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TITLE PAGE

**A response to the Jurisprudence of the High Court in
the 'implied rights cases': An autochthonous Australian
Constitution, Popular Sovereignty and Individual Rights?**

Thesis submitted by

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**Submitted in First Semester 2005
for the degree of Doctor of Philosophy
in the School of Law
James Cook University**

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ABSTRACT

Parliamentary supremacy is a major and important principle of Australian constitutional law. Popular sovereignty, on the other hand, has come to occupy a confusing and possibly dangerous position in Australia's current constitutional arrangements. In the 'implied rights cases', popular sovereignty was said to replace (or at least heavily qualify) parliamentary supremacy, and was seen as a springboard for the protection of individual rights. This thesis argues that the promulgation and enforcement of individual rights chosen by the High Court, against a democratically elected parliament, should be seen as a massive appropriation of political power from parliaments to judges. This is of course not to say that the High Court has no role to play in the development of rights in constitutional law, but it is to say that this role should be exercised cautiously and with restraint, and with due deference to the expressed will of the people through their elected representatives. As a result, any notion of 'extra-constitutional rights' not discerned from the text and structure of the Constitution, that might be said to limit parliamentary supremacy, should not be entertained. The broad traditions, including judicial deference to Parliament and separate roles of the legislature and the judiciary should be maintained, such that the enunciation of rights of general application should be left to parliaments.

The Founders of the Australian Constitution instituted these broad traditions when they envisaged the institutional design and normative scheme of the Constitution. Such traditions were based on positivist and utilitarian notions, and also included the embracing of the doctrine of parliamentary supremacy and the specific rejection of a bill of rights. For the High Court to now show infidelity to the institutional design of the Founders would mean that the checks, balances and traditions envisaged by the Founders are subverted, potentially leading to a dysfunctional constitutional order. Moreover, it is argued this shift in the role of one of the key components of the federation can have a destabilising effect on the High Court itself, and no less the federation. For if Australia ever found itself in the midst of a constitutional crisis, Australians must be able to have utmost faith in the High Court as an apolitical institution to determine the validity of Australian laws.

Since the passage of the Australia Acts in 1986, some Justices of the High Court have sought to imbue the Australian Constitution with a republican form of ideology to search for an autochthonous or 'home-grown' Constitution. It is said the traditional view of the legal basis of the Constitution being the United Kingdom Parliament, cannot support a popular ideological basis to the Constitution and emphasise individual rights. However, the fact that the United Kingdom Parliament can no longer legislate for Australia, does not necessarily mean the legal basis of the Constitution is now popular sovereignty. Nor does it follow that the withdrawal of the British hegemony or Australia's lack of a bill of rights should sanction any greater role for the High Court.

It is this discourse in the 'implied rights cases' surrounding the legal basis of the Constitution and individual rights that this thesis takes up in detail. This thesis will deconstruct the elements of this discourse to show that it constitutes a pernicious challenge to orthodox methods of constitutional interpretation previously based upon the rule of law and the separation of powers. It will be argued that in the 'implied rights cases' the High Court was less concerned about trespassing upon parliament's traditional and separate role than it was in promulgating a new rights discourse for Australia. Whilst doing so, every effort has been made to state the law as at November 2004.

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