PROTHEAN INSTITUTE

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The Anchor:

Why American Conservatism Held the Ground while British, Australian, and Canadian Conservatism Lost

EXECUTIVE SUMMARY

Nothing Left to Conserve (April 2026) identified three strategies for a conservative coalition operating against a discretionary-rule architecture run by a captured enforcement class: Bright-Line Legislative Reform (A), Institutional and Enforcement Balancing (B), and Symmetrical Exploitation (C). This brief argues that Strategy A operates in two modes — statutory codification inside the legislative universe, and constitutional codification one level above it — and that the second is a foundational move with durable defensive impact.

The comparative evidence is direct. American conservatism has held specific contested ground — speech, significant elements of religious liberty, some curriculum authority — that British, Australian, and Canadian conservatism has lost on the same timescale. The difference is not that the American coalition is more disciplined or better organised; on most measures it is not. The difference is that the ground it defended was textually codified rather than conventionally held, and progressive drift against a fixed position is visible in ways that drift against nothing is not.

The Westminster ratchet and the Voice/Victoria sequence of 2022–2025 demonstrate what the absence of codification produces in operation: majorities reject proposals when asked directly, but institutional channels can deliver the same outcome despite majority objections. Queensland's reversal of the Path to Treaty Act in 2024, contrasted with Victoria's statutory progression through the federal referendum defeat to the Statewide Treaty Bill 2025, shows the further distinction within the Commonwealth: statutory codification without constitutional anchoring can be reversed by a single election, but can also be bypassed by an institutionally embedded one.

Codification is not sufficient. The American record on due process, commerce clause, and administrative state expansion is a record of substantial reinterpretive drift against text that nominally prohibited it. Text holds only when a coalition shows up to defend it. The constitutional anchor is the ground on which Institutional and Enforcement Balancing (B) and Symmetrical Exploitation (C) become coherent and generationally durable.

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1. The Westminster Ratchet

Westminster constitutional systems hold their operating norms only in recent memory. Conventions exist to the extent political actors continue to honour them; when a convention is breached and the breach is not reversed, the new conduct becomes the new convention. Over decades this produces cumulative change with no fixed textual reference point against which drift is cleanly visible and quantifiable. There is no moment at which the system registers that something has moved. Every position is simply where the system is now.

In a system that holds its norms only in recent memory, there is no moment at which anyone can point to the text and say: this is how far we have moved. The absence of the text is the mechanism.

A ratchet requires two conditions: that one side is willing to move the mechanism, and that the other is not willing or able to move it back. Both conditions have obtained in every Anglosphere Westminster jurisdiction since approximately 1968. The accumulated drift across sixty years on family structure, institutional neutrality, demographic composition, operational speech rights, and the definition of public benefit is not an artefact of accident. It is the output of a mechanism operating as the mechanism is designed to operate.

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2. The American Exception

The distinctive feature of American conservatism relative to its British, Australian, and Canadian counterparts is not ideological sophistication, coalitional discipline, or institutional patience. On most of these dimensions the American coalition's record is uneven at best and has often been inferior to the Commonwealth equivalents. The distinctive feature is that American conservatism has fought over the past sixty years on ground that was textually codified, and its counterparts have fought on ground that was only conventionally held. The difference in outcome tracks the difference in ground, and the comparison is instructive because the counterfactual is not speculative — it is the Commonwealth record.

The comparative record on speech is the sharpest case. The United States has produced no equivalent of the UK Public Order Act's thirty speech-related arrests per day, no equivalent of Section 18C of the Australian Racial Discrimination Act, no equivalent of Canada's Section 13 human-rights-tribunal regime before its 2013 repeal. First Amendment jurisprudence has drifted substantially across its two-century operation — commercial speech, campaign finance, public-employee speech, student speech have all been reshaped through reinterpretation — but the core protection of political and religious expression against viewpoint-based regulation has held. The holding is not the result of better conservative activism in the United States than in the Commonwealth. It is the result of judges, including progressive ones, being constrained by text that requires viewpoint-neutrality and by a doctrinal tradition (Brandenburg, in particular) that sets a clear bright-line test against which departures are legible. Commonwealth judges applying discretionary standards like "hate" or "offence" face no equivalent textual constraint.

Religious liberty and parental rights over education show the same pattern in a different domain. Wisconsin v Yoder (1972), Pierce v Society of Sisters (1925), and the line of cases protecting religious-school operation and parental primacy in educational decisions have no direct Commonwealth equivalents. The UK charity-commission regulation of religious schools, the Canadian professional-licensing actions against dissenting clinicians, and the Australian curriculum-authority actions against religious educational content have proceeded against constitutional terrain that lacks the anchor points American religious institutions have available. American religious-liberty doctrine has itself drifted — Employment Division v Smith narrowed Free Exercise significantly in 1990, and the Religious Freedom Restoration Act's subsequent history is complicated — but the textual anchor remains available and has repeatedly been invoked to arrest particular losses that Commonwealth equivalents have simply absorbed.

The claim requires careful specification. American conservatism has not generally outperformed its Commonwealth counterparts. American family structure, demographic composition, institutional neutrality of universities, editorial direction of public broadcasters, capture of professional credentialing bodies, and monoculture of the credentialed information environment have drifted in the same directions at comparable rates. What American conservatism has held, British, Australian, and Canadian conservatism has not held. What American conservatism has lost, the Commonwealth equivalents have lost too. The comparative point is narrower than it is sometimes made: codification protected what was codified. It did not protect what was only conventionally held.

The mechanism by which codification produces this protective effect is worth stating directly, because it is not primarily about post-hoc judicial strikedown. The United States has by a wide margin the most active constitutional-challenge culture among common-law democracies, and this produces two distinct structural effects. The first is the obvious one: legislation that breaches codified protections can be and frequently is struck down through litigation brought by standing civil-liberties infrastructure — the ACLU, FIRE, the Institute for Justice, Becket, ADF, Pacific Legal Foundation — that exists to operate this channel and has no Commonwealth equivalent of remotely comparable scale. The second is the one legislators and regulators internalise: drafters

pricing in the probability of constitutional review write different instruments in the first place. Much of what codification protects is never drafted because the drafting would be futile. Commonwealth systems produce no equivalent drafting discipline because there is no equivalent instrument against which to test.

Canada is the clarifying natural experiment. Same Westminster parliamentary lineage as the United Kingdom and Australia, but with the Canadian Charter of Rights and Freedoms entrenched in 1982 — and therefore a codified-rights architecture the other two Commonwealth systems lack. The prediction the brief's argument makes is that Canada should behave more like the United States on Charter-protected ground and more like the UK and Australia everywhere else. The record is consistent. Section 13 of the Canadian Human Rights Act — the federal hate-speech tribunal provision used against right-wing speech for decades — was repealed in 2013 under specifically Charter-based legal pressure, after a series of Section 2(b) expression challenges made it functionally untenable. No equivalent dismantling of the UK Public Order Act speech provisions or Section 18C has occurred, or is available to occur, because the challenge mechanism does not exist. Canada is evidence both ways: the Charter arrested a specific Commonwealth statutory overreach that equivalent UK and Australian instruments absorbed unchallenged, and Canada's partial codification (the Section 33 notwithstanding clause allows legislative override of Charter protections for renewable five-year periods) demonstrates the specific failure mode codified rights suffer when the anchor has a statutory escape hatch. Quebec's Bill 21 and pre-emptive use of the notwithstanding clause in several provinces are the progressive answer to partial codification — and the argument for codification without escape hatches is therefore strengthened, not weakened, by the Canadian record.

The American coalition did not hold its ground because it was better. It held its ground because the ground was textual, and because textual ground produces a challenge mechanism that shapes legislation before it is written and strikes it down afterward. Commonwealth coalitions fighting on conventional ground lost outcomes that American coalitions fighting on textual ground held — on the same issues, over the same period, against the same institutional pressures. Canada, with partial codification, sits between the two records in exactly the position the argument predicts.

3. What Absence of the Anchor Produces

The Voice referendum and the Victorian treaty process together provide the most recent empirical demonstration of what the Westminster architecture produces when the anchor is absent. The

sequence runs from 2022 to 2025 and concentrates both halves of the ratchet argument into a single political moment.

On 14 October 2023, Australian voters rejected the proposed Aboriginal and Torres Strait Islander Voice by 60.06 per cent to 39.94 per cent. Every state returned a No majority; the Australian Capital Territory was the only jurisdiction to return a Yes majority. This was the largest recent Anglosphere data point on public positions toward proposed institutional change on a contested question. When the content was made directly visible and voters were asked to consent, they declined.

The Victorian Treaty Authority and Other Treaty Elements Act was enacted by the Victorian Parliament on 23 August 2022 — fourteen months before the federal referendum. The First Peoples' Assembly of Victoria had been operating since 2019. The state negotiating architecture therefore predated the federal democratic question and continued to operate through the referendum campaign and after the defeat. On 9 September 2025, less than two years after the federal rejection, the Statewide Treaty Bill 2025 was introduced into the Victorian Parliament, establishing Gellung Warl as a permanent statutory authority with formal advisory, representative, truth-telling, and government-accountability-holding functions over matters affecting First Peoples.

The Victorian mechanism is not identical to the Voice. It is, by design, the functional equivalent achieved through a different instrument — an ongoing representative body with formal advisory authority over government action, established by state statute rather than federal constitutional amendment. The substantive outcome is the thing the referendum was asked to authorise and the public rejected. The Victorian delivery mechanism bypasses the democratic question: ordinary legislation, negotiated between state executive and an existing representative body, requiring no direct public consent.

When voters are asked, they decline. When they are not asked, the same coalition delivers the same outcome through institutional channels they do not control. The absence of a textual anchor is what permits the second channel to operate.

Queensland provides the instructive counterpoint within the Commonwealth. The Queensland Path to Treaty Act 2023 was repealed by the incoming LNP government in 2024 following a change of state administration. Where the statutory instrument was politically visible and had not yet been institutionally embedded, a single election reversed it. Where the statutory instrument was institutionally embedded and had already proceeded to a negotiating architecture — as in Victoria — no single election could reach it. The Commonwealth therefore offers, within itself, evidence of a distinction: statutory codification alone is reversible through ordinary democratic means when visible; statutory codification plus institutional embedding is not. Constitutional codification is neither, in the sense that matters: it is neither reversible through ordinary election nor bypassable through ordinary legislation.

4. Constitutional Codification as the Durable Mode

Bright-Line Legislative Reform (Strategy A), as Nothing Left to Conserve defined it, is repeal of the discretionary instruments and their replacement with bright-line rules whose application requires no interpretation. The brief described this as correct in Madisonian principle but slow in execution, requiring a generation of legislative work. What that brief did not distinguish is that Strategy A operates in two modes at different structural levels — statutory codification and constitutional codification — and their durability differs accordingly.

Statutory codification — the standard mode — operates inside the legislative universe. Section 18C can be repealed and replaced by a narrower incitement standard. The speech provisions of the UK Public Order Act can be rewritten to eliminate discretionary offence categories. Ministerial discretion in immigration, charity, and curriculum can be converted into objective statutory criteria. This is the generation-long legislative programme. It works where it succeeds, but it operates at the same level as the original problem: anything a parliament can pass, a subsequent parliament can repeal. The Queensland Path to Treaty reversal is the illustrative case. A statutory bright-line rule produces no structural asymmetry between its passage and its repeal; the ratchet mechanism that produced the original discretionary architecture remains operational and can be turned against the replacement.

Constitutional codification is the durable mode. It operates one level above the statutory universe, and its distinctive feature is structural asymmetry between passage and reversal: supermajority or referendum requirements for amendment that the originating majority itself established. This is democratic in the strict sense — the majority remains sovereign — but the majority's decision at one moment is protected against institutional capture and legislative erosion in the interval before the majority forms an explicit contrary position. The political feasibility of constitutional codification is lower than of statutory replacement; Australia has passed only 8 of 45 referendums since 1901. But the feasibility of the underlying positions — racial non-discrimination as direction-neutral, free expression on contested political questions, electoral integrity through identification — is high. The difficulty is the mechanism, not the substance.

The cautionary case is the United Kingdom's Human Rights Act 1998. Its mechanism is incorporation by reference: UK courts are required to give effect to rights defined externally by the European Convention on Human Rights and by Strasbourg jurisprudence. The substantive content is therefore defined by an interpretive body whose outputs drift over time, and the British text provides no fixed reference point. The Act has arguably accelerated drift rather than constraining it, because it delegated the definitional work to precisely the kind of interpretive architecture the Madisonian standard warns against. The American Bill of Rights approach — textual, specific, locally-adjudicated enumeration — is the model. Incorporation by reference is the anti-model. Both are called codification. Only one functions as an anchor.

Australian path feasibility therefore involves a specific sequencing observation. An Australian Bill of Rights Act, modelled on American enumeration rather than British incorporation, is the realistic first step: it operates inside the legislative universe, it is achievable with parliamentary majorities, and it creates a textual reference point where none currently exists. It remains reversible by subsequent parliaments, which is why it is a first step rather than an end-state. Where a subsequent political moment permits, entrenchment through constitutional amendment converts the reference point into an anchor. The Voice referendum is evidence of the political difficulty of direct constitutional amendment on contested questions; it is not evidence that statutory codification is unavailable.

Statutory codification of positions that already have strong majority support — racial non-discrimination, free expression, electoral integrity — is a different political proposition from constitutional codification of a specific institutional arrangement lacking majority support, and may be politically viable once a conservative government is in power if it has the existential conviction to secure currently-popular positions while they are still currently popular, and the generational perspective to recognise that codification is the work of securing conservative ground for decades beyond the originating administration's own tenure.

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5. The Anchor and the Coalition

Codification is necessary but not sufficient. The American record on due process, commerce clause, and administrative state expansion is a record of substantial reinterpretive drift against text that nominally prohibited it. The Ninth and Tenth Amendments have been largely dormant for a century. The Commerce Clause was reinterpreted during the New Deal in ways that effectively rewrote the federal-state distribution of authority without formal amendment. The administrative state's growth through Chevron deference and equivalent doctrines operated inside enumerated constitutional limits that failed to constrain it. Text is not self-enforcing.

What the American record shows — and what the Commonwealth record, lacking the text, cannot show either way — is that text provides the ground on which the coalition can stand to defend it. The Federalist Society's transformation of the federal judiciary over a generation is Institutional and Enforcement Balancing (B) operating on ground that Bright-Line Legislative Reform (A) had already secured. Without the text, the Society's project would have had nothing to interpret; without the Society, the text would have been interpreted by the same credentialing monoculture that operates unopposed in the Commonwealth. Neither the text nor the coalition is sufficient in isolation. Both in combination is what held the specific ground American conservatism held.

The implication for Commonwealth conservative coalitions is straightforward and difficult. The ground on which Institutional and Enforcement Balancing and Symmetrical Exploitation are asked to operate in Britain, Australia, and Canada is ground without an anchor. Symmetrical Exploitation of the existing discretionary architecture, executed inside a system that has no fixed reference

point, produces short-term tactical gains that revert once the institutional momentum resumes. Institutional and Enforcement Balancing, pursued inside a system where the interpretive positions interpret no fixed text, produces conservative interpreters inside the same monoculture-generating architecture that produced the progressive interpreters. Both strategies work better when they operate on codified ground, and neither substitutes for the codification itself. The sequencing is therefore not optional. Codification first — in its statutory mode where the constitutional mode is unavailable — then the coalitional work that defends what has been codified, then the ongoing contest that prevents reinterpretation from achieving through drift what amendment failed to achieve through process.

The American anchor held because Americans built a coalition to defend it. The Commonwealth lacks the anchor and has not built the coalition. Either alone is insufficient. Both together is what held American ground that Commonwealth conservatism lost on the same issues, over the same period, against the same institutional pressures. The sequence starts with the anchor.

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