

WELCOMING REMARKS

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THE PROSPECT OF AN AUSTRALIAN CONSTITUTIONAL MOMENT:

THE DEBATE ABOUT A BILL (OR CHARTER) OF RIGHTS

CONFERENCE ON RELIGIOUS AND CULTURAL FREEDOM UNDER A BILL OF RIGHTS

SPONSORED BY THE RESEARCH UNIT FOR THE STUDY OF SOCIETY, LAW AND RELIGION (RUSSLR)

OLD PARLIAMENT HOUSE, CANBERRA ACT

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Welcome

Let me join Professor Paul Babie (and _____) in welcoming everyone to this conference on Religious and Cultural Freedom under a Bill of Rights.

It is difficult to imagine a more important or timely topic; and it is difficult to imagine a more appropriate venue than the Old Parliament House, with its deep history in the creation of the Australian Federation.

ICLRS

The International Center for Law and Religion Studies, at Brigham Young University Law School, which I represent today as Associate Director, and as a junior partner in planning this conference, was launched on January 1, 2000, exactly 99 years to the day after the creation of the Australian Federation.

In our ten year history, we have participated, often as co-sponsors, in more than 150 academic conferences in more than 45 countries. Our mission and mandate is

to contribute to the scholarly dialogue about issues involving law and religion, and to contribute in a small way in helping secure and enhance rights of conscience and freedom of religion for all peoples in all places, both for believers and for non-believers.

In the past decade our center has been responsible for 7 books, and dozens of articles on law and religion topics. This year Aspen will publish a law school casebook written by Professor Cole Durham and me that will be the first casebook to approach law and religion from an international and comparative perspective.

Our Center sponsors a major international conference on law and religion each October at BYU Law School. In the past ten years we have had more than 700 delegates from 108 countries participate in that conference. Our conference this October will have approximately 65 delegates from 35 countries, and one of the panels will be dedicated to the subject of this conference, and several of the participants at this conference will be speakers.

While we have attended conferences in Australia, this is our first conference in Australia as a co-sponsor. So we are very happy to be here.

Thanks

I wish to express hearty and heartfelt thanks to the organizing Committee, including Professor **Paul Babie**, Director of the Research Unit for the Study of Society, Law and Religion at the University of Adelaide school of law, **Nigel Wilson**, the Associate Director of RUSLR, **Stephen Webster**, who has coordinated many of the logistics, and the Chair of the conference, **Neville Rochow**, SC, who has managed to juggle his work on this conference with a heavy load of other professional commitments as he has assumed the responsibilities of being appointed Senior Counsel.

I wish to also thank and acknowledge the other co-sponsors of this conference including:

The Australian Human Rights Commission,

ATF,

The University of Auckland Faculty of Law (and Paul Rishworth),

the Group of Eight,

Durham University,

The University of Otago,

and The Ambrose Centre for Religious Liberty.

Thanks also to the many distinguished, jurists (Sir Anthony Mason, Judge Cilfford Wallace, Justice Tassaduq Hussain Jillani, and Justice Grant Hammond),

Academics (too many to enumerate, but who are listed in the program),

and religious, civic and political leaders who have come (many from long distances), and the support of their institutions who have provided funding and support.

There are many other people who have spent countless hours – often on a volunteer basis – to make this conference possible. Please join me in thanking them. (Pause for applause.)

I fully expect our gratitude will have multiplied several times by the time we close this conference on Saturday afternoon.

Australia

I hope you will indulge me a personal note about the place and occasion that brings us together. BYU Law School has had a long and rich history of collaboration with some of the finest law schools and law professors in Australia – including Gabriel Moens, currently the Dean of the Murdoch school of law, who has been a frequent visitor at BYU, Carolyn Evans from the University of Melbourne Law School, with whom we collaborate frequently, and Paul Babie and

the University of Adelaide. For me, these have been and are some of my most enjoyable professional collaborations. I am so grateful to be among friends.

If they knew the depth of my enthusiasm for this country, the Australian Tourism Board would probably give me a job. Although this is only my third visit to Australia, I've enjoyed visiting Brisbane (the University of Queensland), the Gold Coast, and Fraser Island (the largest sand island in the world), as well as Sydney and Adelaide. I've made two pilgrimages to Ayer's Rock (Uluru and Kata-Tjuta), most recently last December with my 14-year-old son, Elliot. And next week I will make a *slight* detour on my way home to visit The Kimberley – Perth, Broome, and Kununurra, where I hope to see some of the spectacular sights from the not-quite-spectacular movie, Australia – Halls Creek, Purnu lulu National Park (including the delightfully-named Bungle Bungles), and Mitchell Falls.

To say that I am an Australiophile is surely an understatement. One of the things I hope to do before I die is to rent a caravan and spend three to six months exploring as much of this beautiful continent as I can.

Australia's Influence

I also believe that Australia's influence in the world is enormous, as an example of a prosperous multicultural society, a successful constitutional democracy, and as a place that respects human rights, including religious and cultural rights. Other countries, including my own, have a lot to learn from Australia, including in how it is grappling with the issues involving native peoples.

The quality of life in Australia is perhaps unmatched. Economic indicators, development indices, prosperity measures, and quality of life surveys routinely place Australia at or near the top. In one recent magazine survey (the Economist in 2008), I wasn't surprised to see that 4 of the 10 most livable cities in the world were in Australia – Melbourne, Perth, Adelaide, and Sydney. And that didn't even include Brisbane, which I think is one of the great river cities of the world, or Canberra, whose very essence may be is livability.

Earlier this year I was in Nepal attending a conference on the constitution drafting process that is going on there, and I said that one important asset Nepal has is that virtually everyone in the world has good will towards that country. With its natural wonders, mountains, and rich cultures, I don't know anyone who harbors ill will towards Nepal.

The same, I think is true of Australia. I don't know anyone who dislikes Australia – unless you count New Zealand rugby fans, or Indian cricket fanatics.

The influence of this country is much more commensurate with its geographic expanse (7.6 million square kilometers) than its relatively small population (about 22 million).

In visiting the Australian War Memorial yesterday, I couldn't help be reminded of the disproportionate sacrifice Australians have made to the cause of freedom and democracy in the world during the past century. And visiting the High Court of Australia, I couldn't help be deeply moved by the symbolism and aspiration of transparent justice for all expressed in the architecture of the building.

The Theme of this Conference

I'd like to conclude by saying a few words about the theme of this conference.

Twenty years ago I was a law student at Yale Law School. One of my most memorable classes was taught by an energetic and charismatic professor. He literally taught from the balls of his feet, dashing up and down the aisles of the classroom in a tattered tweed jacket, almost shouting, propounding his theories and eliciting student comments. He was so passionate, with such a deep love of ideas, and a broad knowledge of Constitutional history, that attending class was a delight.

His text that semester was the draft version of a book he was writing, called "We the People." His name was Bruce Ackerman, and that book, in which he introduced the world to his concept of "Constitutional Moments," has been very influential.

According to my recollection of our classroom discussions (verified this week by a review of his book) one of Ackerman's main theses is that the Constitutional history of the United States can be divided into two types of politics, what he calls "ordinary politics" and what he describes as "higher politics."

Ordinary politics is just what it sounds like – ordinary. People are concerned primarily with their own private interests, and they create parties and coalitions to advance those concerns. Ordinary politics is characterized by self-interest and special interests. Sometimes passions run high, but the issues at stake are relatively pedestrian and mundane.

Higher politics, what Ackerman calls "Constitutional Moments" are less common. They are marked by heightened political enthusiasm, and popular mobilization. During Constitutional Moments, the public becomes deeply engaged in deliberating about the public interest – and people as an aggregate take a relatively impartial view about the development of public policy. Rather than self interest being paramount, in Constitutional Moments, the public interest -- what it is, how it should be understood, and how it should be furthered -- takes center stage. Constitutional moments create frameworks under which normal everyday politics can take place.

Constitutional Moments are quite rare, and one of their characteristics is temporal compression, they are after all "moments." Ackerman counts three or four in the history of the United States – the Founding era, the immediate aftermath of the Civil War, the New Deal era, and the Civil Rights era. The defining feature of Constitutional Moments is that the deliberative character of politics transcends ordinary politics. Self interest is superseded by public interest. The focus is on what we might describe as first principles.

According to Ackerman, the Constitutional change that takes place at Constitutional Moments need not be formal Amendments to the Constitution. The New Deal, for example, constituted a radical revision of the meaning of the U.S. Constitution, but there was not a formal Amendment to the Constitution. But Constitutional Moments are identified by certain heightened forms of popular

mobilization, and legal innovations that may achieve the same status as formal Constitutional Amendments.

Ackerman argues that Constitutional Moments have normative priority in interpreting what the Constitution means. At these infrequent, brief, moments, ordinary politics is transcended, and the people engage in a meaningful, principled, inclusive, public debate about the definition of the public interest.

Is this a Constitutional Moment for Australia?

Professor Ackerman expanded and applied his notion of Constitutional Moments to other countries in a book called “The Future of Liberal Revolution,” written a few years after the fall of the Berlin Wall.

An interesting question – and, frankly, I do not know the answer to that question – is whether Australia is in the midst of a Constitutional Moment as it debates the merits of a Bill (or Charter) of rights.

It may be that the public is or will become sufficiently engaged in the debate, that the discussion of the issues will transcend the normal politics of self-interest and special interest, and become a deep, national conversation about the public interest.

I am not prepared, nor sufficiently informed, to offer an opinion, yet. But surely conferences such as this, which create a forum for a fulsome exploration of the issues, from many different points of view, is an important part of the process of development and deliberation that is essential to a robust exchange of ideas and perspectives.

In any event, I think we can all join in hoping that our discussions will transcend the boundaries of narrow self interest, and that over the next two days we will all participate in a spirited, respectful, uninhibited, discussion of this important topic vital to the public interest – how best to further and facilitate cultural and religious freedom, not just in Australia, but throughout the world.

Welcome, and thank you for being here.