PRINCIPLES AND THEORIES OF CONSTITUTIONAL INTERPRETATION AND ADJUDICATION: SOME PRELIMINARY NOTES

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[*In this article Dr Thomson notes various theories of constitutional interpretation that have been canvassed by Australian and American scholars. It is hoped that the article will be a useful bibliographic guide to some of the scholarship underlying such principles and theories of interpretation.*]

The meaning doesn't matter if its only idle chatter of a transcendental kind.
— *W. S. Gilbert*

Language is the dress of thought. — *S. Johnson*

I venture to believe that it is as important for a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaption; which will disrupt it, if rigidly confined.
— *L. Hand*

The Constitution . . . is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. — *Thomas Jefferson*

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used. — *O. W. Holmes, Jr.*

Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them. — *Benjamin Hoadley*

INTRODUCTION

That written[1] constitutions inevitably involve questions of interpretation is not a startling revelation. For example, James Madison, following his

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1 Whether written documents constitute the totality of a 'Constitution' is a matter of debate. See generally, Grey T. C., 'Do We Have an Unwritten Constitution?' (1975) 27 *Stanford Law Review* 703; Grey T. C., 'Origins of the Unwritten Constitution:

participation in drafting the United States Constitution,[2] recognized not only that this would occur, but also the reasons for such questions:

> All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.[3]

Questions, principles and theories of constitutional interpretation and adjudication[4] are not confined to any particular country. They extend across international boundaries[5] and are sometimes similar to interpretative

Fundamental Law in American Revoluntionary Thought' (1978) 30 *Stanford Law Review* 843; Black H. L., *A Constitutional Faith* (1969) 3-22; Black H. L., 'The Bill of Rights' in Dilliard I. (ed.), *One Man's Stand For Freedom* (1971) 36.

[2] See generally, Brant I., *James Madison: Father of the Constitution: 1787-1800* (1950); *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Norton Library edition, Introduction by Koch A.) (1969); Meyers M. (ed.), *The Mind of the Founder: Sources of the Political Thought of James Madison* (2nd ed. 1981).

[3] 'Paper Number 37' in *The Federalist Papers* (New American Library edition) (1961) 224, 229.

[4] See generally, Brest P., *Processes of Constitutional Decision-making: Cases and Materials* (1975) (1977 and 1980 Supps.); Ducat C. R., *Modes of Constitutional Interpretation* (1978); Murphy W. F., 'The Art of Constitutional Interpretation: A Preliminary Showing' in Harmon M. J. (ed.), *Essays on the Constitution of the United States* (1978) 130; Munzer S. R. and Nickel J. W., 'Does the Constitution Mean What It Always Meant?' (1977) 77 *Columbia Law Review* 1029; Bobbitt P., 'Constitutional Fate' (1980) 58 *Texas Law Review* 695; Sandalow T., 'Constitutional Interpretation' (1981) 79 *Michigan Law Review* 1033; Brest P., 'The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship' (1981) 90 *Yale Law Journal* 1063; Zines L., *The High Court and the Constitution* (1981) 282-323; Lane P. H., *The Australian Federal System* (2nd ed. 1979) 1175-1205; Evans G., 'The Most Dangerous Branch? The High Court and the Constitution in a Changing Society' in Hambly A. D. and Goldring J. L. (eds), *Australian Lawyers and Social Change* (1976) 13, 36-76; Hogg P. W., *Constitutional Law of Canada* (1977) 79-100.

[5] For a collection of comparative materials see, Franck T. M., *Comparative Constitutional Processes: Cases and Materials* (1968); Murphy W. F. and Tanenhaus J., *Comparative Constitutional Law: Cases and Commentaries* (1977); Cappelletti M. and Cohen W., *Comparative Constitutional Law: Cases and Materials* (1979). See also, McWhinney E., *Judicial Review* (4th ed. 1969); Murphy W. F., 'An Ordering of Constitutional Values' (1980) 53 *Southern California Law Review* 703; Kommers D. P., 'Comparative Judicial Review and Constitutional Politics' (1975) 27 *World Politics* 282; Giraudo J. P., 'Judicial Review and Comparative Politics: An Explanation for the Extensiveness of American Judicial Review offered from the Perspective of Comparative Government' (1979) 6 *Hastings Constitutional Law Quarterly* 1137; Bayne P. J., 'Judicial Method and the Interpretation of Papua New Guinea's Constitution' (1980) 11 *Federal Law Review* 121.

techniques used to ascertain the meaning of other written laws[6] and documents.[7]

In the main those who interpret the written words of a constitution act upon unarticulated principles and theories of interpretation. Also infrequently expressed is the relationship between the role that a particular principle or theory plays in adjudication and the substantive constitutional values held by the decision-maker.[8] One of the fundamental issues in constitutional theory and practice is the need to formulate (and consciously act upon) an adequately principled theory of constitutional interpretation.

WHO INTERPRETS?

Because courts exercise the power to declare legislation and executive acts unconstitutional,[9] the judiciary is often considered to be the only expositor of a constitution.[10] Others, however, also have problems and

[6] See generally, Pearce D. C., *Statutory Interpretation In Australia* (2nd ed. 1981). Two matters should be noted. First, that 'there are two opposing canons [of construction] on almost every point': Llewellyn K. N., 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed' (1950) 3 *Vanderbilt Law Review* 395, 401. Second, that 'these rules of construction are not in any sense rules of law. So far as valid, they are what Mr Justice Holmes called them, axioms of experience': Frankfurter F., 'Some Reflection on the Reading of Statutes' (1947) 47 *Columbia Law Review* 527, 544. *Cooper Brookes (Wollongong) Pty Ltd v. Commissioner of Taxation* (1981) 55 A.L.J.R. 434, 443 (Mason and Wilson JJ.).

[7] Several hermeneutical theories and their relationship to constitutional interpretation are discussed in Quinn M. S., 'Of Democracy and Distrust: A Theory of Judicial Review' (1981) 49 *University of Missouri at Kansas City Law Review* 377, 398-400. See generally, Hirsch E. D., *Validity In Interpretation* (1967); Hirsch E. D., *The Aims of Interpretation* (1976). See also Wills G., *Inventing America: Jefferson's Declaration of Independence* (1978).

[8] As to this relationship and that between theories of interpretation and *stare decisis*, see, Monaghan H. P., 'Taking Supreme Court Decisions Seriously' (1979) 39 *Maryland Law Review* 1.

[9] Is the exercise of judicial review itself an unconstitutional arrogation of power by the courts? See generally, Thomson J. A., *Judicial Review in Australia: The Courts and the Constitution* (1979) (S.J.D. thesis Harvard Law School); Berger R., *Congress v. The Supreme Court* (1969); Strayer B. L., *Judicial Review of Legislation in Canada* (1968) 3-22; Cappelletti M., 'The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis' (1980) 53 *Southern California Law Review* 409.

[10] '[T]he story of Australian Constitutional interpretation is almost entirely the story of High Court interpretation. . . .': Evans, *supra* n. 4 at 24. Professor Frankfurter would at this juncture reiterate that '[p]eople have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and *not* the Constitution.': Letter of 18 February 1937 from Felix Frankfurter to Franklin Delano Roosevelt in Freedman M. (ed.), *Roosevelt and Frankfurter: Their Correspondence 1928-1945* (1967) 383 (emphasis in original). Charles Evans Hughes' famous statement that 'the Constitution is what the judges say it is' — (1982) 56 *Australian Law Journal* 98 — is echoed in his advice, when Chief Justice, to Justice Douglas to remember that '[a]t the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilictions'. Justice Douglas, despite being shattered by this remark, later admitted to himself 'that the "gut" reaction of a judge at the level of constitutional adjudications . . . was the main ingredient of his decision'. *The Court Years, 1939 to 1975: The Autobiography of Williams O. Douglas* (1980) 8. Even without taking such utterances to their logical limits, it is possible to understand why Professor Tribe does

duties[11] involving interpretation of a constitution.[12] Indeed, courts have, in some instances, adopted an interpretation espoused or followed by legislators and executive officials.[13] It is therefore necessary that principles and theories of constitutional interpretation and adjudication neither derive solely from, nor be confined to, judicial opinions.

> not regard the rulings of the Supreme Court as synonymous with constitutional truth. As Justice Robert Jackson once observed of the Court, 'We are not final because we are infallible, but we are infallible only because we are final.' And the Courts that held slaves to be non-persons, separate to be equal, and pregnancy to be non sex-related can hardly be deemed either final *or* infallible. Such passing finality as judicial pronouncements possess is an essential compromise between constitutional order and chaos. . . .
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> Tribe L. H., *American Constitutional Law* (1978) iii (emphasis in original).

[11] 'The Senators and Representatives . . . and the members of the several State Legislatures ,and all Executive and Judicial Officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution. . . .': U.S. Constitution Article VI Section 3. 'The oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government. . . .': *Eakin v. Raub* (1825) 12 Sergeant and Rawles Reports 330, 353 (Gibson J., dissenting) (Supreme Court of Pennsylvania). One view is that this oath 'is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty. . . .': *Ibid.* See however, *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 401-2 (Sutherland J. dissenting). For a criticism of the view that such an oath could support judicial review in England, see, Winterton G., 'Parliamentary Supremacy and the Judiciary' (1981) 97 *Law Quarterly Review* 265, 271-4.

[12] For presidential statements concerning the consideration of constitutional questions by the President and Congress independently of judicial interpretations of the Constitution see, Freund P. A., Sutherland A. E., Howe M. D. and Brown E. J., *Constitutional Law: Cases and Other Problems* (4th ed. 1977) 13-16; Gunther G., *Cases and Materials on Constitutional Law* (10th ed. 1980) 25-31. For an example of congressional interpretation, see, Brest, *supra* n. 4 at 15-46. See generally, Eckhardt B. and Black C., *The Tides of Power: Conversations on the American Constitution* (1976); Fisher L., *The Constitution Between Friends: Congress, the President and the Law* (1978); Morgan D. G., *Congress and the Constitution: A Study of Responsibility* (1966); Murphy W. F. and Pritchett C. H., *Courts, Judges and Politics: An Introduction to the Judicial Process* (3rd ed. 1979) 353-96; Rossiter C., *The Supreme Court and the Commander in Chief* (introduction and additional text by Longaker R. 1976); Andrews W. (ed.), *Coordinate Magistrates: Constitutional Law by Congress and President* (1969); Brest P., 'The Conscientious Legislator's Guide to Constitutional Interpretation' (1975) 27 *Stanford Law Review* 585; Cox A., 'The Role of Congress in Constitutional Determinations' (1971) 40 *University Cincinnati Law Review* 199; Sager L. G., 'Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts' (1981) 95 *Harvard Law Review* 17, 24-5, 31-2. For consideration of issues concerning constitutional interpretation and adjudication by the Commonwealth Parliament see *e.g.*, Senate Standing Committee on Foreign Affairs and Defence, *Reference: The Role and Involvement of Australia and the United Nations in the Affairs of Sovereign Australian Territories* (1974-75) (Official Hansard Report) 145-71 (written and verbal evidence of Professor Sawer); Senate Select Committee on Securities and Exchange, *Report on Australian Securities Markets and Their Regulation* (1974) Parliamentary Papers Vol. 10, 309-401 (Opinions of Professors Howard, Lane, Sawer and Zines); Senate Standing Committee on Constitutional and Legal Affairs, *Report on: the Clauses of the National Compensation Bill 1974* (1975) Parliamentary Papers Vol. 11, 30-3, 229-314 (Opinions of F. C. Brennan Q.C., A. M. Gleeson Q.C., R. E. McGarvie Q.C., and M. H. Byers Q.C.); Senate Standing Committee on Constitutional and Legal Affairs, *Report on Aboriginals and Torres Strait Islanders on Queensland Reserves* (1978) 3-20, 91-106 (Opinion of M. Crommelin). For discussion of the debate, whether the judiciary is the 'ultimate interpreter of the Constitution', see *e.g.*, Gunther, *supra* at 32-3.

[13] 'Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply

ORGANIC THEORY — A CONSTITUTION TO BE INTERPRETED

Justice Frankfurter believed 'the single most important utterance in the literature of constitutional law'[14] to be the phrase 'it is *a constitution* we are expounding'.[15] If it is a provision 'made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs'[16] interpreters can turn to numerous judicial and other utterances[17] in an endeavour to justify[18] a broad and expansive reading of words and phrases. Even on such an approach some attempt can be made to link past values with future demands.[19]

them.... [T]hese three isolated instances do not add up, either in number, scope, duration or contemporaneous legal justification, to the kind of executive construction of the Constitution [necessary to justify the action here]. Nor do they come to us sanctioned by long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers': *Youngstown Sheet and Tube Co. v. Sawyer* (1952) 343 U.S. 579, 610, 613 (Frankfurter J.). See also *Dames & Moore v. Regan* (1981) 69 United States Supreme Court Reports, Lawyers Edition 2nd 918, 939-43; Monaghan H. P., 'Presidential War-Making' (1970) 50 *Boston University Law Review* [Special Issue] 19 especially at 31. For a discussion of the thesis that extrajudicial matters can and do determine the meaning of the constitution, see Soifer A., 'Book Review' (1979) 67 *Georgetown Law Journal* 1281.

[14] Frankfurter F., 'John Marshall and the Judicial Function' (1955) 69 *Harvard Law Review* 217, 219. See also, *Youngstown Sheet & Tube Co. v. Sawyer, supra* n. 13. at 596 ('The pole-star for constitutional adjudications is John Marshall's greatest judicial utterance. . . .') (Frankfurter J.).

[15] *M'Culloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316, 407 (Marshall C.J.) (emphasis in original).

[16] *Ibid.* 415.

[17] In addition to *M'Culloch v. Maryland, ibid.* see *e.g., Martin v. Hunter's Lessee* (1819) 14 U.S. (1 Wheat.) 304, 323-7 (Story J.); *Gompers v. U.S.* (1914) 233 U.S. 604, 610 (Holmes J.); *Missouri v. Holland* (1920) 252 U.S. 416, 433 (Holmes J.); *U.S. v. Moreland* (1922) 258 U.S. 433 (Brandeis J., draft opinion quoted in Bickel A. M., *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 107; *Home Building and Loan Association v. Blaisdell* (1934) 290 U.S. 398, 442-3 (Hughes C.J.); *Martin v. City of Struthers* (1943) 319 U.S. 141, 152 (Frankfurter J.); *Youngstown Sheet & Tube Co. v. Sawyer, supra* n. 13 at 596-7; Frankfurter F., 'The Supreme Court in Kurland P. B. (ed.), *Felix Frankfurter on the Supreme Court': Extrajudicial Essays on the Court and the Constitution* (1970) 448, 460; *Baxter v. Commissioners of Taxation (N.S.W.)* (1907) 4 C.L.R. 1087, 1105; *A.G. (N.S.W.) v. Brewery Employees Union of N.S.W.* (1908) 6 C.L.R. 469, 611-3 (Higgins J.); *Commonwealth v. Kreglinger* (1926) 37 C.L.R. 393, 413 (Isaacs J.); *A.N.A. v. Commonwealth* (1945) 71 C.L.R. 29, 85 (Dixon J.); *R. v. Public Vehicles Licensing Appeal Tribunal (Tas.),* (1964) 113 C.L.R. 207, 225; *Spratt v. Hermes* (1965) 114 C.L.R. 226, 272 (Windeyer J.); *North Eastern Dairy Co. Ltd v. Dairy Industry Authority of N.S.W.* (1975) 134 C.L.R. 559, 615 (Mason J.); *Watson v. Lee* (1979) 54 A.L.J.R. 1, 11 (Stephen J.); *A.G. (Vic.) ex rel. Black v. Commonwealth* (1981) 55 A.L.J.R. 155, 174 (Murphy J.). See generally Lane, *supra* n. 4, at 1188-93; Nygh P. E., 'An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and the United States' (1967) 5 *Sydney Law Review* 353, 384-97.

[18] For a criticism of these utterances and the way in which they have been used, see Berger R., *Government By Judiciary: The Transformation of the Fourteenth Amendment* (1977) 373-96. For a more favourable view, see Peebles T. H., 'A Call to High Debate: The Organic Constitution in its Formative Era, 1890-1920' (1980) 52 *University Colorado Law Review* 49.

[19] Compare the distinction between connotation and denotation of words stressed by Barwick C.J. See *e.g., A.G. (Vic.) ex rel. Black v. Commonwealth, supra* n. 17 at 157-8; *Uebergang v. Australian Wheat Board* (1980) 54 A.L.J.R. 581, 590. *Koowarta v. Bjelke-Petersen* (1982) 39 A.L.R. 417, 454, 462-3, 483-4. Professor Lane has criticized this distinction: Lane, *supra* n. 4 at 1117.

For example, Justice Holmes intoned:

> [T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.[20]

The Constitution of the Commonwealth of Australia is, however, contained in section nine[21] of the Commonwealth of Australia Constitution Act 1900.[22] In contrast to the United States Constitution, which was adopted by the people in state ratification conventions,[23] the Australian Constitution was not only 'accepted' by the people at national referendums of 1898 and 1899, but was also altered and enacted as a statute by the United Kingdom Parliament.[24] The fact of such enactment led Chief Justice Latham to observe that the Australian Constitution derives all its force from that enactment and it alone.[25] If[26] the Constitution is merely a statute, albeit an

[20] *Gompers v. U.S.*, *supra* n. 17 at 610. '[T]he words of the Constitution . . . are so unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life': Frankfurter, 'The Supreme Court', *supra* n. 17 at 460. Sometimes a distinction is drawn between provisions granting legislative power and those denying such power, e.g., *Wragg v. N.S.W.* (1953) 88 C.L.R. 353, 386 (Dixon C.J.); *A.G. (Vic.) ex rel. Black v. Commonwealth*, *supra* n. 17 at 167 (Gibbs J.), 172 (Mason J.), 187 (Wilson J.). But contrary, Barwick C.J., *ibid.* 157; Murphy J., *ibid.* 175.

[21] Sections 1-8 are, however, not without significance. See, *e.g.*, Harvey L. and Thomson J. A., 'Some Aspects of State and Federal Jurisdiction under the Australian Constitution' (1979) 5 *Monash University Law Review* 228.

[22] Commonwealth of Australia Constitution Act (1900) (Imp.).

[23] See generally, Elliot J., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* (2nd ed. 5 vols. 1896); Main J. T., *The Anti-Federalists: Critics of the Constitution 1781-1788* (1961).

[24] See generally, La Nauze J. A., *The Making of the Australian Constitution* (1972). As to referenda campaigns and public debate, Bennett S. (ed.), *Federation* (1975); Anderson H. (ed.), *Tocsin: Radical Arguments Against Federation 1897-1900* (1977); Norris R., 'Economic Influences on the 1898 South Australian Federation Referendum' in Martin A. W. (ed.), *Essays in Australian Federation* (1969) 137; Hewett P., 'Aspects of Campaigns in South-Eastern New South Wales at the Federation Referenda of 1898 and 1899' in *ibid.* 167; Hillman W., 'The 1900 Federal Referendum in Western Australia' (1978) 2 *Studies in Western Australian History* 51; Pringle R., 'Public Opinion in the Federal Referendum Campaigns in New South Wales 1898-99' (1979) 64 *Journal Royal Australian Historical Society* 235. But see comment of Aickin J., *infra* n. 28. As to alterations and enactment in England, see de Garis B. K., *British Influence on the Federation of the Australian Colonies, 1880-1901* (1965) (Phd. thesis Oxford University) especially at 325-409.

[25] Latham J., 'Interpretation of the Constitution' in Else-Mitchell R. (ed.), *Essays on the Australian Constitution* (2nd ed. 1961) 1, 5, 8. The Australian Constitution 'is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions': Dixon O., 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597. See also, *Southern Centre of Theosophy Inc. v. South Australia* (1979) 54 A.L.J.R. 43; *China Shipping Co. v. South Australia* (1979) 54 A.L.J.R. 57.

[26] For the view that the Australian Constitution derives its legal force and supremacy from the sovereignty of the Australian people, see, *Bistricic v. Rokov* (1976) 135 C.L.R. 552, 566 (Murphy J.); *China Shipping Co. v. South Australia*, *supra* n. 25 at 81 (Murphy J.); Lumb R. D., 'Fundamental Law and the Processes of Constitutional

important statute,[27] should it be interpreted accordingly by use of the ordinary rules of statutory interpretation?[28]

LEGALISM — A LAWYER'S DOCUMENT

Legalism, as a method of interpretation, is an endeavour to support literalism, strict construction, adherence to the text, technical analysis of rights, duties and powers, and to promote abstract logical reasoning to the exclusion of social, political and other value considerations.[29]

Change in Australia' (1978) 9 *Federal Law Review* 148, 154-8. But see, Bickovskii P., 'No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution' (1977) 8 *Federal Law Review* 460, 467-70; Zines, *supra* n. 4 at 250-1.

[27] 'The Commonwealth Constitution is not merely an instrument for the government of a federation. It is that; but it is more. It is the birth certificate of a nation.': *Western Australia v. Chamberlain Industries Pty Ltd* (1970) 121 C.L.R. 1, 26 (Windeyer J.); 'The Constitution established the Commonwealth of Australia as a political entity and brought it into existence as a member of the community of nations.': *Barton v. Commonwealth* (1974) 131 C.L.R. 477, 498 (Mason J.).

[28] The Judicial Committee of the Privy Council considered that there were two possible answers to such a question.

> The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts. . . . The second would be more radical: it would be to treat a constitutional instrument such as this *sui generis*, calling for principles of interpretation of its own, suitable to its character . . . without necessary acceptance of all the presumptions that are relevant to legislation of private law.
>
> [T]heir Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument. . . . Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

Minister of Home Affairs v. Fisher [1980] A.C. 319, 329. The High Court has been ambivalent, see, *e.g.*: 'The problem which is thus presented to the Court is a matter of the legal construction of the Constitution of Australia, itself a legal document; an Act of the Imperial Parliament': *A.G. (Cth) ex rel. McKinlay v. Commonwealth* (1975) 135 C.L.R. 1, 17 (Barwick C.J.). 'The American theory proceeds upon the philosophical basis that all power comes from the people. Now, that is not the basis of the Australian Constitution at all. It does not assist in the construction of this Constitution': Transcript of Proceedings (6 May 1977, 222) (Aickin J.) in *Queensland v. Commonwealth* (1977) 16 A.L.R. 487. '[W]e must interpret the Constitution by the same rules as would guide us in the interpretation of any other Statute. . . .': *Deakin v. Webb* (1904) 1 C.L.R. 585, 630 (O'Connor J.); 'Our task is simply to interpret and apply the provisions of the Constitution as a statute of the Imperial Parliament. That does not mean that it is not a statute of a special kind. It is. It is the instrument of government for Australia.' *Victoria v. Commonwealth* (1971) 122 C.L.R. 353, 394-5 (Windeyer J.). But see cases cited *supra* n. 17. Some commentators argue that rules of statutory interpretation should not apply to the interpretation of a constitution. See, e.g., Alfange D., 'On Judicial Policymaking and Constitutional Change: Another look at the "Original Intent" Theory of Constitutional Interpretation' (1978) 5 *Hastings Constitutional Law Quarterly* 603, 618-9. Others, however, are more wedded to the use of such rules in constitutional adjudication. See, e.g., Berger R., ' "Government by Judiciary": Judge Gibbons' Argument *ad Hominem*' (1979) 59 *Boston University Law Review* 783, 805-6.

[29] See generally, Zines, *supra* n. 4; Lane, *supra* n. 4; Evans, *supra* n. 4; *McWhinney, supra* n. 5 at 76-95; Sawer G., *Australian Federalism in the Courts* (1967) especially at 52-75; Cooray L. J. M., *Conventions, The Australian Constitution and the Future*

For example, the validity of Commonwealth legislation

> is to be decided by the meaning of the relevant text of the Constitution having regard to the historical setting in which the Constitution was created and the terms and operation of the Act in respect of the subject matter which, upon that construction, is committed by the Constitution to the Parliament. The only true guide . . . is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole: and to find its meaning by legal reasoning.[30]

HISTORICAL ANALYSIS — FIDELITY TO THE FRAMERS

The use of historical materials[31] to determine the meaning of constitutional provisions relies upon the application to a constitution of 'traditional canons of interpretation' according to which 'the intention of the framers being unmistakably expressed, that intention is as good as written into the text'.[32] Whether the framers' intention should be equated with the text and held to be the constitution's meaning has been a subject of lengthy debate.[33]

(1979) 1-43; Galligan B., 'Legitimating Judicial Review: the Politics of Legalism' (1981) no. 8 *Journal of Australian Studies* 33; Blackshield A. R., 'Judicial Innovation as a Democratic Process' in *Future Questions in Australian Politics* (1979 Meredith Memorial Lectures) (1979) 35, 41-3. However 'it seems that many judges who emphasize the importance of legalism do not regard that method of approach as denying resort to broad social and political values they perceive in the Constitution': Zines, *supra* n. 4 at 290. Coper M., 'Book Review' (1976) 1 *University New South Wales Law Journal* 370.. As to statutory interpretation see, *Cooper Brooks (Wollongong) Pty Ltd v. Commissioner of Taxation, supra* n. 6; Section 15 AA Acts Interpretation Act 1901 (Cth) (as amended); Australia, Attorney-General's Department, *Another Look at Statutory Interpretation* (1982).

[30] *A.G. (Cth) ex rel. McKinlay v. Commonwealth, supra* n. 28 at 17 (Barwick C.J.). '[T]he Court . . . is saddled with the duty of interpreting the words of the Constitution, giving them their full weight without qualifications which are not inherent in the language of the Constitution itself': *Uebergang v. Australian Wheat Board, supra* n. 19 at 589 (Barwick C.J.). '[N]early all [Australian] judges' regard the *Engineers Case* (1920) 28 C.L.R. 129 'as the key stone of the arch of constitutional interpretation': Zines, *supra* n. 4 at 282. See also, Sawer, *supra* n. 29 at 52-75. The High Court does use material extraneous to the text as an aid to the interpretation of the constitution. *A.G. (Vic.) ex rel Black v. Commonwealth, supra* n. 17 at 157-8 (convention debates, historical material, U.S. Constitution and judicial decisions) (Barwick C.J.).

[31] See generally, Miller C., *The Supreme Court and the Uses of History* (1969) especially 211-8 (select bibliography); Kyer C. I., 'Has History a Role to Play in Constitutional Adjudication: Some Preliminary Considerations' (1981) 15 *Law Society Upper Canada Gazette* 135. See also, White G. E., 'Truth and Interpretation in Legal History' (1981) 79 *Michigan Law Review* 594. It should, however, always be recalled that '[u]nder the sheep's covering of history lies the lion's skin of philosophy': Freund P. A., *The Supreme Court of the United States: Its Business, Purposes, and Peformance* (1961) 77.

[32] Berger, *supra* n. 18 at 7 [citing, *inter alia, Hawaii v. Mankicki* (1903) 190 U.S. 197, 212 — 'A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law'.] Berger's 'central issue' is, 'given a *clearly discernible* intention, may the Court construe the [14th] Amendment in undeniable contradiction of that intention?': Berger R., 'The Scope of Judicial Review: An Ongoing Debate' (1979) 6 *Hastings Constitutional Law Quarterly* 527, 530 (emphasis in original).

[33] See *e.g.* Berger ,*supra* n. 18 at 363-72; Berger R., 'The Scope of Judicial Review and Walter Murphy' [1979] *Wisconsin Law Review* 341, 347-55; Berger R., 'Paul Brest's Brief for an Imperial Judiciary' (1981) 40 *Maryland Law Review* 1. Contrary views are set forth in Murphy W. F., 'Constitutional Interpretation: The Art of the Historian, Magician or Statesman?' (1978) 87 *Yale Law Journal* 1752-4, 1760-71;

This theory of constitutional interpretation necessitates a 'historical focus' to ascertain 'what did the framers mean to accomplish, what did the words they used mean to them'.[34] It is therefore critical to discover what was *'the'* original intention. Yet, even when there is resort to all available historical materials,[35] including convention and ratification debates, draft provisions and contemporaneous records,[36] conclusions concerning the original inten-

Brest P., 'The Misconceived Quest for the Original Understanding' (1980) 60 *Boston University Law Review* 204; Perry M. J., 'Book Review' (1978) 78 *Columbia Law Review* 685, 691-705. See generally, Silver I., 'Constitutional History and the Berger Court' (1978) 23 *New York Law School Review* 859; Bridwell R., 'The Federal Judiciary: America's Recently Liberated Minority' (1979) 30 *South Carolina Law Review* 467; Berger R., 'The Fourteenth Amendment: Light from the Fifteenth' (1979) 74 *Northwestern University Law Review* 311, 356-71; Berger R., 'The Role of the Supreme Court' (1980) 3 *University of Arkansas at Little Rock Law Journal* 1; Berger R., 'The Role of the Supreme Court in a Democratic Society' (1980) 26 *Villanova Law Review* 414; 'Symposium' (1979) 6 *Hastings Constitutional Law Quarterly* 403-635.

[34] Berger, *supra* n. 18 at 8.

[35] The High Court's use of rules relating to constitutional convention debates and draft Bills is, compared to the U.S. Supreme Court, very restrictive. See, *e.g., Seamen's Union of Australia v. Utah Development Co.* (1978) 22 A.L.R. 291, 307-9 (Stephen J.). Similarly with respect to legislative history. *Wacando v. Commonwealth and Queensland* (1981) 56 A.L.J.R. 16 ,25 (Mason J.). The High Court's *ex cathedra* pronouncements concerning more general history — *e.g., A.G. (Vic.) ex rel. Black v. Commonwealth, supra* n. 17 — leaves much to be desired. However, for some, '[i]t is possible to exaggerate the significance of the High Court's refusal . . . to refer to the vast bulk of the Constitution's *travaux préparatoires.* The American experience does not suggest that either judicial unanimity or historical accuracy is a necessary consequence of allowing such references': Finnis J. M., 'Separation of Powers in the Australian Constitution' (1967-70) 3 *Adelaide Law Review* 159, 176. But what are the consequences for judicial interpretation of either approach to the use of historical materials?

> English courts are often reproached for excessive attachment to the text and — deservedly, I think — for the way in which they altogether ignore the legislative history. The implication in the reproach is that the history would be less constraining than the text. We see [in Professor Berger's conclusions concerning the history of the 14th Amendment to the U.S. Constitution] that it can be even more restrictive. The thoughts of our ancestors, meticulously recorded, leave little scope for the imagination. English judges, who proceed by attributing their own thoughts to an abstract entity, 'Parliament', may have in the end greater freedom.

Devlin P., 'Judges, Government and Politics' (1978) 41 *Modern Law Review* 501, 503-4.

[36] There is, of course, the insurmountable problem of incomplete historical material. 'The hard truth is that we have no collection of documents that anyone can plausibly argue constitutes a full and accurate record of what the founders said at Philadelphia': Murphy, *supra* n. 33 at 1764. For similar difficulties with the 14th Amendment, see *ibid.* 1755-6. The Australian historical record is also incomplete. Not only are the successive draft Bills of the Constitution, see La Nauze, *supra* n. 24 at 289-91, not gathered together in a bound volume(s) but also account must be taken of Alfred Deakin's observation at the 1891 Constitutional Convention:

> There is much unstated in [the Debates], because the delegates to this Convention have practically lived together for six weeks in private as well as in public intercourse, and from the natural action and reaction of mind upon mind have been gradually shaping their thoughts upon this great question. The bill which we present is the result of a far more intricate, intellectual process than is exhibited in our debates; unless the atmosphere in which we have lived as well as worked is taken into consideration, the measure as it stands will not be fully understood.

Official Report of the National Australian Convention Debates (1891) 914. Professor La Nauze correctly concludes that '[w]hat happens overnight in conferences may be as important as what is said in debate': La Nauze, *supra* n. 24 at 44.

tion behind particular provisions frequently differ to a marked extent.[37] Similar conclusions are not even reached as to whether by using seemingly general and textually open ended phrases such as, 'due process' and 'equal protection', the original intention was nevertheless ascertainable and specific or rather was to allow, or perhaps encourage, interpretations varying from the particular meaning which those phrases held for the framers.[38]

Express provision of formal amendment procedures and implementation of an historical method of interpretation entails, to some extent,[39] acceptance of the proposition that the present generation is and should be bound by the framers' original intention. That intention and meaning prevails until altered or changed according to the manner envisaged and procedure provided for by the constitution. To do otherwise would be, it is argued, to render the exclusive formal amendment provisions otiose.[40]

SUBSTANTIVE THEORY — EVERYMAN'S CONSTITUTION

Constitutions are rarely, if ever, value free. Indeed the fundamental purpose is to select and elevate specified rights and values over others.[41]

[37] See, *e.g.*, Brown E. J., 'Book Review' (1954) 67 *Harvard Law Review* 1439; Berger R., 'Government by Judiciary: Some Countercriticism' (1978) 56 *Texas Law Review* 1125; Knowlton R. E., 'Book Review' (1978) 32 *Arkansas Law Review* 157; Berger R., 'The Fourteenth Amendment: Facts vs. Generalities' (1978) 32 *Arkansas Law Review* 280; Soifer A., 'Protecting Civil Rights: A Critique of Raoul Berger's History' (1979) 54 *New York University Law Review* 651; Berger R., 'Soifer to the Rescue of History' (1981) 32 *South Carolina Law Review* 427; Curtis M., 'The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger' (1980) 16 *Wake Forest Law Review* 45; Berger R., 'Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat' (1981) 42 *Ohio State Law Journal* 435; Fisher L., 'Raoul Berger on Public Law' (1978) 8 *Political Science Reviewer* 173; Berger R., 'A Political Scientist as Constitutional Lawyer: A Reply to Louis Fisher' (1980) 41 *Ohio State Law Journal* 147. See also *infra* n. 38.

[38] The debate and references are in Berger R., 'The Scope of Judicial Review: A Continuing Dialogue' (1980) 31 *South Carolina Law Review* 171, 183-93. Bridwell R., 'The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule?' (1980) 31 *South Carolina Law Review* 617; Berger R., 'A Comment on "Due Process of Law" ' (1980) 31 *South Carolina Law Review* 661. See also *supra* n. 33 and 37.

[39] The original intention may itself indicate that (judicial) interpreters are not to be confined to the framers' intentions and meanings. For example, Isaac Isaacs expounded:

> We are taking infinite trouble to express what we mean in this Constitution; but as in America so it will be here, that the *makers of the Constitution* were not merely the Conventions who sat, and the states who ratified their conclusions, but the Judges of the Supreme Court. . . . [T]he renowned Judges who have pronounced on the Constitution, have had just as much to do in shaping it as the men who sat in the original Conventions.

Official Record of the Debates of the Australasian Federal Convention (Third Session) (1898) i, 283 (emphasis added).

[40] Berger, *supra* n. 18 at 318. The 'original intention' should prevail because '[t]he sole and exclusive vehicle of change the Framers provided was the amendment process' of Article Five. *Ibid.* 363-4. Berger argues that the Framers did not, even in seemingly open-ended phrases such as 'due process' and 'equal protection', which for Berger's Framers have fixed and ascertainable meanings, intend 'to leave it "to succeeding generations . . . to rewrite the 'living' constitution anew". . . .' *Ibid.* [quoting from Miller A. S., 'An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis upon the Doctrine of Separation of Powers' (1973) 27 *Arkansas Law Review* 584, 595].

[41] The discussion of and decisions concerning, such choices is described in Farrand

That is, a constitution not only makes substantive value commitments, but also, by giving them supremacy,[42] endeavours to make certain decisions and decision-making processes respect and conform to those commitments — for example, a federal rather than a unitary system of government, equal State representation in the Senate and protection of private property.[43] In accordance with their constitutional status these rights and values merit special deference and protection.

Elaboration in a comprehensive manner of any particular theory of rights and values — either that of Herbert Spencer or John Rawls — occurs extremely infrequently, if at all, in constitutions. This, of course, has not prevented endeavours to extrapolate from and then read back into the constitution various theories or political philosophies.[44] Constitutional interpretation then proceeds in the light of and in accordance with the substantive values and characteristics of the constitution or particular provision.

Although nebulous, there are some constraints on personal freewheeling value imposition under the guise of 'interpretation'.

> Unelected judges sworn to uphold the Constitution are not empowered simply to impose their own catalogues of personal preferences on the rest of us. But . . . it does not follow that a judge is duty-bound to avoid all value choices or to escape the limits of a personal philosophy. On the contrary, the unavailability of any mechanistic formula for constitutional interpretation . . . entails the necessity of precisely such personal judicial choice. *To read* and enforce *the Constitution, one must embrace a political philosophy of its structure and aims.* Since the 'right' philosophy cannot be 'deduced' from any authoritative source, it follows that, at this ultimate level, there can be no escape from the demands of subjectivity.[45]

M., *The Framing of the Constitution of the United States* (1913) and La Nauze, *supra* n. 24. As to the substantive nature of constitutional provisions including those which appear to address 'procedural' concerns, see Tribe L. H., 'The Puzzling Persistence of Process — Based Constitutional Theories' (1980) 89 *Yale Law Journal* 1063.

[42] Article VI section 2 United States Constitution and Covering Clause 5 Australian Constitution.

[43] Article 1 section 8; 10th Amendment; Article 1 section 3; 5th Amendment United States Constitution. Ss. 51, 107, 7, 51(xxxi), 92 Australian Constitution. '[T]he Constitution may *appear* in large part to address the structure and arrangement of government . . . but the concerns that *underlie* and *explain* the structures and arrangements ordained by the Constitution are themselves undeniably substantive'. Tribe, *supra* n. 41 at 1066 n. 9 (emphasis in original).

[44] For reference to various constructs see Monaghan H. P., 'The Constitution Goes to Harvard' (1978) 13 *Harvard Civil Rights-Civil Liberties Law Review* 117, 118-20.

[45] Tribe L. H., *1979 Supplement to American Constitutional Law* (1979) 2-3 n. 7 (emphasis added). Indeed Professor Laurence Tribe's treatise-*American Consti tutional Law* (1978) is an attempt to formulate arguments and justifications for the imposition of preferred substantive values through *judicial* interpretation and adjudication. See generally, *supra* n. 10; Manning R. K., 'Book Review' (1978) 9 *Cumberland Law Review* 335; Nagel R. F., 'Book Review' (1979) 127 *University of Pennsylvania Law Review* 1174; Tushnet M. V., 'Dia-Tribe' (1980) 78 *Michigan Law Review* 694. Advancement of differing substantive values, under the guise of constitutional exegesis, also permeates Australian treatises. For example, contrast, Howard C., *Australian Federal Constitutional Law* (2nd ed. 1972) with Lane, *supra* n. 4. Professor Tribe endeavours to 'provide a coherent foundation for an active, continuing, and openly avowed effort to construct a more just constitutional order'. Such an effort is undertaken because, for Professor Tribe, and perhaps others,

> the morality of responsible scholarship points not at all to the classic formula of supposedly value-free detachment and allegedly unbiased description. Instead such

Such an approach, however, does not necessarily require policymaking to be assigned to the judiciary rather than, as is usual in a representative democracy, to elected officials. A distinction may be drawn between the meaning of the Constitution, the ascertainment of which is not within the sole province of any single person or institution, and judicial enforceability.[46]

PROCESS AND PARTICIPATION — A MATTER OF RULES AND PROCEDURE

The theory of constitutional adjudications and interpretation, advanced and elaborated by John Hart Ely, is particularly addressed to and for the use of the judiciary. It is an element of the 'process-perfecting view of constitutional law'[47] which advances the argument that

> contrary to the standard characterization of the [United States] Constitution as 'an enduring, but evolving statement of general values', . . . in fact the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large — with ensuring broad participation in the processes and distributions of government.[48]

> morality points to an avowal of the substantive beliefs and commitments that necessarily inform any account of constitutional arguments and conclusions. I am convinced that attempts to treat constitutional doctrine neutrally elide important questions and obscure available answers.

Tribe, *supra* n. 10 at iii, iv. At this juncture, there is an important question to be asked: what, if any, constitutional warrant is there which might permit non-elected and tenured judges to participate in such an enterprise? See generally *supra* n. 9. Any answer should at least be a significant, if not the predominant, factor in questions concerning the role and processes of the judiciary in constitutional decisionmaking. See generally *infra* n. 62.

[46] However, where the balance is struck may be a matter of dispute. Professor Tribe '[w]hile conceding the courts a less exclusive role as constitutional oracles' would cede to 'them a greater authority-and duty-to advance justice overtly. . . .' In advocating a more candidly creative role than conventional scholarship has accorded the courts' Professor Tribe sees himself 'as a proponent of more self awareness than of an altered balance of governmental power;' Tribe, *supra* n. 10 at iv.

[47] Tribe, *supra* n. 41 at 1064.

[48] Ely J. H., *Democracy and Distrust: A Theory of Judicial Review* (1980) 87 (footnotes omitted). See generally, Cox A., 'Book Review' (1981) 94 *Harvard Law Review* 700; Tushnet M. V., 'Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory' (1980) 89 *Yale Law Journal* 1037; Nowak J. E., 'Foreword: Evaluating the Work of the New Libertarian Supreme Court' (1980) 7 *Hastings Constitutional Law Quarterly* 263, 269-73; Murphy P. L., 'Book Review' (1980) 65 *Minnesota Law Review* 158; Gerety T., 'Book Review' (1980) 42 *University Pittsburgh Law Review* 35; Fleming J. E., 'A Critique of John Hart Ely's Quest for the Ultimate Constitutional Interpretivism of Representative Democracy' (1982) 80 *Michigan Law Review* 634; Murphy W. F., 'Constitutional Interpretation: Text, Values, and Processes' (1981) *Reviews in American History* 7; Leedes G. C., 'Book Review' (1981) 59 *North Carolina Law Review* 628; Estreicher S., 'Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture' (1981) 56 *New York University Law Review* 547; Laycock D., 'Taking Constitutions Seriously: A Theory of Judicial Review' (1981) 59 *Texas Law Review* 343; Levinson S., 'Judicial Review and the Problem of the Comprehensible Constitution' (1981) 59 *Texas Law Review* 395; 'Symposium: Judicial Review Versus Democracy' (1981) 42 *Ohio State Law Journal* 1-434; 'Symposium: Constitutional Adjudication and Democratic Theory' (1981) 56 *New York University Law Review* 259-582.

Given a constitution predominantly concerned with procedure and participation[49] the judiciary should confine its attention to matters of process. Of these two aspects, procedural fairness in individual cases and participation in the political process, the representation-reinforcing theory of judicial review addresses the latter. In interpretation of and adjudication under open-ended constitutional provisions, that theory insists that judicial review 'can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack'.[50] By limiting courts to maintaining and enforcing an open, fair and equal political process this theory endeavours to resolve the conflict between the power of judicial review exercised by unelected judges and the postulates of representative and majoritarian democracy.[51]

> In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognise commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[52]

To reinforce representative government, the function of the judiciary is to correct, along the lines required by the Constitution,[53] such process malfunctioning. This is achieved by judicial intervention, first 'to ensure that the political process — which is where particular substantive values *are* properly identified, weighed, and accommodated — is open to those of all viewpoints on something approaching an equal basis'.[54] Achieving such an

[49] This view of the United States Constitution is not held by all. See, *e.g.*, Tribe, *supra* n. 41; Conant M., 'Book Review' (1981) 34 *Vanderbilt Law Review* 233, 236-41; Lynch G. E., 'Book Review' (1980) 80 *Columbia Law Review* 857, 859-62. Professor Ely does not deny that the Constitution may have some provisions, albeit of minor importance, concerned with substantive values. Ely, *supra* n. 48 at 98-101.

[50] Ely, *supra* n. 48 at 181. Professor Ely examines and dismisses other possible theories of interpretation: Clause bound interpretivism, whereby regard is had to norms 'stated in or clearly implicit in the written constitution', is indefensible because constitutional provisions are too broad and open-ended. Non-Interpretivism, where the interpreter is to find (and define) fundamental values in such provisions, must inevitably end up constituting the interpreter (most often a court) as a legislative council of revision. *Ibid.* 11-72. For another solution see Cox, *supra* n. 48 at 714-5.

[51] For a criticism of Ely's theory of representation, see, O'Fallon J. M., 'Book Review' (1980) 68 *California Law Review* 1070, 1077-9.

[52] Ely, *supra* n. 48 at 103 (emphasis in original) (footnote omitted).

[53] Ely maintains that:

> The Constitution has . . . proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself — by structuring decision processes at all levels to try to ensure, first, that everyone's interests will be actually or virtually represented (usually both) at the point of substantive decision, and second, that the processes of individual application will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in theory.

Ibid. 100-1.

[54] *Ibid.* 74. For the view that even if the political process is open to all, judicial review remains available to restrict any infringement on constitutional rights, see,

open political process requires judicial attention to matters such as freedom of political speech and association, voting rights and legislative apportionment.

Second, in addition to individual participation, the judiciary can endeavour to ensure that the people's elected representatives in making decisions 'take into account the interests of all those their decisions affect'.[55] That is, the decision-making process itself is to be procedurally fair and equal.

This requirement flows from the ninth amendment, the due process, equal protection and privileges or immunities clauses of the fourteenth amendment to the United States Constitution. Professor Ely argues that

> it is inconsistent with constitutional norms to select people for unusual deprivation on the basis of race, religion, or politics, or even simply because the official doing the choosing doesn't like them. When such a principle of selection has been employed the system has malfunctioned. . . .[56]

To ascertain whether this selection process has occurred, courts must change from examination of the overt procedures to the 'psychology of decision' so as to flush out 'unconstitutional motivations'. If courts thereby discover 'official attempts to inflict inequality for its own sake — to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members' the legislation or resulting decision should be invalidated.[57]

The second, rather than the first, aspect of this representation-reinforcing theory of constitutional adjudication does not fit easily into the Australian constitutional framework. Without provisions such as those in the Fourteenth Amendment government decisions in Australia motivated by prejudice concerning minorities are not constitutionally suspect or infirm.[58]

Benedict M. L., 'To Secure These Rights: Rights, Democracy, and Judicial Review in the Anglo-American Constitutional Heritage' (1981) 42 *Ohio State Law Journal* 69, 78-85.

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[55] Ely, *supra* n. 48 at 100.

[56] *Ibid.* 137. Professor Tribe points out that this 'theme' of 'the value of protecting certain minorities from perennial defeat in the political area . . . was anticipated by John Marshall; it assumed a central role for Harlan Fiske Stone; it signally motivated Earl Warren; and it has been elaborated by numerous scholars . . .'. Tribe, *supra* n. 41 at 1072-3 (footnotes omitted). Professor Ely does note that

> the Constitution, the Equal Protection Clause in particular, cannot mean that everyone is entitled to equal treatment by every law. In fact much of the point of most laws is to sort people out for different treatment. . . . Neither can the Constitution coherently be interpreted as outlining some 'appropriate' distributional pattern against which actual allocations of hurts and benefits can be traced to see if they are constitutional. The constitutionality of most distributions thus cannot be determined simply by looking to see who ended up with what, but rather can be approached . . . only by attending to the process that brought about the distribution. . . .

Ely, *supra* n. 48 at 135-6.

[57] *Ibid.* 153. See also, O'Fallon, *supra* n. 51 at 1082-8 (unconstitutional motivation) 1084-8 (suspect minorities); Tribe, *supra* n. 41 at 1072-7 (which groups are to count as 'discrete and insular minorities'). Under such motivational analysis 'the very same governmental action can be constitutional or unconstitutional depending on why it was undertaken'. Ely, *supra* n. 48 at 137.

[58] *Cf. Ansett Transport Industries (Operations) Pty Ltd v. Wardley* (1980) 142 C.L.R. 237, 267 (Murphy J.) (query Commonwealth Parliament's power to 'unjusti-

There is more scope, albeit limited, for Australian courts to police the Commonwealth political and electoral process. As yet the High Court has not enunciated or adopted a representation-reinforcing interpretation in respect of seemingly relevant constitutional provisions.[59] The decisions to date, however, do not foreclose the possibility that this may occur.[60]

FUNCTIONS AND INSTITUTIONS — TAKING RIGHTS SERIOUSLY

Like Professor Ely's proposals the central tenets of Professor Choper's thesis[61] proffer solutions to 'the enduring problem of constitutional theory: can judicial review be reconciled with the fundamental presuppositions of democracy, with its emphasis on the majoritarian political process?'[62]

Such a reconciliation need not be attempted through the development of a body of principles as to '*how* the [Supreme] Court should interpret various provisions of the [United States] Constitution'.[63] Instead, Professor Choper, although conceding 'that the federal judiciary has supreme *power* to decide constitutional questions'[64] sets forth a theory of constitutional adjudication comprising four justiciability proposals which redefine the role of courts in the political process.[65]

fiably' discriminate on the basis of sex) with U.S. Supreme Court decisions on sex discrimination. Tribe, *supra* n. 10 at 1060-77 and *1979 Supplement* at 98-101. Can for example, state taxation of federal instrumentalities come within such analysis on the basis that the national population is not represented in the State legislature? See, *e.g., M'Culloch v. Maryland, supra* n. 15 at 435-6. Decisions based on race, sex and national origin may be suspect under the Racial Discrimination Act (1975) (Cth). See also, Article 26 of the *International Covenant on Civil and Political Rights* contained in Schedule 1 to the Human Rights Commission Act 1981 (Cth).

[59] For example, ss. 7, 24 and 57 Australian Constitution. As to State Constitutions see *e.g., Western Australia v. Wilsmore* (1982) 40 A.L.R. 213.

[60] See *e.g., A.G. (Cth) ex rel. McKinlay v. Commonwealth, supra* n. 28. See also, Hanks P. J., 'Parliamentarians and the Electorate' in Evans G. (ed.), *Labor and the Constitution 1972-1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* (1977) 166, 170-7; Brazil P., 'Commentaries' *ibid.* at 205-7; Coper M., 'Commentaries' *ibid.* at 209, 210-2; Zines L., 'The Double Dissolutions and Joint Sitting' *ibid.* 217.

[61] Choper J. H., *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980). See generally, McGowan C., 'Constitutional Adjudication: Deciding when to Decide' (1981) 79 *Michigan Law Review* 616; Sager L. G., 'Constitutional Triage' (1981) 81 *Columbia Law Review* 707. Levinson, *supra* n. 48; O'Brien D., 'Judicial Review and Constitutional Politics: Theory and Practice' (1981) 48 *University of Chicago Law Review* 1052.

[62] Monaghan H. P., 'Book Review' (1980) 94 *Harvard Law Review* 296, 297. On this question see generally, Bishin W. R., 'Judicial Review in Democratic Theory' (1977) 50 *South California Law Review* 1099. For an Australian perspective see Blackshield, *supra* n. 29 at 46-8.

[63] Choper, *supra* n. 61 at 1 (emphasis in original). This question Choper notes is surrounded by 'enormously complicated and profound issues . . .' *Ibid.*

[64] *Ibid.* 381 (emphasis in original). If one concedes to the judiciary this power, will, as a practical matter, the courts (or any branch of government) give up some or all of their power? To ask the Courts to do so is 'a heroic task'. Nowak J. E., 'Book Review' (1980) 68 *California Law Review* 1223, 1230.

[65] Implementation of Choper's four proposals —
(i) Individual Rights Proposal,
(ii) Federalism Proposal,

Justiciability proposals emerge from an examination of the question 'whether the [Supreme] Court should adjudicate certain constitutional issues'.[66] The answer depends upon an empirical and structural inquiry as to whether the political process adequately protects and promotes constitutional values and whether the Supreme Court diminishes its institutional resources in endeavouring to resolve constitutional disputes. Where this does not occur judicial review can and should be exercised.

The first justiciability proposal is that all individual civil rights and liberties issues be justiciable. The main role of the Court is seen to be the protection of civil liberties.[67]

> [T]he overriding virtue of and justification for vesting the Court with this awesome power [of judicial review] is to guard against governmental infringement of individual liberties secured by the Constitution.
>
> . . .
>
> [T]he experience of history strongly suggests that vesting the majority with the ultimate power of judgment, although far from being calamitous, would not sufficiently protect minority rights.
>
> . . .
>
> [T]he task of custodianship has been and should be assigned to a governing body that is insulated from political responsibility and unbeholden to self-absorbed and excited majoritarianism. The Court's aloofness from the political system and the Justices' lack of dependence for maintenance in office on the popularity of a

(iii) Separation of Powers Proposal,
(iv) Judicial Proposal —
may have the effect of limiting the quantitative use and exercise of the 'antimajoritarian judicial power'. *Ibid.* 1224.

[66] Choper, *supra* n. 61 at 1.

[67] Note, however, that historically this has *not* been the case. For example, Professor McCloskey has noted:

> [T]he [United States Supreme] Court has undertaken in these years [1941-1969] the task of creating a vast and almost wholly new body of constitutional jurisprudence in the field of civil rights. . . .
>
> The relative newness of civil rights as a constitutional issue is one of those obvious facts whose significance is easy to overlook. America has regarded itself as the land of the free since at least 1776, and the Constitution has been revered as the palladium of freedom since its inception. But although the literature of American democracy is rich in libertarian generalities, this rhetoric of individual rights has rarely been translated into concrete legislative prescriptions and judicial doctrines in the nineteenth or even in the early twentieth century.

McCloskey R. G., *The Modern Supreme Court* (1972) 4. See also Miller A. S., 'On Politics, Democracy and the First Amendment: A Commentary on *First National Bank v. Bellotti*' (1981) 38 *Washington & Lee Law Review* 21, 27-30; Rabban D. M., 'The First Amendment in Its Forgotten Years' (1981) 90 *Yale Law Journal* 514. For contrary views as to post 1969 Supreme Court civil rights decisions see Cox A., 'Federalism and Individual Rights under the Burger Court' (1978) 73 *Northwestern University Law Review* 1; Choper J. H., 'The Burger Court: Misperceptions Regarding Judicial Restraint and Insensitivity to Individual Rights' (1979) 30 *Syracuse Law Review* 767. In the United States there is a 'trend away from exclusive reliance on the federal Constitution to protect civil liberties'. Note, 'Private Abridgement of Speech and the State Constitutions' (1981) 90 *Yale Law Journal* 165 (footnote omitted). See generally, Brennan W. J., 'State Constitutions and the Protection of Individual Rights' (1977) 90 *Harvard Law Review* 489. Indeed, those libertarians who advocate judicial interpretation and enforcement of a written Bill of Rights and eulogize the Supreme Court's performance by considering only post-1954 Bill of Rights and 14th Amendments decisions, should not ignore the years 1791-1953. For a summary of the Supreme Court's 'interpretation[s] of constitutional provisions . . . [that] lead to disastrous results in deciding issues involving individual rights', see Nowak, *supra* n. 64 at 1228-30.

> particular ruling promise an objectivity that elected representatives are not — and should not be — as capable of achieving.[68]

This individual rights proposal appears to encompass all civil rights and groups or minorities without addressing the question whether some rights and minorities might not need or merit judicial defence against majoritarian political decisions.[69] Other questions also arise, for example, as to the correctness of the factual premises of this proposal.

> Currently, at least, [the majoritarian political] process is not insensitive to claims of individual rights and liberties. Quite the contrary. The vast bulk of rights and liberties possessed by the citizens of the United States are the product of that political process.[70]

The second justiciability proposal is that the judiciary should not decide constitutional questions concerning the ambit of the national government's powers. That should be a non-justiciable matter for final resolution by the political branches of the national government.[71] In the American federation, states and their interests are adequately represented and vindicated in the national political process. Even if such an assertion could be debated,[72] American constitutional law 'has emptied the concept [of federalism] of nearly all legal content and replaced it with a frank recognition of the legal hegemony of the national government'.[73]

The other element to this Federalism proposal is that courts should continue to decide issues of state encroachment onto national interests and powers. Justification for such judicial review is the unsatisfactory and insufficient representation of national interests in state government.[74]

The third justiciability proposal advocates that '[t]he federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-à-vis one another'.[75] The only exception to the relegation of decisions concerning these matters to other branches of

[68] Choper, *supra* n. 61 at 64, 65, 68.

[69] For elaboration, see, Nowak, *supra* n. 64 at 1225-6, 1228-30. See also *ibid.* 1226 (criticizing the absence of a clear definition of what are civil rights and what constitutes a minority).

[70] Monaghan, *supra* n. 62 at 310. Even if the judiciary is conceded an important role there also exist 'numerous other mechanisms for protecting against majoritarian tyranny' *ibid.* 309 n. 52.

[71] Choper, *supra* n. 61 at 175. For literature discussing whether judicial review is essential in a federal system, see, Freund, Sutherland, Howe and Brown, *supra* n. 12 at 17-8.

[72] For example, compare Choper, *supra* n. 61 at 176-93 with Kaden L. B., 'Politics, Money and State Sovereignty: The Judicial Role' (1979) 79 *Columbia Law Review* 847, 857-68. See also, Emy H. V., *The Politics of Australian Democracy: Fundamentals in Dispute* (2nd ed. 1978) 192-200.

[73] Monaghan H. P., 'The Burger Court and "Our Federalism"' (1980) 43 *Law & Contemporary Problems* 39. Even the Supreme Court's decision in *The National League of Cities v. Usery* (1976) 49 L. Ed 2d 245 'increasingly appears to be a constitutional sport rather than the wellspring of significant additional [constitutional] restraints on the national government'. Monaghan, *supra* n. 62 at 300 (footnote omitted). But see, Benedict, *supra* n. 54 at 74-5.

[74] Choper, *supra* n. 61 at 207. See also, *supra* n. 58.

[75] Choper, *supra* n. 61 at 263.

the national government is judicial resolution of a legislative executive conflict which also involves civil rights issues.[76]

A basic objection to this separation of powers proposal is the likelihood that it 'could significantly shift political power by bestowing the advantage of inertia on presidential policy determinations'. The judiciary may well 'augment presidential power by a nonjusticiability doctrine that in effect validates virtually every claim of inherent [constitutional] presidential authority'.[77]

The fourth justiciability proposal requires courts to continue to decide the ambit of their own judicial power.[78] The practical reason for this judicial proposal is to prevent other branches of government interfering with judicial resolution of individual civil rights and liberties issues.

Australian implementation of these proposals may have a somewhat different effect than what may occur in the United States. In the absence of an express[79] Bill of Rights in the Commonwealth Constitution[80] the Individual Rights proposal can hardly be expected to assume major and overriding operational importance as a method of constitutional adjudication.

As the Commonwealth government's constitutional hegemony is not as complete as in the United States, adoption of the Federalism proposal would currently require the High Court to forego more constitutional decision-making than the United States Supreme Court. Determination of the limits of Commonwealth legislative power remains a prominent feature of judicial decision-making.

Given the concept of ministerial responsibility,[81] implementation in Australia of the Separation of Powers proposal may not have a significant impact on the distribution of constitutional and political power between the legislative and executive branches of the Commonwealth government.[82]

[76] *Ibid.* 326-30, 361.

[77] Monaghan, *supra* n. 62 at 305, 306. See also, Nowak, *supra* n. 64 at 1232-4.

[78] Choper, *supra* n. 61 at 382-3.

[79] Note, however, Murphy J.'s 'implied' constitutional rights and liberties. See, *e.g., Ansett Transport Industries (Operations) Pty Ltd v. Wardley, supra* n. 58 at 267 (sex discrimination); *Seamen's Union of Australia v. Utah Development Co., supra* n. 35 at 157 (serfdom); *A.G. (Cth) ex rel. McKinlay v. Commonwealth, supra* n. 28 at 64-75 (voting rights); *McGraw-Hinds (Aust.) Pty Ltd v. Smith* (1979) 24 A.L.R. 175, 199-200 (slavery, serfdom, freedom of movement and communication) *Sillery v. R.* (1981) 35 A.L.R. 227, 234 (cruel and unusual punishment). *Uebergang v. Australian Wheat Board, supra* n. 19 at 596-7 (freedom of travel and communication and freedom of speech and assembly).

[80] See, however, ss. 24, 25, 41, 51(xxxi), 80, 92, 116, 117 Australian Constitution.

[81] Note s. 64 Australian Constitution.

[82] Consider, however, the High Court's role in possible disputes concerning the Governor-General's actions under section 57 and disputes arising from a 'November 1975' incident. See generally, Sawer G., *Federation Under Strain: Australia 1972-1975* (1977) especially at 57-8, 148-51; Howard C. and Saunders C., 'The Blocking of the Budget and Dismissal of the Government' in *Labor and the Constitution 1972-1975, supra* n. 60 at 251, 272-83; Zines, *supra* n. 60 at 236-7; *Wakely v. Lackey* (1880) 1 (N.S.W.) L.R. 274 especially at 282-3, 285, 286; *The State of Victoria v. Commonwealth* (1975) 134 C.L.R. 338, 404-5 (Jacobs J.); Tribe, *supra* n. 10 at 194-8; *Re Toohey; Ex parte Northern Land Council* (1982) 38 A.L.R. 439; Lindell G. J., *Justiciability of Political Questions Under the Australian and United States Constitutions* (1972) (LL.M. thesis Adelaide Law School) especially at 484-559.

Whatever might be the effect of any such proposals in the Australian or United States constitutional system their examination 'provides a valuable corrective for the myopia of those who see judicial decisions as the only possible course of . . . constitutional law'[83] and only mechanism for resolving constitutional disputes.

CONCLUSION

The foregoing is not an exhaustive list of theories of constitutional interpretation and adjudication. For example, theories and judicial decisions based on neutral principles, reasoned elaboration and structural relationships between and within governments, can also be advanced.[84]

No one theory, however, can stand alone. A mixture or blending of various elements of each may be required in an endeavour to address questions such as — what is the justification, in a representative democracy, for the judicial power to declare legislation unconstitutional? What is the proper method of resolving constitutional disputes? What standards should guide the decisionmaker? Recurrence to such first principles and fundamental issues is always necessary and may well be overdue in Australian constitutional law.

[83] Monaghan, *supra* n. 62 at 298.

[84] See, *e.g.*, Wechsler H., 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harvard Law Review* 1, reprinted in Wechsler H., *Principles, Politics and Fundamental Law: Selected Essays* (1961) 3; Greenawalt K., 'The Enduring Significance of Neutral Principles' (1978) 78 *Columbia Law Review* 982; Miller A. S., *The Supreme Court: Myth and Reality* (1978) 51-87. See, *e.g.*, Hart H. and Sacks A., *The Legal Process: Basic Problems in the Making and Application of Law* 161-71 (tentative edition 1958); White G. E., 'The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change' (1973) 59 *Virginia Law Review* 279, reprinted in White G. E., *Patterns of American Legal Thought* (1978) 136. See, *e.g.*, Black C., *Structure and Relationship in Constitutional Law* (1969); Bobbitt, *supra* n. 4 at 721-5; cases cited in *McGraw-Hinds (Aust.) Pty Ltd v. Smith, supra* n. 79 at 198-200. Mention should also be made of seven forthcoming works. Levinson S., 'Law as Literature' (to be published in the *Texas Law Review*); Fiss O., 'Objectivity and Interpretation' (to be published in 34 *Stanford Law Review*); Fleming J. E., *Toward the Ultimate Interpretivism of Constitutional Democracy* (Ph.D. dissertation Princeton University); Perry M. J., *The Constitution, The Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (1982) (to be published by Yale University Press); Murphy W. F., *The Art of Constitutional Interpretation* (tentative title); Brest P. and Levinson S., *Processes of Constitutional Decisionmaking: Cases and Materials* (2nd ed. 1982); Bobbitt P., *Constitutional Fate* (1982).

** Since the completion of this article, the following papers have been published: Dimond P. R., 'Strict Construction and Judicial Review of Racial Discrimination under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds' (1982) 80 *Michigan Law Review* 462; Fickle S. C., 'The Dawn's Early Light: The Contributions of John Hart Ely to Constitutional Theory' (1981) 56 *Indiana Law Journal* 637; Clark R. H., 'A New Theory of Judicial Review: *A Critical Analysis of John Hart Ely's* Democracy and Distrust' (1981) 11 *Capital University Law Review* 33; Lupu I. C., 'Choosing Heroes Carefully' (1980) 15 *Harvard Civil Rights-Civil Liberties Law Review* 779; Dunne G. T., 'The Straight and Narrow Path' (1982) 80 *Michigan Law Review* 652; Kaufman A. L., 'Book Review' (1981) 9 *Hofstra Law Review* 1111; Veron J. M., 'Book Review' (1981) 56 *Tulane Law Review* 447; Merritt G. S., 'Book Review' (1981) 6 *University of Dayton Law Review* 353; Hovekamp H., 'The Proud Pre-eminence' (1981) 8 *Hastings Constitutional Law Quarterly* 429; Saphire R. B.,

'Book Review' (1981) 6 *University of Dayton Law Review* 359; Stephenson D. G., 'Recharting the Course: Judicial Review in the 1980's' (1981) 26 *New York Law School Law Review* 943; Ball M. S., 'Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law' (1981) 59 *Texas Law Review* 787; Tushnet M. V., 'Deviant Science in Constitutional Law' (1981) 59 *Texas Law Review* 815; Kurland P. B., 'Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What The Law Is" ' (1981) 23 *Arizona Law Review* 581; Grano J. D., 'Judicial Review and a Written Constitution in a Democratic Society' (1981) 28 *Wayne Law Review* 1; Konefsky A. S., 'Men of Great and Little Faith: Generations of Constitutional Scholars' (1981) 30 *Buffalo Law Review* 365, especially at 381-3.