the history of the Australian Parliament.’¹⁷⁵ Fitting with Penton’s liberalism and his vocation, he bristled especially at government censorship, which he witnessed daily firsthand as an editor and writer during the war.¹⁷⁶ Indeed, shortly after the amended referendum Bill was passed by Parliament in March 1944, Penton and the *Daily Telegraph* were at the centre of a fiasco which saw the sensational suppression of the *Daily Telegraph* and other newspapers for speaking out against the censors’ heavy-handedness.¹⁷⁷ It is unsurprising then that the *Daily Telegraph* under Penton’s direction would be such a forthright proponent of constitutionally protected freedom of speech.

In the lead-up to the referendum Bill’s introduction and passage through Parliament, the *Daily Telegraph* strongly campaigned in favour of constitutional rights protections to limit governmental power, especially in the domain of freedom of speech and the press. In early December 1943, anticipating federal

¹⁷² Editorial, ‘Freedom’s Safeguards’, *The Sydney Morning Herald* (Sydney, 24 February 1944) 4. See also Editorial, ‘Whittling Down the Powers Bill’, *The Sydney Morning Herald* (Sydney, 1 March 1944) 6.

¹⁷³ See generally Patrick Buckridge, *The Scandalous Penton: A Biography of Brian Penton* (University of Queensland Press, 1994); Brian Penton, *Think — Or Be Damned: A Subversive Note on National Pride, Patriotism, and Other Forms of Respectable Ostrichism Practised in Australia* (Angus and Robertson, 1941); Brian Penton, *Advance Australia — Where?* (Cassell, 1943).

¹⁷⁴ Buckridge (n 173) 203, 224–6.

¹⁷⁵ *Ibid* 209, 216. Even before Penton was editor, the *Daily Telegraph* endorsed a call by Evatt while still on the High Court for constitutionalising individual rights protections: Editorial, ‘Let Us Have Constitutional Safeguards of Free Speech’, *Daily Telegraph* (Sydney, 27 December 1938) 4.

¹⁷⁶ Buckridge (n 173) 126, 258, 261–2.

¹⁷⁷ *Ibid* 258–63; Brian Penton, *Censored! Being a True Account of a Notable Fight for Your Right to Read and Know, with Some Comment upon the Plague of Censorship in General* (1947) 13–14.

Cabinet discussing the expansion of Commonwealth powers, the *Daily Telegraph* urged in an editorial that the empowerment of the Commonwealth needed to be tempered by decentralisation of administration as well as the constitutional entrenchment of ‘every possible liberty of opinion and expression, association and belief’.¹⁷⁸ A few days later, Penton penned an opinion piece titled ‘It All Depends on — Dr Evatt’, which warned of the dangers of dictatorship lurking in enlarged Commonwealth powers and quoted Evatt’s own words to press for constitutional protection of free speech.¹⁷⁹ Celebrating Evatt’s entry into federal politics as ‘a new day ... breaking over the dun, dull half-light of our mediocre political scene’, Penton cautioned that Evatt’s reputation would suffer if he betrayed his liberal sensibilities by excluding constitutional rights from the referendum proposals.¹⁸⁰

Between the announcement of the referendum in December 1943 and the incorporation of rights protections into the referendum Bill in March 1944, the *Daily Telegraph* repeatedly editorialised in favour of the constitutional entrenchment of free speech and other liberties.¹⁸¹ The paper also devoted considerable space in its news coverage and opinion sections to constitutional rights and their supporters.¹⁸² With the unrelenting promotion of

¹⁷⁸ Editorial, ‘Checks Are Essential to New Powers’, *Daily Telegraph* (Sydney, 2 December 1943) 8.

¹⁷⁹ Editorial, ‘It All Depends on — Dr Evatt’, *Daily Telegraph* (Sydney, 8 December 1943) 6.

¹⁸⁰ Ibid.

¹⁸¹ Editorial, ‘Well, Why Not Protect These Rights?’, *Daily Telegraph* (Sydney, 10 December 1943) 6; Editorial, ‘Conference Will Shape Your Future’, *Daily Telegraph* (Sydney, 13 December 1943) 7; Editorial, ‘Planning a Peace-Time Victory’, *Daily Telegraph* (Sydney, 4 January 1944) 6; Editorial, ‘Protect Our Right to Protest’, *Daily Telegraph* (Sydney, 11 February 1944) 1; Editorial, ‘Safeguards against Tyranny’, *Daily Telegraph* (Sydney, 15 February 1944) 6; Editorial, ‘The Referendum Is Doomed if These Doubts Remain’, *Daily Telegraph* (Sydney, 1 March 1944) 3; Editorial, ‘Convince the People They Won’t Be Pushed Around’, *Daily Telegraph* (Sydney, 2 March 1944) 3; Editorial, ‘Leave No Loopholes for a Budding Dictator’, *Daily Telegraph* (Sydney, 3 March 1944) 3.

¹⁸² See, eg, Don Whittington, ‘Opposition to Powers Move Likely’, *Daily Telegraph* (Sydney, 10 December 1943) 5; ‘Safeguards Demanded on Powers’ Transfer’, *Daily Telegraph* (Sydney, 10 December 1943) 5; Sumner Welles, ‘Freedoms “Bulwark for Peace”’, *Sunday Telegraph* (Sydney, 2 January 1944) 3; Frank Louat, ‘Govt Must Guarantee Free Speech: Democracy’s Key Freedom’, *Daily Telegraph* (Sydney, 9 February 1944) 6 (‘Govt Must Guarantee Free Speech’); ‘Guarantee of Free Speech Sought’ (n 149) 5; ‘Absence of Freedom Provisions “Ominous”’, *Daily Telegraph* (Sydney, 12 February 1944) 7; Don Whittington, ‘Demand for Free Speech Guarantee’, *Daily Telegraph* (Sydney, 14 February 1944) 5; ‘Free Speech Guarantee’, *Sunday Telegraph* (Sydney, 20 February 1944) 5; ‘Free-Speech Appeal to Members’ (n 151) 7; Thomas Dunbabin, ‘Guide to What You Should Know of the Constitution’, *Daily Telegraph* (Sydney, 23 February 1944) 6; ‘Survey Shows 84% Favor Inclusion of Freedom Clause’, *Daily Telegraph* (Sydney, 23 February 1944) 6; ‘Free Speech Sought in Powers Bill’, *Daily Telegraph* (Sydney, 24 February 1944) 5; ‘Internal Censoring Criticised’, *Daily Telegraph* (Sydney, 26 February 1944) 5; ‘Readers

constitutional rights by Penton and the *Daily Telegraph*, as well as their friendly relationship with Evatt, it is likely that their advocacy influenced the government's decision to incorporate constitutional rights protections.

Another significant force for the constitutional protection of free speech was the liberal-oriented Constitutional Association of New South Wales and its very active President, Frank Louat. The Constitutional Association, established in 1925, was an anti-communist organisation committed to constitutional government, the British Empire and the promotion among Australians of 'a better appreciation of the rights and duties of citizenship'.¹⁸³ Though ostensibly non-partisan, the Constitutional Association had close ties to non-Labor parties and had actively campaigned for non-Labor governments and against the ALP in its first decade.¹⁸⁴ It held regular events that often featured prominent speakers from the non-Labor side of politics, including Spender when he was Treasurer in 1940.¹⁸⁵

Louat, the Association's President from 1940 to 1946, was a prominent barrister and well-known public commentator and broadcaster of a liberal bent.¹⁸⁶ He was given a significant platform at Penton's *Daily Telegraph*, to which he probably contributed more than any other outside writer.¹⁸⁷ An executive member of the UAP until he resigned from the imploding Party in 1943, Louat unsuccessfully stood as a UAP candidate for Eden-Monaro in the 1940 federal election and, like Evatt, received the *Daily Telegraph's* public support in his election bid.¹⁸⁸ Also like Evatt, he had received a doctorate for a thesis on the scope of executive power, against whose dramatic bureaucratic expansion Louat regularly inveighed in public.¹⁸⁹ Although a strong

Discuss Need for Powers Bill Safeguards', *Daily Telegraph* (Sydney, 7 March 1944) 10; 'More Readers State Views on Powers Bill Issues', *Daily Telegraph* (Sydney, 8 March 1944) 6. See also below nn 186–198 for a discussion of Frank Louat and his contributions to the *Daily Telegraph*.

¹⁸³ Advertisement, 'NSW Constitutional Association' (1929) 1(1) *Australian Quarterly* 5. See generally Peter Loveday, 'Anti-Political Political Thought' [1969] (17) *Labour History* 121.

¹⁸⁴ See, eg, 'The Constitutional Association: An Account of Its Activities', *The Sydney Morning Herald* (Sydney, 26 February 1926) 10; 'Reform of Parliament: Constitutional Association', *The Sydney Morning Herald* (Sydney, 13 May 1932) 8; J Dyneley Fell, 'Opposing Langism', *The Sydney Morning Herald* (Sydney, 27 May 1932) 6.

¹⁸⁵ 'Spender's Plea for Facts', *The Sun* (Sydney, 18 October 1940) 4.

¹⁸⁶ Martha Rutledge, 'Louat, Frank Rutledge (1901–1963)', *Australian Dictionary of Biography* (Web Page, 2006) <<https://adb.anu.edu.au/biography/louat-frank-rutledge-10863/text19281>>, archived at <<https://perma.cc/HAW9-9QR7>>.

¹⁸⁷ Buckridge (n 173) 205.

¹⁸⁸ Ibid 212–13; 'Louat Resigns UAP Positions', *Daily Telegraph* (Sydney, 24 September 1943) 6.

¹⁸⁹ Frank Louat, 'A Survey of the Executive Power of the Commonwealth' (LLD Thesis, University of Sydney, 1932). See, eg, "'Insidious Form of Government by Myriad Regulations": Public

supporter of enlarged Commonwealth legislative powers, Louat was no friend of unification's traditional champion, the labour movement, and he was a fierce and highly visible defender of individual liberty against government regulation.¹⁹⁰ Despite his non-Labor credentials, Louat was among the small group of legal advisers assisting Evatt and the Curtin government at the 1942 Constitutional Convention.¹⁹¹

From the moment of the referendum's announcement in late 1943, the Constitutional Association helmed by Louat was vocal in demanding that a free-speech guarantee be attached to the referendum.¹⁹² While supportive of the expansion of Commonwealth powers to deal with postwar reconstruction, Louat and the Constitutional Association insisted that constitutional protection of free speech was needed to ensure that such enlarged powers were not abused.¹⁹³ Louat put this position to Evatt in person in January 1944 at the Australian Institute of Political Science Summer School on postwar reconstruction, where Evatt had outlined the government's case for the referendum.¹⁹⁴

Ahead of the government introducing its original referendum Bill into Parliament in February 1944, Louat published a lengthy opinion piece in the *Daily Telegraph* making the case for a constitutional guarantee of free speech.¹⁹⁵ In a context where '[e]very day some fresh case is being made out for official control and for unquestioning obedience to authority', Louat warned that the demise

Service Has Grip on Community', *Daily Telegraph* (Sydney, 5 July 1933) 5; Frank Louat, 'Restoring Faith in Our Federal System', *Daily Telegraph* (Sydney, 9 December 1940) 6. Evatt's 1924 doctoral thesis was published posthumously as HV Evatt, *The Royal Prerogative* (Law Book, 1987).

¹⁹⁰ On Commonwealth power, see, eg, 'To Abolish State Parliaments: NSW Move Launched', *The Herald* (Melbourne, 25 March 1940) 10; 'Changes Urged in Constitution', *Daily Telegraph* (Sydney, 28 May 1942) 5. On the labour movement, see, eg, Frank Louat, 'UAP Needs a Faith That Moves Hearts', *Daily Telegraph* (Sydney, 25 August 1943) 8; 'Protest Meeting against Strikes', *Daily Telegraph* (Sydney, 6 May 1946) 4. On protecting individual liberty against government interference, see, eg, Frank Louat, 'Yes, It Could Happen Here', *Sunday Telegraph* (Sydney, 26 May 1940) 8; 'Personal Rights Infringed: Misuse of Power Affects Liberty', *Daily Telegraph* (Sydney, 15 May 1943) 5; Frank Louat, 'Election Will Fix Post-War Life', *Daily Telegraph* (Sydney, 14 July 1943) 6.

¹⁹¹ Rutledge (n 186).

¹⁹² See, eg, 'Safeguards Demanded on Powers' Transfer' (n 182) 5; Louat, 'Govt Must Guarantee Free Speech' (n 182) 6; 'Freedom of Speech and Press' (n 171) 3; 'Free Speech Guarantee' (n 182) 5; 'Powers Bill's Scope: Clause Urged for Free Speech', *The Sydney Morning Herald* (Sydney, 23 February 1944) 9 ('Powers Bill's Scope'); 'Internal Censoring Criticised' (n 182) 5.

¹⁹³ See above n 192.

¹⁹⁴ Evatt, 'Reconstruction and the Constitution' (n 96) 263. Evatt's response is at 286. Evatt's speech was reported in the newspapers: see, eg, 'Dr Evatt Puts Case for Review of Constitution' (n 96) 2.

¹⁹⁵ Louat, 'Govt Must Guarantee Free Speech' (n 182) 6. See also Frank Louat, 'Govt Must Guarantee Free Speech: Democracy's Key Freedom', *The Mail* (Adelaide, 26 February 1944) 5.

of free speech was ‘no mere Wellsian conception of what might happen in an unbelievably mad world’ but a reality that had come to pass globally through ‘the smooth, calculated, scientific, accepted technique of authoritarianism’, and a situation to be guarded against by a constitutional guarantee of free speech.¹⁹⁶ Two weeks later, the Constitutional Association commenced a lobbying campaign that saw it contact every member of the federal Parliament urging them to incorporate a free-speech guarantee into the constitutional amendment proposal.¹⁹⁷ Upon the government’s insertion of the rights guarantees a few weeks later, Louat declared the move ‘a triumph for the democratic method under which laws could still be reshaped through the influence of public opinion’, including presumably that of the Constitutional Association and Louat himself.¹⁹⁸

It was only in the wake of all of this liberal and conservative pressure — from politicians, newspapers such as the *Daily Telegraph* and civil society organisations like the Constitutional Association — that the government moved to amend its proposals for constitutional reform by incorporating the rights protections. Upon introducing the rights guarantees into the referendum Bill, Evatt explicitly acknowledged that the government had listened to the criticisms and proposals of Menzies and Spender, even as he reaffirmed his own longstanding commitment to constitutional rights.¹⁹⁹ Discussing the potential impact of the free-speech protection, Evatt also highlighted US Supreme Court cases that would have appealed to the government’s liberal and conservative critics, including a famous decision upholding a criminal anarchy statute used to target communists and another decision invalidating a newspaper tax as a violation of press freedom.²⁰⁰ The evidence strongly suggests that liberal and

¹⁹⁶ Louat, ‘Govt Must Guarantee Free Speech’ (n 182) 6.

¹⁹⁷ See, eg, ‘Powers Bill’s Scope’ (n 192) 9.

¹⁹⁸ ‘Guarantees Praised’, *The Sydney Morning Herald* (Sydney, 10 March 1944) 4.

¹⁹⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1944, 1154 (Herbert Vere Evatt, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 1944, 1343 (Herbert Vere Evatt, Attorney-General).

²⁰⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 1944, 1396, 1398–9 (Herbert Vere Evatt, Attorney-General). The cases were, respectively, *Gitlow v New York*, 268 US 652 (1925) and *Grosjean v American Press Co, Inc*, 297 US 233 (1936). Evatt’s reference to a US case invalidating a newspaper tax may have also been intended as an allusion to the New South Wales Lang government’s 1926 newspaper tax. Evatt, though a New South Wales Labor backbencher at the time, was an opponent of Lang and the newspaper tax. He appeared as counsel in a successful constitutional challenge to the newspaper tax: *John Fairfax & Sons Ltd v New South Wales* (1927) 39 CLR 139, 140. See also Kylie Tennant, *Evatt: Politics and Justice* (Angus and Robertson, 1970) 59; TD Mutch, ‘The Labor Fight: Dr Evatt Attacks Premier’, *Truth* (Sydney, 5 June 1927) 1, 10. For more insight into Evatt’s early political career

conservative criticism played a decisive role in Labor's belated adoption of the constitutional rights provisions, especially the guarantee of free speech.

V THE CATHOLIC ORIGINS OF THE RIGHTS PROVISIONS

Alongside the attacks made by liberal and conservative politicians, a further important source of criticism of the rights-infringing potential lurking in the Curtin government's constitutional proposals came from Catholic quarters. As I explore below, prominent Catholic clergy, newspapers and other actors influenced the Curtin government's decision to integrate constitutional rights — especially stronger protections for religious freedom — into its reform plans, both at the 1942 Constitutional Convention and under the 1944 referendum legislation. The embrace of constitutional rights by Australian Catholics reflected wider transnational trends in Catholic social and political thought. According to dominant strands of political Catholicism globally at the time, it was only by recognising the inviolable dignity and rights of the human person that states could avert a descent into totalitarianism, especially of a communist variety. For Australian Catholics, guarantees of religious freedom were necessary to protect individuals, the family and Catholic religious and educational institutions from the depredations of the state.

A *The 1942 Constitutional Convention*

To properly grasp Catholic advocacy for constitutional rights in the 1940s, it is necessary to understand the role of the Catholic Church within Australian politics and the ideas shaping Catholic political interventions. Placing the Catholic Church and its acolytes ideologically and politically is a complicated task.²⁰¹ On the one hand, much Catholic social doctrine at the time was stridently critical of the impoverishing and destructive forces of capitalism and advocated for workers' rights, including through cooperative and corporatist strategies for organising industry.²⁰² Australian Catholics, predominantly of Irish heritage,

and his relationship with Lang, see Gideon Haigh, *The Brilliant Boy: Doc Evatt and the Great Australian Dissent* (Scribner, 2021) 55–6.

²⁰¹ On the political ambivalence of Catholic human rights, see Shortall (n 21) 447–8.

²⁰² In Australia, see Race Mathews, *Of Labour and Liberty: Distributism in Victoria, 1891–1966* (University of Notre Dame Press, 2018) 7, 113, 159, 164–5, 298; Bruce Duncan, *Crusade or Conspiracy? Catholics and the Anti-Communist Struggle in Australia* (UNSW Press, 2001) 9, 18–19, 52, 75, 118, 148; Ross Fitzgerald, *The Pope's Battalions: Santamaria, Catholicism and the Labor Split* (University of Queensland Press, 2003) chs 1–2; Michael Hogan, 'Australian Catholic Corporatism: Proposals for Industrial Councils in the 1940s' [1992] (62) *Labour History*

were overwhelmingly members of the working class and were strongly represented in the labour movement and the ALP.²⁰³ On the other hand, dominant strands within political Catholicism in Australia and abroad were deeply committed to maintaining traditional family hierarchies and reinvigorating a virtuous rural lifestyle, strongly supportive of private property (albeit usually more equally distributed) over public ownership, and sceptical of state power, especially when exercised in a socialist or communist guise.²⁰⁴ Throughout the 1930s, there was also pronounced support in some influential Catholic circles for fascism.²⁰⁵ The Church's fervent anti-communism — which began gaining ground politically in the late 1930s and which formed the basis of a concerted campaign from 1942 by the Catholic Social Studies Movement for the control of unions — would lead in 1955 to a dramatic and acrimonious split in the ALP, helping to keep Labor out of power nationally until 1972.²⁰⁶ All in all, throughout the mid-20th century, the Catholic Church exerted a conservative force on the Australian labour movement, even as its adherents typically opposed the more freewheeling versions of capitalism promulgated by businesses and many in the non-Labor parties.²⁰⁷

The solicitude for human rights shown by Australian Catholicism in the debates over the Curtin government's constitutional reforms was not an antipodean anomaly. Rather, it reflected a growing international Catholic orientation towards 'personalism': the protection of the rights and dignity of the human person from totalitarianism, particularly in its communist strain.²⁰⁸ By the 1940s, opposition to totalitarianism had become a defining feature of political

91, 91–4, 97–8, 105. See further Chappel, *Catholic Modern* (n 21) 123–32; Carlo Invernizzi Accetti, *What Is Christian Democracy? Politics, Religion and Ideology* (Cambridge University Press, 2019) ch 5.

²⁰³ Elizabeth Malcolm and Dianne Hall, *A New History of the Irish in Australia* (NewSouth Publishing, 2018) 299–302. See also Judith Brett, 'Class, Religion and the Foundation of the Australian Party System: A Revisionist Interpretation' (2002) 37(1) *Australian Journal of Political Science* 39, 39–42.

²⁰⁴ In Australia, see Duncan (n 202) 30–1, 52, 118; Fitzgerald (n 202) 8. See generally Chappel, *Catholic Modern* (n 21) ch 2; Giuliana Chamedes, *A Twentieth-Century Crusade: The Vatican's Battle to Remake Christian Europe* (Harvard University Press, 2019); Invernizzi Accetti (n 202) ch 5.

²⁰⁵ Fitzgerald (n 202) 26–30.

²⁰⁶ Ibid chs 2–4; Duncan (n 202) ch 16; Paul Ormonde, *The Movement* (Nelson, 1972) 1–4. See generally Robert Murray, *The Split: Australian Labor in the Fifties* (Cheshire, 1970).

²⁰⁷ See Fitzgerald (n 202) ch 1.

²⁰⁸ Samuel Moyn, 'Personalism, Community, and the Origins of Human Rights' in Stefan-Ludwig Hoffmann (ed), *Human Rights in the Twentieth Century* (Cambridge University Press, 2011) 85, 88, 91–4 ('Personalism').

Catholicism worldwide.²⁰⁹ Indeed, in the 1930s, European Catholic intellectuals had been influential both inside and outside the Church in formulating the theory of totalitarianism: a regime, they argued, under which the human person was subjected to complete domination by the state.²¹⁰ While Catholic theories of totalitarianism emphasised that it came in both communist and fascist variants, it was the fight against communism that overwhelmingly occupied the Church's attention.²¹¹ To protect against totalitarian domination and articulate an alternative political vision, the Church and its acolytes from the late 1930s increasingly promoted the dignity of the human person, alongside rights for individuals and families, as fundamental principles of political order.²¹² Through such appropriations of rights language, political Catholicism 'made what had been secular and liberal into a set of values that were now religious and conservative.'²¹³

By the end of the 1930s, Australia's major Catholic institutions were mirroring the preoccupations of international political Catholicism, adopting both a strident anti-communism and a concern for human rights.²¹⁴ From 1940, the Australian Catholic Church's commitment to rights was often articulated in the Archbishops' annual Social Justice Statements, which disseminated Catholic social doctrine for a lay audience — including politicians — and could sell hundreds of thousands of copies.²¹⁵ The May 1942 Social Justice Statement, titled *For Freedom*, warned that the wartime surrender of liberties, if maintained in peacetime, 'may be as effective as pagan Communism or Nazism in destroying the freedom which the individual and the family should rightly enjoy.'²¹⁶ To guard against such a dire eventuality, the Social Justice Statement urged that 'freedom for the individual' be protected, including through rights to life, education, the rearing and education of one's children, religious freedom and freedom of conscience, work, rest and recreation, and ownership of property.²¹⁷ The divine source of these rights demanded their protection from state interference: 'These rights come to men from God. They do not come from the State, and as

²⁰⁹ Chappel, *Catholic Modern* (n 21) 10–11, chs 2–4.

²¹⁰ James Chappel, 'The Catholic Origins of Totalitarianism Theory in Interwar Europe' (2011) 8(3) *Modern Intellectual History* 561 ('Catholic Origins').

²¹¹ *Ibid* 563; Chappel, *Catholic Modern* (n 21) 62–3; Shortall (n 21) 452–3.

²¹² Moyn, 'Personalism' (n 208) 92–3, 95; Duranti (n 21) 268–74; Chappel, *Catholic Modern* (n 21) 61.

²¹³ Moyn, *Christian Human Rights* (n 21) 3–4. But see Shortall (n 21) 447–8.

²¹⁴ Duncan (n 202) pt I; Fitzgerald (n 202) chs 1–2; Piccini (n 21) 26–30.

²¹⁵ Duncan (n 202) 33; Piccini (n 21) 27–9.

²¹⁶ Episcopal Committee on Catholic Action, *For Freedom* (Advocate Press, 1942) 2.

²¹⁷ *Ibid* 3 (emphasis omitted).

the State did not give them, so, in normal circumstances, it cannot take them away.²¹⁸ Alongside these calls to protect the freedom of the individual, the Social Justice Statement also sought protection for the rights of the family, ‘a disciplined freedom for industry’ through corporatist structures, and ‘freedom for the small community’ through decentralisation.²¹⁹

This concern for individual, family and religious rights was at the forefront of Catholic responses to the Curtin government’s proposals for dramatically enlarged Commonwealth power in 1942. Most significant of the Catholic critiques of the government’s proposed constitutional reforms was a public intervention in November 1942 by the long-serving Archbishop of Melbourne, Daniel Mannix. Not only Australia’s most senior Catholic, Mannix was also one of the country’s leading public figures going back to his campaigning against conscription during the First World War.²²⁰ Significantly, Mannix had a good personal relationship with Evatt dating from the 1920s, although they would later fall out during the Labor–Catholic split over communism.²²¹

It was a statement by Evatt that spurred Archbishop Mannix to public action in defence of divinely inspired constitutional safeguards for religious freedom. Barely a week out from the Constitutional Convention, Evatt in well-publicised comments had sought to dispel a claim by Victorian Premier Dunstan that the Curtin government’s proposed expansion of Commonwealth power would result in a parade of rights-infringing horrors.²²² The principles of representative and responsible government, Evatt replied, were more than adequate safeguards of individual liberty. He pointed to the example of the state Parliaments, whose relatively unconstrained parliamentary sovereignty gave them

power to pass laws for interfering with religious freedom or for abolishing freedom of speech, or for arresting and imprisoning citizens without trial, or even for beheading every person in the community of whom they might disapprove.²²³

That the states did not do such things demonstrated that ‘the people had it in their hands to control their legislatures’, a principle which would apply with

²¹⁸ Ibid (emphasis omitted).

²¹⁹ Ibid (emphasis omitted). On the industrial aspects of this program, see Hogan (n 202) 92–3.

²²⁰ For recent biographies, see Brenda Niall, *Mannix* (Text Publishing, 2015); James Griffin and Paul Ormonde, *Daniel Mannix: Beyond the Myths* (Garratt Publishing, 2012).

²²¹ Griffin and Ormonde (n 220) 245–6; Niall (n 220) 354–6; Ormonde (n 206) 59–62, 110–11.

²²² ‘Premier Chary of Federal Bill’ (n 120) 3.

²²³ ‘Hope for Compromise on Reform Issue: Government Wants State Approval’, *The Herald* (Melbourne, 14 November 1942) 3 (‘Hope for Compromise on Reform’).

equal force to a Commonwealth Parliament with enlarged powers.²²⁴ ‘Any abuse of power’, Evatt said, ‘could be dealt with by the people to whom the Parliament was responsible.’²²⁵ While Evatt’s invocation of parliamentary sovereignty was intended to assuage conservative concerns about the government’s proposals, it enlivened the fears of Mannix, who professed his amazement at the legally unbridled nature of lawmaking power that existed in the states.²²⁶

As summarised in *The Advocate*, a newspaper published by Melbourne’s Catholic Archdiocese, Mannix warned his audience of the dangers of unfettered government power, already latent in the states’ regimes of parliamentary sovereignty:

Australia claimed to be fighting against the menace of subjection to totalitarian conquerors in an omnipotent world State. But, apparently, they had already within Australia itself all the legal machinery for totalitarian slavery. The only thing wanting was the Dictator, or Dictators, to set the machinery working.²²⁷

While Mannix supported ‘a well-defined extension of power’ to the Commonwealth to deal with the challenges of postwar reconstruction, Mannix urged upon Evatt two further constitutional reforms to prevent any newly enlarged Commonwealth power lapsing into tyranny. The first was a constitutional acknowledgement ‘that all authority, whether of Emperor, or King, or Parliament or other body, came from God; and, therefore, that all human law must be fitted into, and conformable with, God’s law.’²²⁸ The result would be that, should ‘the legal atrocities to which Dr Evatt referred’ ever come to pass, they ‘would not be in reality legal enactments at all, but only invalid usurpations.’²²⁹ The second reform Mannix sought was a constitutional guarantee of religious freedom applicable against both the state and federal Parliaments and enforceable by the High Court.²³⁰ Mannix later elaborated that such constitutional

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ ‘Religious Freedom and Australian Law’, *The Advocate* (Melbourne, 19 November 1942) 5. For reports of the speech in Melbourne newspapers, see ‘Constitution Plans: Differing Views’, *The Age* (Melbourne, 16 November 1942) 2; ‘Safeguard for Religious Freedom’, *The Argus* (Melbourne, 16 November 1942) 3.

²²⁷ ‘Religious Freedom and Australian Law’ (n 226) 5.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

protection for religious freedom should encompass protection for religious schools and religious institutions engaged in charitable activities.²³¹

Even before Mannix had entered the public debate over the Curtin government's original proposals for constitutional reform, Catholic figures had been stressing the need to ensure that individual liberties were granted proper constitutional protection against governmental intrusion. In October 1942, JD Simonds, the Archbishop of Hobart and recently appointed successor-in-waiting to Mannix, delivered a well-publicised speech warning of the threat that the government's proposed reforms posed to individual liberties.²³² Simonds, who played an important role in developing the Social Justice Statements and had delivered a radio broadcast of the 1942 Statement upon its publication, saw the *Constitution* as '[t]he great safeguard we have against infringement of the liberty of the individual', especially with its guarantees of religious freedom.²³³ If the government's proposal to effectively do away with judicial review came to pass, 'we would become a people completely at the mercy of a tyranny', Simonds proclaimed.²³⁴

Catholic newspapers likewise pressed for constitutional guarantees of individual rights in any expansion of Commonwealth powers. For example, an editorial published in early November 1942 by the South Australian Catholic Church's newspaper, *The Southern Cross*, recognised the necessity of expanding Commonwealth powers but decried the lack of constitutional rights protections.²³⁵ That lack was all the more glaring

[a]t a time of increasing peril to the inalienable rights of the individual and of a marked tendency to merge, in the name of social betterment, the human personality in the all-absorbing state ...²³⁶

²³¹ See Mannix's comments in 'Constitution Convention: Assembly at Canberra', *The Age* (Melbourne, 23 November 1942) 2. It is possible that Mannix saw these constitutional reforms as an indirect means to advance his longstanding campaign for state governments to fund Catholic schools. See also Niall (n 220) 348–9.

²³² 'Archbishop's Counsel on Constitution Change', *The Mercury* (Hobart, 21 October 1942) 1; 'Preserving Rights of the People: Archbishop's Advice', *The Argus* (Melbourne, 21 October 1942) 3; 'Individual Liberties: Warning by Archbishop', *The West Australian* (Perth, 21 October 1942) 2.

²³³ 'Archbishop's Counsel on Constitution Change' (n 232) 1. On Simonds and the Social Justice Statements, see Duncan (n 202) 33–4; 'Archbishop Simonds to Broadcast on Eve of Social Justice Sunday', *The Southern Cross* (Adelaide, 29 May 1942) 9.

²³⁴ 'Archbishop's Counsel on Constitution Change' (n 232) 1.

²³⁵ Editorial, 'Alteration of the Constitution', *The Southern Cross* (Adelaide, 6 November 1942) 6.

²³⁶ *Ibid.*

Since all agreed that the war was ‘being prosecuted in the cause of the Christian civilisation’, *The Southern Cross* demanded that the *Constitution* make good on Australia’s status as ‘a nation that claims to be Christian.’²³⁷ Anticipating Mannix’s intervention, the editorial called for the constitutional enshrinement ‘of God and of the inviolable rights of the human soul created by God, together with specific reference to the sanctity of family life and parental control.’²³⁸ Such constitutional reforms, the paper believed, ‘would place religion and human freedom beyond power of any parliament to assail.’²³⁹

As with the liberal and conservative critiques of the government’s reform proposals in 1942, such Catholic interventions into public debate appear to have spurred the government to incorporate constitutional protections for rights on the eve of the Constitutional Convention.²⁴⁰ In his opening speech to the Constitutional Convention, Evatt acknowledged that the government’s inclusion of new protections for freedom of speech and religion was a response to public criticism.²⁴¹ Mannix’s intervention, calling for the extension of religious freedom protections to the states, seems to have been especially decisive, for this was precisely one of the new provisions added to the government’s proposals.

B *The 1944 Referendum*

Catholic actors also forthrightly agitated for the constitutional protection of rights in debates over the 1944 referendum proposals, just as they had ahead of the 1942 Constitutional Convention. Within political Catholicism in Australia as elsewhere, rights, dignity and liberty remained central preoccupations, perceived to be bulwarks against the threat of totalitarianism, especially that posed by socialism and communism. Such concerns were front and centre of the Catholic Church’s 1943 statement to the Federal government on postwar reconstruction, titled *Pattern for Peace*.²⁴² The ‘cardinal principle’ underpinning *Pattern for Peace*’s detailed policy prescriptions — concerning such matters as family policy, population growth, industrial relations and rural

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ ‘Constitution Move Upsets Govt’s Opponents’ (n 87) 5; ‘Federal Post-War Plans’ (n 134) 9.

²⁴¹ *Record of Proceedings* (n 90) 7–8 (HV Evatt).

²⁴² Australian National Secretariat of Catholic Action, *Pattern for Peace: Statement on Reconstruction Presented to the Federal Government on Behalf of the Catholic Community* (Advocate Press, 1943) (*‘Pattern for Peace’*). An abridged version served as the 1943 Social Justice Statement. See also Duncan (n 202) 54–6.

reorganisation — was ‘a recognition of the dignity and personality of man.’²⁴³ That principle would be realised, said the Church, only if

the personality of the individual and his right, as well as that of the family or occupational group to which he belongs, to freedom, will have been preserved from the attacks to which it is being subjected by modern totalitarianism.²⁴⁴

Such concerns over the need to protect individual and family rights from government interference motivated Catholic interventions in the debates over the referendum.

From the beginning of 1944, prominent Catholic actors, especially in Melbourne, exerted public and private pressure on Evatt and the Curtin government to temper the referendum proposals through constitutional rights guarantees. In January, prominent Melbourne-based Catholic newspapers the *Catholic Worker* and *Freedom* inveighed against the lack of constitutional rights in the government’s referendum proposals, with the *Catholic Worker*’s headline dramatically proclaiming that ‘Slavery Is an Issue’ with the proposed expansion of Commonwealth powers.²⁴⁵ The story prompted Evatt to write to Archbishop Mannix denouncing the story as ‘an utter disgrace,’ since Evatt himself ‘had utterly opposed all bureaucratic tendencies, often with success.’²⁴⁶ Evatt also pointed to the existing protections for religious freedom in s 116 of the *Constitution*, along with judicial review and the temporary nature of the new Commonwealth powers, as adequate safeguards against governmental tyranny.²⁴⁷ At the end of January, Mannix wrote back to Evatt echoing the newspapers’ sentiments by pressing for new constitutional protections of religious freedom and educational choice, noting that similar protections even existed in Fascist Italy, Nazi Germany and the Soviet Union.²⁴⁸

At the end of January 1944, Evatt’s Summer School speech outlining the government’s constitutional reform plans presented another opportunity for Melbourne Catholic actors to exert pressure for the inclusion of constitutional rights in the referendum. One source of that pressure was Father James Murtagh, a Melbourne priest and associate editor of *The Advocate*.²⁴⁹ Murtagh’s

²⁴³ *Pattern for Peace* (n 242) 4.

²⁴⁴ *Ibid.*

²⁴⁵ Duncan (n 202) 108; Griffin and Ormonde (n 220) 246.

²⁴⁶ Griffin and Ormonde (n 220) 246.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid* 245–6.

²⁴⁹ Michael Costigan, ‘Murtagh, James George Hill (1908–1971)’, *Australian Dictionary of Biography* (Web Page, 2006) <<https://adb.anu.edu.au/biography/murtagh-james-george-hill-11215/text19995>>, archived at <<https://perma.cc/3PA9-X5XE>>.

recorded intervention came in response to a speech by Lloyd Ross, the Director of Public Relations for the government's Ministry of Post-War Reconstruction.²⁵⁰ Against Ross's defence of a resplendent social-democratic order after the war, Murtagh warned that, to guard against the dangers of creating a 'monolithic society', it would be necessary to uphold 'the dignity of the individual' by protecting individual rights and devolving power to 'subsidiary groups' rather than centralising it in an all-powerful state.²⁵¹ In comments following Evatt's speech, an assertive young Catholic lawyer in attendance from Melbourne, John Ginnane, called for the expanded Commonwealth powers to be accompanied by constitutional protections for such liberties as freedom of association, vocation, speech and the press, and religion.²⁵² Ginnane's comments were reported in several mainstream newspapers.²⁵³ They were also reproduced in full in *The Advocate*, alongside a report of Murtagh's comments and other key contributions at the Summer School.²⁵⁴

Throughout February 1944, successive editorials in *The Advocate* espoused similar sentiments, warning of the threat to individual liberties posed by the proposed expansion of Commonwealth power and calling for stronger constitutional rights protections.²⁵⁵ While conceding the need for greater Commonwealth powers, *The Advocate* sounded the familiar alarm about the lurking spectre of totalitarianism, which underscored the importance of "writing in" specific provisions to guarantee ... civil liberties and fundamental personal rights.²⁵⁶ That need was also underscored, declared *The Advocate*,²⁵⁷ by the inadequacy of s 116, as confirmed by the High Court's approach to religious freedom in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*.²⁵⁸

²⁵⁰ Lloyd Ross, 'A New Social Order' in DAS Campbell (ed), *Post-War Reconstruction in Australia* (Australasian Publishing, 1944) 183, 183–232.

²⁵¹ *Ibid* 231–2.

²⁵² Evatt, 'Reconstruction and the Constitution' (n 96) 270–2. Ginnane later expanded on these themes, especially around the freedom of vocation, in a speech to the Newman Society, a Catholic organisation based at the University of Melbourne: John Ginnane, 'Democracy and the Constitution', *The Advocate* (Melbourne, 19 April 1944) 4.

²⁵³ 'Dr Evatt Puts Case for Review of Constitution' (n 96) 2; 'Federal Works Plan after War: No Safeguards under Constitution', *The Age* (Melbourne, 1 February 1944) 3.

²⁵⁴ 'Threat to Fundamental Liberties: The Case for Constitutional Guarantees', *The Advocate* (Melbourne, 9 February 1944) 5, 15; 'Canberra School Seeks the Middle Way', *The Advocate* (Melbourne, 9 February 1944) 5.

²⁵⁵ Editorial, 'Toward Reconstruction', *The Advocate* (Melbourne, 2 February 1944) 6; Editorial, 'Wouldn't Cut Wood: Fined £10', *The Advocate* (Melbourne, 9 February 1944) 6; Editorial, 'A Guarantee of Liberties', *The Advocate* (Melbourne, 16 February 1944) 6.

²⁵⁶ 'A Guarantee of Liberties' (n 255) 6.

²⁵⁷ *Ibid*.

²⁵⁸ (1943) 67 CLR 116.

Critical of the capacity of freedom of speech and the press to arrest the advance of the Bellocian 'servile State', *The Advocate* instead promoted constitutional protections for religious liberty, cultural and educational freedom, and freedom of vocation as the best safeguards of 'human freedom and dignity'.²⁵⁹ Like views were given prominence in *The Advocate's* letters page.²⁶⁰

Catholic newspapers outside Melbourne also pressed for individual rights to be constitutionally guaranteed in the referendum proposals. For instance, *The Southern Cross* picked up on Louat's call for a constitutional guarantee of free speech but saw value in going further to constitutionalise 'other fundamental rights'.²⁶¹ Sydney's *The Catholic Weekly*, closely controlled by a board dominated by Sydney's Archbishop Norman Gilroy, devoted its front page at the start of March to an editorial whose headline decreed 'Religion Must Be Safeguarded'.²⁶² Noting with approval the campaign by 'secular newspapers' for constitutional safeguards of freedom of speech and the press, *The Catholic Weekly* insisted that the *Constitution* also needed to include 'absolute guarantees that none of the cherished rights of Christian people in this Christian country are ever placed in jeopardy'.²⁶³ Those guarantees would include protections for religious education and freedom of association so as to enable the dissemination of Catholic teachings.²⁶⁴

In the face of this Catholic pressure for constitutional rights, especially regarding religious freedom, the government relented, just as it had done ahead of the 1942 Constitutional Convention. As Evatt told Parliament upon incorporating the rights provisions into the referendum Bill:

I think I can say, from the letters and messages I have received, that a tremendous body of non-partisan leaders of thought in this country, including church leaders

²⁵⁹ 'A Guarantee of Liberties' (n 255) 6. On the influence of French-British Catholic thinker Hilaire Belloc on Australian Catholicism of the period, see Duncan (n 202) 11; Fitzgerald (n 202) 1, 20–2.

²⁶⁰ 'No New Powers to Commonwealth without Constitutional Guarantees of Basic Liberties: Correspondents Stress Totalitarian Dangers', *The Advocate* (Melbourne, 16 February 1944) 4.

²⁶¹ Editorial, 'Fetters and Freedoms', *The Southern Cross* (Adelaide, 3 March 1944) 6.

²⁶² Editorial, 'Religion Must Be Safeguarded: Opportunity of Referendum Should Not Be Missed', *The Catholic Weekly* (Sydney, 2 March 1944) 1 ('Religion Must Be Safeguarded'); Kevin Hilferty, 'Kelleher, James Michael (1909–1964)', *Australian Dictionary of Biography* (Web Page, 2006) <<http://adb.anu.edu.au/biography/kelleher-james-michael-10670>>, archived at <<https://perma.cc/SP7S-HBZA>>.

²⁶³ 'Religion Must Be Safeguarded' (n 262) 1.

²⁶⁴ *Ibid.*

of all denominations, welcome the inclusion in the bill of the two freedoms which President Roosevelt regarded as basic to the democratic way of life.²⁶⁵

The evidence suggests that one particular denomination, the Catholic Church, exerted an outsized influence in producing this result. As Evatt suspected, members of that denomination also welcomed it. A week after the government announced its intention to incorporate the rights provisions into the referendum, *The Catholic Weekly* declared that ‘the principal objections to the powers proposal have now been met, and the Government is worthy of congratulation on its ready concurrence with a reasonable public demand.’²⁶⁶ *The Catholic Weekly* would later come out against the referendum on the basis that the new powers could support ‘industrial conscription’ of workers.²⁶⁷ While some other influential Catholic actors would also oppose the referendum, Mannix publicly endorsed it — his fears about religious freedom seemingly assuaged.²⁶⁸

VI CONCLUSION

In the early part of the 1940s, a national debate over constitutional rights took place for the first time since Federation. The Curtin government’s efforts to constitutionalise new rights to free speech and religious freedom, doomed though they were, inaugurated a discussion about constitutional rights that recurs to this day. But it would be a mistake to see in that recurrence a deep continuity between then and now.

In our time, the project to institute new constitutional rights is cherished and championed by those on the political left and widely opposed by those on the right. By contrast, when constitutional rights first emerged to national prominence in the early 1940s, their champions were predominantly liberal, conservative and Catholic actors eager to head off the supposed threat of totalitarianism that underlay Labor’s social-democratic program of postwar reconstruction. While those on the left did not for the most part oppose constitutional rights, few were enthusiastic advocates. Actors in the labour movement and other progressive social movements saw constitutional progress coming predominantly from the expansion of government power at the national level rather than the imposition of new judicially enforceable restraints on that

²⁶⁵ Ibid.

²⁶⁶ Editorial, ‘Guarantees of Freedom’, *The Catholic Weekly* (Sydney, 16 March 1944) 4.

²⁶⁷ Duncan (n 202) 109. The ‘industrial conscription’ argument was the most common and effective argument conservative actors marshalled against the referendum proposals during the campaign: Waters (n 159) 52–4.

²⁶⁸ Duncan (n 202) 109–10; ‘Dr Mannix on the Referendum: Says He Will Vote “Yes”’, *The Argus* (Melbourne, 22 July 1944) 3.

power. It was conservative pressure, not deep ideological commitment, that compelled the Curtin government into the belated pursuit of constitutional rights. A marginal afterthought, constitutional rights were taken up to mollify conservative concerns about the far-reaching nature of Labor's grander constitutional project: the enlargement of federal power as the means to an enlarged social-democratic welfare state.

Revealed by this history is the potential for constitutional rights to displace and even undermine competing and more progressive agendas for constitutional change. If that is a theme known all too well in some other places, it has not claimed much attention in Australia.²⁶⁹ Given Australia's prevailing politics of constitutional rights, the prospect that conservative actors would once more take up the mantle of constitutional rights, as they had done in the 1940s, may seem remote. And yet, contemporary rallying by conservatives to the causes of free speech and religious freedom — the same rights conservatives championed against the Curtin government — highlights the potential for a revival of conservative constitutional rights today. Indeed, a handful of conservative actors have already begun taking up the charge through the implied freedom of political communication, albeit so far without success.²⁷⁰

If experience demonstrates the possibility of a conservative reclamation of constitutional rights, it also suggests an alternative constitutional vision that might reclaim a place within progressive politics: a renewed project for expanding democratic control over political, social and economic life. Unlike in earlier decades, that project may not necessarily involve such an overriding attachment to the national government as the privileged vehicle for progressive struggle. It must transcend past investments in settler colonialism, white supremacy

²⁶⁹ See generally Amanda Shanor, 'The New *Lochner*' [2016] (1) *Wisconsin Law Review* 133; Jedediah Purdy, 'Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment' (2018) 118(7) *Columbia Law Review* 2161.

²⁷⁰ See, eg, Nonee Walsh, 'Jeff McCloy, Newcastle Lord Mayor and Developer, Defends \$10k Donation to Liberal Candidate', *ABC News* (Web Page, 4 August 2014) <<https://www.abc.net.au/news/2014-08-02/newcastle-mayor-jeff-mccloy-defends-donation-to-lib-candidate/5643448>>, archived at <<https://perma.cc/8QCM-YXUK>>; Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, *No Offence Intended: Why 18C Is Wrong* (Connor Court Publishing, 2016); Gina Rushton, 'A Woman Fined for Her Anti-Abortion Protests Is Trying to Overturn Safe Access Zones around Clinics', *Buzzfeed News* (Web Page, 9 April 2019) <<https://www.buzzfeed.com/ginarushton/kathy-clubb-high-court-abortion-safe-access>>, archived at <<https://perma.cc/VEP4-LB6A>>; Paul Karp, "'Like the Stasi': Rightwing Thinktank Challenges Australia's Foreign Influence Transparency Scheme', *The Guardian* (online, 10 September 2020) <<https://www.theguardian.com/australia-news/2020/sep/10/like-the-stasi-rightwing-thinktank-challenges-australias-foreign-influence-transparency-scheme>>, archived at <<https://perma.cc/CX4N-NT3P>>. For cases arising from these developments, see *McCloy v New South Wales* (2015) 257 CLR 178; *Clubb v Edwards* (2019) 267 CLR 171; *LibertyWorks Inc v Commonwealth* (2021) 391 ALR 188.

and patriarchy. An inspiring glimpse of what such a transformed constitutional vision might entail in part can be found in Aboriginal and Torres Strait Islander peoples' contemporary struggles for constitutional justice. Those struggles have been powerfully captured in the 2017 *Uluru Statement from the Heart*, with its aspiration for First Nations peoples to more fully exercise sovereign control over their lives, communities and territories.²⁷¹ As for a broader constitutional program of deepening democracy, that urgently demands imagining.

²⁷¹ *Uluru Statement from the Heart* (Statement, First Nations National Constitution Convention, 26 May 2017). See also Megan Davis, 'The Long Road to Uluru: Walking Together' (2018) 60 *Griffith Review* 13.