AFTER LITERALISM, WHAT?

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[*In the previous issue of the M.U.L.R., the companion piece of this article traced the rise and the beginning of the fall of constitutional literalism in Australia. This article deals in detail with the two divergent methodologies concurrently challenging literalism for dominance in the field of constitutional interpretation. These are referred to as 'progressivism' and 'intentionalism'. The rationale and articulation of each methodology is examined, and the implication of their adoption for the future direction of constitutional interpretation in Australia considered. An attempt is made to synthesize elements of literalism, progressivism and intentionalism into a single, principled methodology.*]

It was suggested in the companion article[1] to this piece that there are presently two incipient challenges to literalism as the orthodoxy of constitutional interpretation in Australia. These were labelled 'progressivism' and 'intentionalism'. What is attempted in this article is an account of the emergence of these two challenges; an explanation of their essential hostility to literalism; an analysis of the implications which the triumph of either would hold for the future direction of Australian constitutional interpretation; and a consideration of whether it would be possible to synthesize elements of all these competing interpretative approaches — progressivism, intentionalism and literalism — into a single, principled methodology. It should be appreciated that the challenges to literalism here identified as 'progressivism' and 'intentionalism' are currently more emergent tendencies than fully articulated positions, and that they are consequently difficult to isolate and describe with any great degree of precision.

PROGRESSIVISM

The term 'progressivism' has been chosen to describe an approach to constitutional interpretation which maintains that provisions should be so interpreted as to give them the meaning most consonant with the recognition and satisfaction of the needs of contemporary Australian society. Of course, numerous variant formulations could be given, but the central idea — that the Constitution is to be interpreted 'progressively', that is, in accordance with what the interpreter believes to be the current demands of a dynamically developing Australian society — remains constant. A crucial component of a progressivist approach to constitutional interpretation in Australia will ordinarily be a belief that much of the language of the Constitution is profoundly and generally ambiguous, and therefore open to

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1 Craven, G., 'Cracks in the Facade of Literalism: Is There an Engineer in the House?' (1992) 18 M.U.L.R. 540.

moulding in accordance with this or that progressive agenda without doing actual violence to the text.[2]

A progressivist will thus see one of the most basic responsibilities of the High Court as being to keep the Constitution 'up to date'. Of course, it may be accepted as a virtual truism that one dynamic of any system of constitutional interpretation must be a desire to ensure that the constitution in question does not become hopelessly out of touch with the society to which it relates, even if this dynamic is not always explicitly acknowledged by those who interpret the document. The important issue is more one of the extent to which such a concern becomes an overtly controlling principle of constitutional interpretation — at which point one may be said to have reached progressivism — than whether it has any influence at all.

Partly on this basis, that there is always a progressivist element in constitutional interpretation, it might be argued that there is nothing particularly 'new' about the progressivism considered in this article. For example, one could point to such statements of judicial realpolitik as the much-quoted *dictum* of Windeyer J. in *Victoria v. Commonwealth*,[3] to the effect that the decision in *Engineers* itself simply involved reading the Constitution in a 'new light', a light shed by political and social developments which took place in Australia in the years since Federation. But such overt articulations of what could be regarded as something approaching a progressivist position[4] have hitherto been relatively rare.[5] On a more modest but also more pervasive level, it could be suggested that the High Court's time-honoured distinction between the connotation and denotation of terms used in the Constitution — the connotation of words remains fixed as in 1900, but the denotation may change over time in light of altered circumstances[6] — contains a built-in mechanism by which the Constitution may be brought progressively into line with the changes wrought by time.

The difference here is partly one of degree, though none the less important for that. It is also a matter of articulation and acknowledgement. The old connotation-denotation distinction was adapted for use in the literalist tradition of *Engineers*. It was entirely consistent with the notion that the words of the Constitution had a determinate, readily ascertainable and literal meaning. It simply posited that an aspect of that meaning — the denotation — could vary over time: but meaning was still to be deduced by

2 The exact relationship between the text and progressivism is considered below; *infra* 881-2.

3 (1971) 122 C.L.R. 353, 396.

4 It is in any event far from clear that Windeyer J. was intending to endorse anything more than the particular interpretative techniques adopted in *Engineers*.

5 Perhaps the clearest application of a progressivist approach in an actual decision of the Court is by Mason J. in *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168, 224-5. A very clear articulation of progressivism appears in Mason, Sir Anthony, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, especially 22-3.

6 As to which see *e.g.* Zines, L., *The High Court and the Constitution* (2nd ed. 1987) 16-7; Coper, M., *Encounters with the Australian Constitution* (1987) 405-6; Sawer, G., *Australian Federalism in the Courts* (1967) 95-6.

a literal construction of the terms used. Moreover, at least in theory, the application of the connotation-denotation distinction was entirely unconnected with any desire consciously to 'up-date' the Constitution in line with perceived changes in the Australian polity, although its potential for covert use to such an end is obvious enough, and at one extremity of the scale, it may be difficult to determine where a free-wheeling use of this concept ends, and progressivism begins.[7]

That being acknowledged, the two are essentially distinct as a matter of interpretative principle. A judge applying the old connotation-denotation distinction is operating within the usual literalist construct, with all its overtones of textual conclusiveness and determinacy; is heavily constrained by the text, in the sense that he or she cannot go beyond the denotation, whatever that has come to be; and is unconcerned by the policy results of any particular interpretation arrived at. A progressivist interpreter, by way of contrast, will tend to see the text merely as a loosely-structured set of instructions expressed in varying degrees of ambiguity, to be consciously moulded in accordance with the needs of contemporary society.

As suggested above, there is also a significant difference in terms of articulation between the connotation-denotation distinction — even where used as a covert vehicle for progressivism — and progressivism itself. Ultimately, to whatever end it is used, an application of the connotation-denotation principle will have to be justified in terms of traditional theories of textual construction. Its ability to appeal to wider policy considerations is inherently limited. In the case of progressivism, a judge so-minded is able to reason far more independently of the text on the basis of policy considerations alone. Again, the difference may be one of degree, but of a significant degree. At bottom, it is the difference between a judge saying 'At the present time, the term means this', and 'Within a wide spectrum of competing possible meanings, I have chosen this, because it will produce the best societal results'.

In the United States, progressivism has long been a recognized approach to constitutional interpretation. It has in fact been advanced in a variety of forms, some extreme, which have provoked correspondingly extreme reactions. Thus, some American scholars have asserted not merely that the text of the United States Constitution should be *interpreted* progressively, but appear to be moving towards the position that the text itself is essentially devoid of moral or legal authority, and that the Supreme Court is thus entitled to mould the constitutional dispositions of the state more or less freely in accordance with its own 'progressive' values.[8] To this extent, progressivism in the United States can be non-textual in character, and the

7 A case in point being elements of the reasoning of the majority in *Commonwealth v. Tasmania* ('the *Dams* case') (1983) 158 C.L.R. 1 (see *e.g.* at 228-30 *per* Mason J.).

8 One has in mind here the work of such theorists as Laurence Tribe (*e.g. Constitutional Choices* (1985)), and Mark Tushnet (*e.g. Red, White and Blue: A Critical Assessment of Constitutional Law* (1988); 'Critical Legal Studies and Constitutional Law: An Essay in Deconstruction' (1984) 36 *Stanford Law Review* 623).

Constitution merely the clay of judicial choice. Other American progressivists are gentler with the text, and more closely approach the resolution of ambiguity model outlined above, although even these are inclined to move far enough away from the actual words of the Constitution as to nonplus the Australian constitutionalist.[9] In any event, it is unarguable that much of the United States Constitution, and particularly the Bill of Rights, has been so moulded by the activism of progressivist judges as to bear only the most tenuous connection with the relevant text. The famous case of *Roe v. Wade*[10] is an apt illustration of this process, which has elicited thundering denunciations from such conservative constitutional theorists as Bork[11] and Berger.[12]

It may be acknowledged at this point that any Australian version of progressivism would necessarily be weaker than its American counterpart. There are at least two reasons for this. First, the Australian Constitution does not contain a Bill of Rights composed largely of almost infinitely vague and elastic provisions, which excite passionate political and social controversy in many of their applications. Thus, both the opportunity and the temptation to engage in a wholesale re-working of the text is diminished. Secondly, the extreme version of American progressivism noted above, which actually denies the binding authority of the text, is simply too antithetical to too many of Australia's constitutional assumptions and judicial attitudes to seriously take root. Whatever other arguments may excite Australian constitutional law and theory, it is a given that the text is authoritative, whatever that text may mean. Controversy arises not over the supremacy of the Constitution as such, but primarily over the instrumental means by which its meaning is to be ascertained. To assert that in constitutional cases the High Court is entirely free to move in whatever direction it thinks best would be to maintain a truly revolutionary proposition, which would fly in the face of accepted notions of democracy, historical continuity, rule of law and parliamentary supremacy, to name but four of Australia's leading constitutional icons.

The net effect of all this is that any Australian school of constitutional progressivism will necessarily start from the position that the Constitution is supreme, but will go on to stress the open-ended nature of many of its terms, and the corresponding necessity that they be understood in light of constantly changing circumstances. Such views will most likely be gathered together under the rubric of the proposition that the Constitution is a deliberately vague document, intended to be moulded and adapted over the course of time by policy-directed judicial decision. To this extent, Australian progressivism will be an interpretative progressivism, rather than one which proceeds largely independently of the constitutional text.

As stated above, progressivism is presently less a fully articulated school

9 See *e.g.* the work of Bickel, A., *The Least Dangerous Branch* (1962) and Ely, J., *Democracy and Distrust: A Theory of Judicial Review* (1980).
10 410 U.S. 113 (1973).
11 See generally Bork, R., *The Tempting of America: The Political Seduction of the Law* (1990).
12 *E.g.* Berger, R., *Federalism: The Founders' Design* (1987).

of thought on the High Court than an emergent tendency. Nevertheless, keeping in mind some of the factors identified in the companion piece to this article as being particularly conducive to its evolution,[13] it is possible to discern its first stirrings. Interestingly, those judges who are clearly most tempted to move in a progressivist direction have so far been more inclined to indulge this predilection in their extra-curial writings than in their judicial pronouncements.

Probably the closest approach to the articulation of a consciously progressivist interpretative methodology is comprised in the 1986 article of the present Chief-Justice, Sir Anthony Mason.[14] This immensely interesting piece, although containing comforting references to more traditional interpretative techniques, including the connotation-denotation distinction, adopts an essentially progressivist view of the High Court's task of constitutional interpretation, and is in tone and flavour entirely sympathetic to such a methodology. Sir Anthony's central thesis, developed specifically in the context of the federal division of powers, is classically progressivist.[15]

To him, the Constitution is not a monolithic block of determinate meanings. On the contrary, it is a comparatively loosely structured document, to be 'dynamically' adapted by the Court to changing circumstances. While the text is supreme, the understanding of that text is volatile, and changeable in the hands of a Court responsive to current problems and events. The duty of the Court to keep the Constitution 'up to date' is reinforced by the 'cumbersome' nature of the amendment process.[16] The theme of a constitution loosely formulated to allow for judicial adaptation is a crucial one: the Constitution is a document 'framed in general terms to accommodate the changing course of events, so that the courts interpreting them must take account of community values'.[17] Naturally, it contemplates 'a flexible balance of powers'.[18] The critical passage is as follows:

> The problem is that the words of the Constitution have to be applied to conditions and circumstances that could not have been foreseen by its authors. It follows that exploration of the meaning of the language of the Constitution at the time of its adoption and the intentions of the authors have a limited value in resolving current issues. Accordingly, there is a natural tendency to read the Constitution in the light of the conditions, circumstances and values of our own time, instead of freezing its provisions within the restricted horizons of a bygone era. *Viewed in this way, the Constitution is not so much a detailed blueprint as a set of principles designed as a broad framework for national government.*[19]

The basic message to be derived is thus that far from being a raft of determinate literal meanings in the tradition of *Engineers*, the Constitution is highly indeterminate in content, and that the particular meaning to be

13 See Craven, 'Cracks in the Facade of Literalism', *supra* n. 1.

14 Mason, 'The Role of a Constitutional Court in a Federation', *supra* n. 5. See also Mason, Sir Anthony, 'Future Directions in Australian Law' (1987-8) 13 *Monash University Law Review* 149, especially 155-63.

15 See generally Mason, 'The Role of a Constitutional Court in a Federation', *supra* n. 5, 22-3.

16 *Ibid.* 22.

17 *Ibid.* 5.

18 *Ibid.* 23.

19 *Ibid.* 23 (emphasis supplied).

ascribed to given words will be largely (within broad textual limits) a policy question, to be answered according to the exigencies of the times.

Of course, Sir Anthony is only one judge, but it is interesting to note what are essentially similar stirrings on the part of his brethren. Thus, Justice McHugh has adopted — admittedly in a non-constitutional context — a view of judicial functions broadly sympathetic to the general tenor of policy-based activism which lies at the heart of the progressivist writing of the present Chief Justice. In 'The Law-making Function of the Judicial Process',[20] Justice McHugh argues strongly for an increased judicial activism in light of the need to adapt Australian law to an unprecedented degree of social change.[21] Responding to the usual charge levelled against judicial activism, namely, that it is undemocratic, Justice McHugh trenchantly responds:

> In certain situations, invoking democratic rhetoric to legitimise the refusal to deliver justice is itself undemocratic, particularly when legislative reform is unlikely. When a legislature fails to recognize and address a problem of law reform, the use of democratic rhetoric to deprive the courts of the opportunity to contribute to the development of the law and the doing of justice is highly questionable. The courts, as much as the legislatures, are in continuous contact with the concrete needs of the community.[22]

As stated, these views were not formulated in the specific context of constitutional interpretation, but it is difficult to see why they could not be so applied. Indeed, given that it is arguably the Constitution above all other legislation which should be responsive to changing social needs; that the Constitution is the legal document in Australia most difficult to amend; and that the record of the political process as a fermenter of constitutional change has been woeful, it would appear on the surface that there is no reason why Justice McHugh would express himself less forcefully in relation to constitutional interpretation than in connection with any other aspect of judicial decision-making.

Instances of overt progressivism are rather rarer in the cases than in the extra-curial writings. This is partly because progressivism can be difficult to discern amidst the application of other, more staid judicial techniques: for example, the use of the connotation-denotation distinction for the purpose of arguing that the denotation of a word has changed expansively since 1900;[23] or the identification of an 'evident' purpose behind a particular constitutional provision, which just happens to produce the social or other results desired by the judge in question.[24] Nevertheless, it is certainly true that the influence exerted by the perceived desirability of particular policy results is readily traceable in the reasoning of a number of judges over the past ten years, and emerges most clearly in some of the cases relating to

20 (1988) 62 *Australian Law Journal* 15, 116.
21 *Ibid.* 116.
22 *Ibid.* 123-4.
23 *E.g.* the *Dams* case, *supra* n. 7, 228-30 *per* Brennan J.
24 One might suspect the operation of such considerations, for example, in relation to the interpretation of section 90: see *e.g. Hematite Petroleum Pty Ltd v. Victoria* (1983) 151 C.L.R. 599, 630-2 *per* Mason J., 660-2 *per* Deane J.

Commonwealth powers with respect to external affairs[25] and corporations,[26] as well as in certain decisions concerning the Commonwealth's exclusive power to impose duties of excise.[27]

Perhaps the clearest instance of a judge adopting a progressivist approach is (not surprisingly) that of Sir Anthony Mason in *Koowarta v. Bjelke-Petersen*.[28] In that case, his Honour clearly regarded the suggested policy advantages of a broad Commonwealth power of treaty-implementation as being highly relevant to the interpretation of the external affairs power contained in section 51(29). Thus, he observed of the view that Commonwealth legislative power was not so extensive, and that effective treaty-implementation would in many instances depend on legislative action by the States:

> The ramifications of such a fragmentation of the decision-making process as it affects the assumption and implementation by Australia of its international obligations are altogether too disturbing to contemplate. Such a division of responsibility between the Commonwealth and each of the States would have been a certain recipe for indecision and confusion, seriously weakening Australia's stance and standing in international affairs.[29]

As Chief Justice, Sir Anthony was subsequently to cite the decision in *Koowarta* as supporting the proposition that the 'recent interpretations of the external affairs power are based to a significant extent on policy arguments'.[30]

It is important when contemplating these tentative moves towards an overtly progressive interpretation of the Constitution both to keep in mind the forces prompting such moves, and to understand that these forces are only likely to increase in strength with time. The forces in question were identified and considered in detail in a connected article,[31] but a reiteration of some few of the more important factors will not go astray. Among the forces operating upon the High Court so as to produce an atmosphere sympathetic to the adoption of progressivism are a diminution of faith in the certainty of language; an increasing general awareness of and acceptance by the courts themselves of their own policy role; the perceived failure of the constitutional amendment process as a means of reflecting social change; and the potential of progressivism to facilitate the Court's entry into new fields of judicial endeavour in the interpretation of the Constitution. Each of these forces will continue to operate on the High Court into the foreseeable future, if anything with increasing vigour.

It is also appropriate at this point to stress the essential antipathy between literalism and progressivism. This lies in the fact that progressivism typically rejects any concept of the 'natural' or 'literal' meaning of the text in favour

25 *E.g. Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168; the *Dams* case, *supra* n. 7.
26 *E.g. Actors and Announcers' Equity Association v. Fontana Films Pty Ltd* (1982) 150 C.L.R. 169; *State Superannuation Board v. Trade Practices Commission* (1982) 150 C.L.R. 282; the *Dams* case, *supra* n. 7.
27 *E.g. Hematite Petroleum Pty Ltd v. Victoria* (1983) 151 C.L.R. 599.
28 (1982) 153 C.L.R. 168.
29 *Ibid.* 225.
30 Mason, 'Future Directions in Australian Law', *supra* n. 14, 158.
31 See Craven, 'Cracks in the Facade of Literalism', *supra* n. 1.

of a general perception of ambiguity — or at least of a range of possible meanings — within which what are basically policy perceptions of current social needs will be deployed in order to arrive at a desirable interpretation. The concept of a baldly determinative, literally-interpreted text is put aside in favour of a far looser, socially responsive style of interpretation. As interpretative methodologies, in both theory and flavour, literalism and progressivism are highly antagonistic.

Of course, it would be possible to argue, especially in the crucial context of the federal division of powers, that differences of interpretative theory matter less than an identity between chosen ends and practical results, and that the adoption of a progressivist approach would simply involve an overt articulation of precisely the same policy considerations that have always lain behind *Engineers*-style literalism, namely, those relating to the general desirability of enhanced central power. There is some truth in this point, but it should not be overplayed. In the first place, the profound difference in terms of interpretative theory between a literalist and a progressivist approach cannot lightly be dismissed: the adoption of progressivism by the Court would involve a major departure from past modes of constitutional reasoning. Secondly, the overt articulation of policy arguments would produce not only a totally different constitutional 'style' on the High Court, but would also impose new burdens upon it (the relevant policy arguments would need to be clearly thought out and presented in a convincing manner), as well as exposing the Court to all the usual and well-rehearsed dangers which attend a judicial body adrift on the sea of policy.[32] Finally, as has been suggested, literalism is largely unable to service a policy agenda much beyond the centralization of power, whereas progressivism has at least the potential to carry the Court into new and exciting areas such as the implication of fundamental human rights.[33]

This is not to say that there can be absolutely no point of intersection between literalism and progressivism, or at least between textualism and progressivism. As has been noted, the more extreme forms of American progressivism which virtually negate the text could find no place in the Australian constitutional tradition: the text, once understood, must be accorded primacy. Thus, even the most committed progressivist Australian judge, if faced with an entirely unambiguous piece of constitutional language, would acknowledge him or herself bound, and at this point progressivism and textualism may be regarded as being in uneasy equilibrium. But the concept of ambiguity is a seductive one. Once it is accepted as a matter of general constitutional approach that the terms of the Constitution are typically ambiguous, and that when found to be ambiguous are to be interpreted in such a way as to fulfil the current social needs of the nation,

32 *E.g.* Stephen, Sir Ninian, 'Southey Memorial Lecture 1981: Judicial Independence: A Fragile Bastion' (1982) 13 M.U.L.R. 334.

33 See Craven, 'Cracks in the Facade of Literalism', *supra* n. 1. See also *Leeth v. The Commonwealth* (1992) 174 C.L.R. 455; *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 66 A.L.J.R. 695; *Nationwide News Pty Ltd v. Wills* (1992) 66 A.L.J.R. 658.

the temptation to discern the necessary degree of ambiguity will frequently be irresistible, while the opportunities to do so will be immense. Thus, the idea that literalism and progressivism are ultimately consistent because the latter will only be brought into play in the exceptional case of ambiguity is essentially a fool's hope: once the Constitution goes from being something approximating a 'blueprint' to something approaching 'general principles', ambiguity becomes the rule rather than the exception, and the field of operation accorded to the progressivist judge is wide indeed.

INTENTIONALISM

The second current challenge to literalism has been designated in this article as 'intentionalism'. Other names could have been chosen, notably 'originalism', but this has been rejected on the grounds that it carries with it connotations derived from American constitutional jurisprudence which are not necessary components in any Australian debate.[34]

The central element of an intentionalist approach to constitutional interpretation is reasonably obvious: it posits that the overriding duty of the Court is to give effect to the intentions of those who formulated the Constitution. The search for this sacred intention is absolute, and thus not to be gainsaid by reference to other considerations, including technical rules of legal construction. Were one to identify the underpinning rationale of intentionalism, it would undoubtedly be found to lie in a vision of democratic principle. The Australian intentionalist would argue that the Constitution, having been generated through a process which accorded with principles of representative democracy,[35] and popularly ratified at referenda,[36] is to be faithfully applied by the courts in fulfilment of the intentions of the representatives of the colonial populations who framed it. The High Court is, so far as possible, a mere conduit of meaning to the minds of the Founding Fathers, the persons in whom the democratic authority for constitution building was originally located.

Even more than progressivism, elements of intentionalism have always been present in Australian constitutional law.[37] At a very basic level, our constitutional jurisprudence is replete with formalistic references to the 'intention' and 'purpose' behind particular provisions. More importantly, even the dominant literalism of *Engineers* is ultimately based upon the assertion that it provides the best means of divining 'the intention'.[38] Thus,

34 For a general account of intentionalism in Australian constitutional law see Craven, G., 'Original Intent and the Australian Constitution — Coming Soon to a Court Near You?' (1990) 1 *Public Law Review* 166. See also Dawson, Sir Daryl, 'Intention and the Constitution — Whose Intent?' (1990) 6 *Australian Bar Review* 93.

35 The Constitutional Conventions of the 1890s were popularly elected: see Quick, J. and Garran, R., *The Annotated Constitution of the Australian Commonwealth* (1901) 163-5; Craven, 'Original Intent and the Australian Constitution — Coming Soon to a Court Near You?', *supra* n. 34, 177.

36 *Ibid.*

37 See Craven, 'Cracks in the Facade of Literalism', *supra* n. 1.

38 *Ibid.*

in at least this limited sense, intentionalism has always lain at the heart of constitutional interpretation in Australia.

However, it should not therefore be thought that there is little difference between a literalist and an intentionalist approach. To an *Engineers*-style literalist, the bare text is both the beginning and the end of the search for intention: for most purposes, the intention exists only to the extent that it emerges from the text. To the pure intentionalist who regards the text as a mere servant of intention, however, it occupies a far less lofty position, and further sources of intention (such as Convention Debates or other historical materials) also typically will be relevant. Moreover, even an intentionalist who would concede the conclusiveness of an unambiguous text will be eager to inject other sources of intention into the constitutional equation in the event of uncertainty. In this sense, the moderate intentionalist and the moderate progressivist will probably have in common a willingness to embrace the concept of an essentially ambiguous Constitution in order to allow greater scope for the free operation of their chosen interpretative methodology. Of course, this is the only pre-conception that they are likely to share: the historicism of the committed intentionalist will be anathema to the progressivist, while intentionalism itself is ordinarily entirely hostile to any approach based upon the desirability of answering current social needs.[39]

'Intentionalism' or 'originalism' has had a stormy history in the United States, where it has acquired strong right-wing political associations. It has been resorted to in that country by, among others, those who are eager to wind back what they see as socially ruinous 'liberal' interpretations placed by the Supreme Court upon the open-textured provisions of the American Bill of Rights.[40] As these interpretations are all highly unlikely (to put it mildly) to have been those intended by the Founders, a theory of what is usually referred to as 'original intent' is attractive to those seeking to undermine the constitutional positions thus achieved. This is not to say that American originalists do not have a sincere commitment to their interpretative theory on strictly legal or logical grounds, but it is effectively impossible to separate the political conservativism of United States originalism from its purely interpretative aspects. It should be noted that an Australian intentionalist would in no sense be committed, even incidentally, to a corresponding political or social agenda. To the extent that literalism has subverted the original intention of the Australian Founders, the net result has been the greater centralization of power, rather than the occurrence of any social revolution. Thus, while a return to that intent might well effect

39 Unless it could be argued that the intention of the Founders was for the judiciary to engage in a constant up-dating of the Constitution. This is occasionally suggested: *e.g.* Crawford, J., 'The Legislative Power of the Commonwealth' in Craven, G. (ed.), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) 123. However, the suggestion is highly implausible in light of historical evidence: *cf.* Craven, G., 'The States — Decline, Fall or What?' in Craven, G. (ed.), *Australian Federation Towards the Second Century* (1991) 63-4.

40 See *e.g.* Berger, R., *Federalism: The Founders' Design* (1987); Bork, R., *The Tempting of America* (1990).

some change in the federal balance of power, it could not be represented as diminishing hard-won rights and liberties, or as serving an inherently conservative political agenda.

As was seen to be the case with progressivism, a meaningful intentionalism is at present merely an emergent tendency on the High Court, although its course is reasonably easy to mark. As that course has been traced in some detail elsewhere,[41] it will not be unduly elaborated upon here. The posture of the Court towards intentionalism is probably best reflected in the view it takes of the use in the interpretation of the Constitution of the written Debates of the Founding Fathers ('the Convention Debates'). A strongly literalist approach will prompt the exclusion — or at least the discounting — of the Debates, on the basis that it is the words of the Constitution themselves which are of importance, not the subjective and often difficult-to-ascertain subjective intentions of the Founders. Under an intentionalist methodology, the Debates will be highly relevant as contributing to an understanding of the crucially important historic intent. Indeed, to the extent that an intentionalist is prepared to assert the general ambiguity and open-endedness of constitutional language, the Debates will be one of the most obvious and important tools in resolving that ambiguity.

Traditionally, the High Court has eschewed the use of the Debates, a rejection which pre-dated *Engineers*,[42] but which was undoubtedly given added vigour by the literalist approach adopted in that case. The ban was continued throughout the years of the *Engineers* hegemony,[43] but has quite recently collapsed, coincidentally with the first re-publication of the Debates themselves. Thus, in *Cole v. Whitfield*[44] the Court cautiously reassessed its attitude towards the Debates, saying that while they could not be used with the object of substituting the subjective intention of the Founders as to the meaning of particular words for the meaning conveyed by the language itself, they could be consulted 'for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged'.[45] Clearly, this endorsement of the use of the Debates was so expressed as to be as consistent as possible with the approach endorsed in cases like *Engineers*: the supremacy of the text is maintained, but at the same time the Debates may apparently (and not a little puzzlingly) be used as a sort of amplificatory supplement. Probably the best way of understanding the *dictum* in *Cole* is to see it as permitting recourse to the Convention Debates (and thereby to the expressions of subjective intention which they contain) in the event of ambiguity in the actual text.

41 See Craven, 'Original Intent and the Australian Constitution' *supra* n. 34.

42 *Municipal Council of Sydney v. Commonwealth* (1904) 1 C.L.R. 208; *State of Tasmania v. Commonwealth of Australia and State of Victoria* (1904) 1 C.L.R. 329.

43 Although it is clear that the Court made indirect use of the debates, if only by considering the historical accounts in Quick and Garran, *op. cit.* n. 35: see *e.g. Re Pearson; Ex parte Sipka* (1983) 152 C.L.R. 254.

44 (1988) 165 C.L.R. 360.

45 *Ibid.* 385.

It is beyond question that the use of the Debates in this way in *Cole* itself had a significant effect upon the chaotic jurisprudence of section 92, but the full impact of the Court's new attitude to the deliberations of the Great Conventions was not felt until the landmark decision of *New South Wales v. Commonwealth* ('the *Corporations* case').[46] In that case, the profoundly ambiguous words of section 51(20) were held not to allow the Commonwealth to legislate with respect to the formation of corporations. The crucial factor in the majority judgment was undoubtedly the views of the Founders revealed by a consultation of the Convention Debates,[47] along with a perusal of other historical material, into which category fell not only the Draft Constitution Bills but also (effectively) the earlier decision of *Huddart Parker*.[48]

The Court did not really go beyond the proposition contained in *Cole* concerning the use of the Debates, but this rather surprising and important victory for the States dramatically emphasized the emerging importance of intentionalism as a player in Australian constitutional interpretation. On the basis of decisions like *Cole* and the *Corporations* case, it would seem that a moderate version of intentionalism is emerging on the Court, one is tempted to believe almost by accident. It is a 'moderate' intentionalism in the sense that there is little doubt that the Court would regard both Debates and 'subjective' intention as irrelevant where the words of the Constitution evince a clear and certain meaning: but when ambiguity is present, historical materials will be consulted for the purpose of settling the conflict.

Thus, it should be clear that a commitment to this moderate form of intentionalism does not involve any assertion of the total subordination of the constitutional text to some notional extra-textual intent. Under the sort of approach that emerges from *Cole* and the *Corporations* case, an unambiguous text is to be accepted as a definitive statement of constitutional intent. Only in the case of ambiguity will further sources be consulted in an effort to amplify that intent. Nevertheless, lest such an approach might be thought to differ but little from the High Court's traditional literalism, its full implications should be considered. Once again, ambiguity — and especially some idea of general constitutional ambiguity, such as that presented in connection with the progressivist approach — is a difficult concept to contain. The natural tendency of the originalist will be to err on the side of discerning ambiguity in order to bring the full panoply of intentional evidence into play. Moreover, particularly in the context of such broad provisions as the tersely expressed placita of section 51, a finding of textual ambiguity will not be difficult to make out. At this point, the literal text is relegated from being a conclusive statement of intent to being merely an important indicator of intent, and techniques very different from those

46 (1990) 169 C.L.R. 482.
47 *Ibid.* 502-4; see also Craven, 'Original Intent and the Australian Constitution', *supra* n. 34, 183-5.
48 (1909) 8 C.L.R. 330.
49 For a fuller account of such factors see Craven, 'Cracks in the Facade of Literalism', *supra* n. 1.

hitherto used by the Court in the disposition of constitutional matters — such as the detailed sifting of the historical record — will need to be brought into play. Thus, even the moderate form of intentionalism described above poses an enormous challenge to the constitutional methodology espoused in *Engineers*. It is worth noting that, as was seen to be the case with progressivism, there is no reason to suppose that the types of forces broadly sympathetic to intentionalism will cease to operate upon the Court in the near future. To take but two examples, the general movement for the purposive, non-technical interpretation of statutes is continuing to grow in strength, while a weakening of belief in the efficacy of texts as a means of conveying meaning reinforces the case of intentionalism, as much as that of progressivism.[49]

One of the most important points to be made in relation to these two emergent challenges to literalism is that, unlike the High Court's traditional literalism, each does offer a basic vision of the role of the Court in its task of constitutional interpretation. Under progressivism, the fundamental duty of the Court is to keep the Constitution, so far as possible, in tune with the changing needs of society. For the intentionalist, the Court is charged with the inviolable task of giving effect to the intentions of the Framers. Each of these highly divergent visions is a great deal more satisfying as a theory of constitutional interpretation than the unadorned instrumentalism of *Engineers*. Interestingly, all three do have one thing in common, namely, each is to some extent intention-based: intentionalism directly; literalism intrinsically, in the sense that its conceptual validity depends upon its utility as a means of divining intention; and even progressivism, at least to the limited extent that it seems to posit the existence of some basic historical intent that the Court should constantly revise the Constitution.[50]

IMPLICATIONS OF PROGRESSIVISM AND INTENTIONALISM

Two issues fall for consideration in this section of the article. The first concerns the general implications which would be held for Australian constitutionalism by the adoption of either progressivism or intentionalism as a new constitutional orthodoxy. The second relates to the exact theoretical and practical questions which would have to be faced by the Court in the event that it did choose to follow one or other of these conflicting paths of constitutional interpretation.

That a basic conflict exists between progressivism and intentionalism there can be no real doubt. The two approaches are highly antagonistic in theory, practice and flavour. Thus, progressivism is a theory of interpretation based on present and future needs; intentionalism turns upon past

50 As evidenced by concerns to demonstrate a 'progressive' intention on the part of the Founders themselves: see *e.g.* Crawford, 'The Legislative Power of the Commonwealth', *supra* n. 39; Thomson, J., 'Principles and Theories of Constitutional Interpretation and Adjudication' (1982) 13 M.U.L.R. 597, 606. In the context of American progressivism see *e.g.* Brest, P., 'The Misconceived Quest for the Original Understanding' (1980) 60 *Boston University Law Review* 204, 215-6.

intentions. Progressivism stresses the need for policy choices; intentionalism posits the existence of historically mandated constitutional principles, in accordance with which decisions must be made. Progressivism exalts judicial choice; intentionalism seeks to confine that choice to the sifting of historical and other intentional evidence. It is true that there is the possibility of a minimal meeting between the two methodologies at a theoretical level, in the sense that one might seek to argue that the Founding Fathers *intended* that the High Court function in a progressivist manner.[51] But this is a sweeping proposition, difficult to support on the historical evidence.[52] Progressivism and intentionalism are really chalk and cheese, one a charter for judicial activism in the constitutional sphere, the other a quite contrary blueprint for judicial constraint in accordance with perceived principles of what might be termed 'historical democracy'.

As regards the implications which would flow from the High Court's substantial adoption of progressivism, some have already been noted in considering the differences between progressivism and literalism. Thus it has been seen that whatever version of progressivism were ultimately to be chosen, the centrality of the constitutional text — at least as comprising a set of objectively and readily ascertainable dispositions of constitutional questions — would be greatly diminished. As was suggested, it is not even remotely conceivable that the Court would adopt some extreme version of progressivism whereby the text of the Constitution ceased to play an important role in the constitutional jurisprudence of Australia. What is much more likely is that the text would come to be seen as considerably less determinative, far more ambiguous (or 'open-textured'), and increasingly to be interpreted by reference to the making of explicit choices between competing policy options.[53]

In this connection, Sir Anthony Mason is undoubtedly correct in saying that exposure of policy choices will make for far more open debate of constitutional decisions than that which presently occurs while the operation of policy considerations is hidden beneath the rhetoric of an interpretative device like literalism.[54] It is, however, much more doubtful whether he and his fellow judges will greatly enjoy the debate once it has begun, or indeed whether they will make much of a fist at winning it. Either way, it is clear that the unblushing entry of the Court into the realm of constitutional policy would make for a dramatically freer style of constitutional interpretation than that which presently exists. It is equally clear that the ability of the Court to float above the tempests of political controversy engendered by its decisions would be correspondingly reduced.

As to the effect of a move towards progressivism upon the Court's attitude to the federal balance of power, it is probably fair to say that such

51 See *ibid.*
52 *Supra* n. 50.
53 As to the dangers of such an approach see *e.g.* Stephen, *supra* n. 32, 342-5.
54 See Mason, 'Future Directions in Australian Law', *supra* n. 14, 158-9.

a move would in practical terms bode ill for the States — although progressivism itself is intrinsically neither centralist nor federalist, but merely ends-based in its orientation. This is because progressivist judges and thinkers like Mason C.J. tend to see progressivism as a means of furthering their quite separate policy judgment that the increased centralization of power in Australia is a worthwhile end in itself. As Sir Anthony remarks:

> the complexity of modern life, the integration of commerce, technological advance, the rise of the welfare society, even the intrusive and expanding reach of international affairs into domestic affairs, require increasing action on the part of the national government.[55]

Of course, in the unlikely event that High Court progressivists were converted to some vision of the theoretical advantages of strongly decentralized federalism, the opposite conclusion would presumably follow.

Some might argue that progressivism would in fact involve but a small departure from the past, at least so far as the federal balance is concerned. It would be maintained that the Court would merely pursue a centralizing agenda overtly by way of progressivism rather than covertly by way of literalism. But as was observed above, the overt articulation of policy factors in this context is important if only because judicial motivations are thereby exposed to public scrutiny and attack. Moreover, it is very likely that a largely unrestrained recourse to policy factors would have far greater potential to alter the federal balance of power than an often laboured and artificial manipulation of constitutional language.

It is true, however, that the most obvious capacity of progressivism for constitutional development does not lie in the field of Australian federalism. The most dramatic impact of progressivism would be felt in areas of constitutional law which the High Court currently might well wish to develop, but which are not, in the absence of a suitable piece of constitutional text, easily susceptible to extension by means of the device of literalism. The prime example is constitutional guarantees of fundamental rights. Were the Court to wish to embark upon a novel and stimulating career of teasing such rights out of the admittedly unpromising body of the Australian Constitution, literalism as an extractive tool would be next to useless. Progressivism, on the other hand, allied with some fairly broad concept of constitutional implication, would be a far more promising ally. There are as yet only limited signs of the Court developing an interest in this direction,[56] but it is far from unlikely that in the event that the constitutional star of federalism in Australia continues to fall, the Court will come to focus its attention on such hitherto undeveloped aspects of constitutional doctrine.

Of course, any adherence by the Court to some version of progressivism would raise a whole series of quite profound questions concerning its functioning as an agency of constitutional review, and these questions would need to be squarely faced. The most obvious is the fundamental one of

55 Mason, 'The Role of a Constitutional Court in a Federation', *supra* n. 14, 23.

56 See above; see also *Union Steamship Company of Australia Pty Ltd v. King* (1988) 166 C.L.R. 1; Mason, 'Future Directions in Australian Law', *supra* n. 14, 163; Mason, 'The Role of a Constitutional Court in a Federation', *supra* n. 14, 11-3.

legitimacy. This has a number of inter-connected aspects. Perhaps the most basic concerns the relationship between a progressivist Court and the amendment process contained in section 128. The Court could not avoid confronting the argument that the adaptation of the Constitution to the changing needs thrown up by time is to be achieved not by judicial *fiat*, but via the democratic amendment formula set out in the Constitution. Under such a view, the surface appeal of which has been acknowledged even by Chief Justice Mason,[57] progressivism would constitute a usurpation of the basic prerogative of the Australian people to change their own constitutional arrangements. This piece is not concerned to pursue this debate, but it is one that a Court committed to progressivism would need to be able to prosecute convincingly.

As it happens, this is one of the points at which progressivism and intentionalism most readily collide. The intentionalist will ordinarily argue with some conviction that the Founders' scheme for the revision of the Constitution lies in section 128, while the progressivist — without entirely disdaining that provision — will look primarily to the Court to bring the document into line with changing times.[58] Naturally, the heat which this type of debate will generate will depend ultimately upon the abandon with which a Court is prepared to wield the progressivist scythe — the freer it is in its recourse to policy considerations, the more intense will be any reaction along 'democratic' or intentionalist lines.

All in all, these types of controversy could be expected to rage over ground already parched by numerous conflagrations concerning the role of judges in 'making law', but with the flames fanned to a greater intensity — particularly through the invocation of democratic theory — by the fact that the debate would be taking place in the highly sensitive context of basic constitutional dispositions, rather than some subsidiary area of law. Thus, such arguments as those over the suitability of judges as fermenters of social change in view of suggested deficiencies in their own background and training[59] would in all likelihood be mounted with particular force, and would need to be vigorously countered by proponents of progressivism. In this context, it is interesting to recall that not only has McHugh J. defended judges against the charge that their law-making activities are undemocratic, but has also asserted that the 'courts, as much as the legislatures, are in continuous contact with the needs of the community'.[60]

Certainly, it could hardly be denied that a High Court seriously committed to progressivism would rapidly descend from the apolitical summits

57 Mason, 'The Role of a Constitutional Court in a Federation', *supra* n. 14, 22-3; see also the lengthy consideration of democratic objections to judicial activism by Justice Michael McHugh in 'The Law-Making Function of the Judicial Process' (1988) 62 *Australian Law Journal* 15, 116.

58 A possible reconciliation between the two views, along the lines that the Founders intended substantial judicial revision has already been noted, and doubted; see *supra* n. 39.

59 See *e.g.* Bakan, J., 'Strange Expectations: A Review of Two Theories of Judicial Review' (1990) 35 *McGill Law Review* 439; 'Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)' forthcoming, *Canadian Bar Review*.

60 McHugh, *supra* n. 57, 122.

upon which it supposedly dwells, and into the hurly-burly of daily political controversy, to occupy a position much like that in which the United States Supreme Court finds itself. Sir Anthony Mason apparently looks forward to the ensuing open debates over the appropriateness of the Court's decisions with some relish,[61] but whether these would be as congenial in practice as they might appear in theory remains to be seen.

One thing, however, is clear. Before the Court could effectively engage in (and defend its decisions as part of) such a policy debate, it would need to considerably refine its argumentative techniques. By this is meant two things. In the first place, if the Court is to make increasingly policy-oriented decisions, it is going to have to develop evidentiary and procedural techniques which facilitate the elucidation of the material which will be needed as the basis of these decisions. There is no point in its attempting to function as a policy court if it has no means of getting before it the relevant policy considerations and options. To this task, traditional evidentiary approaches are largely unequal, and while it is acknowledged that the Court has of late made some progress in this direction, there is still a long way to go.[62] Secondly, assuming that the Court can get the relevant policy material before it, it will have to do a better job of explaining its preferred policy outcomes than would be suggested by some of the past statements of its current members. For example, some of the statements of Mason C.J. cited above,[63] which might be taken as implying that the more significant the problem, the more self-evident the case that it be dealt with on a national basis, hardly constitute a sufficient basis for the articulation of policy choices in the specific context of the federal division of power. Similar comments could be made concerning the limited policy articulations embarked upon by some members of the Court in relation to the interpretation of the external affairs power contained in section 51(29),[64] and the definition of 'duties of excise' in section 90.[65]

The implications of a future adherence by the High Court to a doctrine of intentionalism, although perhaps less profound than those posed by a conversion to progressivism, would nevertheless be momentous. One may begin by re-iterating that the general style of Australian constitutional interpretation would be radically changed: the present overwhelming importance attached to the literal meaning of constitutional terms would be greatly diminished, while the ultra-literalism which has emerged from the *Engineers* line of cases would entirely vanish. Again, this is not to say that a term the meaning of which was abundantly clear would not be interpreted

61 See Mason, 'Future Directions in Australian Law', *supra* n. 14, 158-9.

62 See generally, Kenny, S., 'Constitutional Fact Ascertainment' (1990) 1 *Public Law Review* 134.

63 *E.g. supra* 888.

64 *E.g.* the *Dams* case, *supra* n. 7, 126-7 *per* Mason J., 220-2 *per* Brennan J.; *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168, 225-9 *per* Mason J.

65 See *Hematite Petroleum Pty Ltd v. Victoria* (1983) 151 C.L.R. 599, 630-2 *per* Mason J.; 660-2 *per* Deane J. Similar statements could be made concerning some of the 'economic' reasoning contained in decisions concerning section 92: see *e.g. Bath v. Alston Holdings Pty Ltd* (1988) 78 A.L.R. 699, 675-80.

'literally', but in the common event of ambiguity, an interpretative regime quite different to that embodied in *Engineers* would come into play.

Here it may be noted that what could loosely be termed 'historical' research would clearly come to occupy a far more central place than formerly in the High Court's interpretative methodology. The attempt to discern the intention of the Founders behind a constitutional term which had been stigmatized as ambiguous would necessarily be fuelled to a significant extent by the identification and consultation of relevant historical materials. Thus, were intentionalism to hold sway on the Court, it might be that the volumes of the Commonwealth Law Reports would find themselves, at least initially, yielding pride of place to the Convention Debates, and even to the letters of those such as Isaacs, Deakin and Higgins.

The implications held for the federal balance by an ascendant doctrine of constitutional intentionalism would be fascinating. The basic point to be grasped here is both simple and relatively uncontroversial: the Founding Fathers unquestionably intended that the balance of power in the Australian federation should be considerably more in favour of the States than has come to be the case.[66] The vital question is whether the attachment of an added importance to the intentions of the Founders in the interpretation of the constitutional text would translate into a reversal of the general centralizing influence hitherto exercised by the High Court. The answer to this question would, by and large, be in the affirmative. The overall effect of literalism has been to permit the expansive interpretation of provisions conferring legislative power on the Commonwealth by quarantining such provisions from the subjective intentions which accompanied their making. As was seen in the *Corporations* case, the injection of these subjective intentions into the interpretative equation can have a significantly confining effect upon words which might otherwise be made to carry a fair burden in support of the expansion of Commonwealth legislative competence.[67] Indeed, the corporations power and its future interpretation under an intentionalist approach is an interesting case in point. It is highly likely that even a cursory consultation of historical materials on the meaning of such terms as 'trading' and 'financial' corporations would be extremely uncongenial to those wishing to maintain the majority positions adopted in such cases as *Actors and Announcers Equity Association of Australia v. Fontana Films Pty Ltd*[68] and the *Dams* case.[69] It is thus probable that a new emphasis upon the actual intentions of the Founders would tend strongly in the direction of confining, and perhaps even winding back the extent of Commonwealth power.

Correspondingly, intentionalism is not — unlike progressivism — an

66 See *e.g.* Craven, G., 'The States — Decline, Fall or What?' in Craven, G. (ed.), Australian Federation Towards the Second Century' (1991) 50-7.

67 Thus, there is no particular reason to suppose that the case for confining section 51(20) to the regulation of the activities of existing corporations is any more compelling as a matter of literal interpretation than that advanced by Gibbs J. in *Actors and Announcers Equity Association of Australia v. Fontana Films Pty Ltd* (1982) 150 C.L.R. 169, 181-5 for its containment to the regulation of the 'trading' activities of trading corporations.

68 (1982) 150 C.L.R. 169.

69 The *Dams* case, *supra* n. 7.

interpretative approach which offers much to a Court determined to develop constitutional doctrine into new and exciting areas. Tied as it is to a legal species of historical determinism, intentionalism is a force which is directed towards restricting, rather than enhancing judicial choice. There would be little room within an intentionalist methodology for such projects as the development of a more or less comprehensive scheme of constitutional guarantees of individual liberties, although it should not be forgotten in this connection that the concept of constitutional implication is not at all inconsistent with an intentionalist approach.

As was seen to be the case with progressivism, an intentionalist Court would have to face a variety of important issues arising over its choice of interpretative methodology. It is true that intentionalism, which does not turn to any significant degree upon a concept of policy choice, would not raise acute questions of democratic and political legitimacy in the same way as progressivism. However, intentionalism does potentially suffer from a real want of palatability as an interpretative theory in one important respect: it raises the spectre of Australia's constitutional arrangements being ruled by what would undoubtedly be referred to as the 'dead hand of the past'.[70] This is a potent rallying cry, and one which conjures up a prospect particularly appalling to the small power elite (notably including the High Court itself) which has hitherto been so successful in achieving constitutional change in what it would regard as desirable directions. An intentionalist Court would need to be able to counter such arguments, presumably by reference to some notion of the continuing democratic legitimacy of the constitutional intentions of the Founders. Nevertheless, the controversy would doubtless be intense.

Another major issue to be faced by the Australian intentionalist corresponds directly with that which confronts a progressivist over the suitability of judges as formulators of policy: if judges are not trained in the art of policy-making, are they necessarily any better educated in the arcane mysteries of history, a mastery of which may well be necessary if one is to discern the intentions of the Founders among the flotsam and jetsam of the past? Arguably, if constitutional interpretation is primarily a matter of history, it would be better left to historians than to lawyers.[71] This argument tends to flow into a much wider and more complicated one as to the ability of any person, historian or lawyer, to fix with a real degree of exactitude upon the past intention of a third party, especially in relation to any subject so complex as the meaning to be carried by this or that term of a century-old constitution. This is a topic which has produced a voluminous literature in the United States,[72] and is not pursued here.[73] As was the case with

70 See Craven, 'Original Intent and the Australian Constitution', *supra* n. 34, 178-9; in an American context see Simon, L., 'The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?' (1985) *California Law Review* 1482, 1531-5.

71 *Cf.* Brest, *supra* n. 50, 218-22.

72 *E.g. ibid.*; and see generally Eagleton, T., *Literary Theory* (1983) 62-88; Kelman, M., *A Guide to Critical Legal Studies* (1987) 213-23.

73 But see Craven, 'Original Intent and the Australian Constitution', *supra* n. 34, 179.

arguments against the admissibility of progressivism on the grounds of democratic legitimacy, it is not suggested that the considerations advanced here are such as to preclude an intentionalist approach to constitutional interpretation. What they do reveal, however, is the need for an intentionalist Court to be prepared to strongly articulate, justify and defend its interpretative stance.

Of course, the difficulty with spelling out in roughly logical order the various questions which a 'progressivist' or an 'intentionalist' Court would need to face is that, at least in the short term, we are unlikely to see the emergence of a Court which neatly fits either of these labels. Rather, what we may expect with reasonable confidence — and arguably already have — is a Court which flirts with elements of both progressivism and intentionalism, without articulating the basis of either, and which swaps rather chaotically from one to the other, and from both to literalism, according to the circumstances surrounding the particular case before it. Thus, in the *Corporations* case[74] (and to some extent in *Cole v. Whitfield*[75]) we see a Court which is significantly intentionalist in its orientation; in *Dams*[76] we may discern progressivist influences; and in a number of cases the old *Engineers*-style literalism continues unabated.[77]

The point to be made here is that, however deficient the High Court's literalism may have been as a method of constitutional interpretation, it had at least the lonely virtue of general consistency of application. There is a real danger that the dissolution of the literalist hegemony will see a long period of confusion, indecision and imprecision on the Court, during which it will not be possible to say that any interpretative approach holds sway. Perhaps the most profound difficulty to be faced in this swirling mist of competing methodologies is that, at heart, each contains considerably more than a grain of truth. Thus, real weight *should* be given to the plain constitutional text. The interpretation of the Constitution *should*, wherever possible, advance the current interests of the Australian people. The Court *should* be faithful to the intentions of the Framers. But none of these approaches in isolation seems to be capable of providing a fully self-sustaining account of the process of constitutional interpretation, nor of delivering a knock-down blow to objections raised by protagonists of the other methodologies. The most likely result, then, in the absence of any possible reconciliation between these approaches, is one of prevalent conflict and confusion.

THE FUTURE — IS THERE A WAY FORWARD?

It follows from what has been said before in this article that the achievement of a reconciliation between these contending interpretative theories

74 (1990) 169 C.L.R. 482.
75 (1988) 165 C.L.R. 360.
76 The *Dams* case, *supra* n. 7.
77 *E.g. Richardson v. Forestry Commission* (1988) 164 C.L.R. 261, 307 *per* Deane J.

and their synthesis into a single cohesive methodology would in fact be an extremely difficult task. Nevertheless, if one accepts the suggestion made above that each does represent a desirable end or value in the process of constitutional interpretation, and if one also accepts that without some form of reconciliation the interpretation of the Australian Constitution will inevitably become an increasingly fragmented and incoherent process, then any attempt at synthesis, however tentative, must be of some value. The question is, of course, whether such a synthesis is even remotely possible.

Having been unremittingly critical of the High Court's current methodology, the author feels in fairness compelled to at least try to run these interpretative strands together in an attempt to produce the synthesis desired. As it happens, it would appear that some such synthesis is indeed possible, and that it would offer at least the prospect of a coherent and consistent theory of constitutional interpretation, which would go some way towards recognizing the various constitutional and interpretative values and interests embodied in each of literalism, progressivism and intentionalism. It is in no sense intended in this piece to fully articulate this synthesis, but merely to sketch its chief features in necessarily broad terms. For lack of a better name, and at the grave risk of further proliferating the rash of 'isms' in the field of Australian constitutional interpretation, it will be referred to as 'contextualism', for reasons that will quickly become apparent. As an interpretative methodology, it would rest on five central propositions.

The first is that in the interpretation of the Australian Constitution, it is indeed the case that the search for the intentions of those who framed the document is paramount. It would seem that this proposition is necessarily contained not only in any theory of intentionalism, but also — fundamentally — in literalism. As has been seen, the supremacy of the words under literalism flows primarily from their alleged status as windows into the minds of the Founders.[78] At least thus far, literalism and intentionalism, properly understood, may be reconciled. Moreover, an at least general acceptance of the necessity to search for the Founders' intent would seem to be unavoidable as a matter of democratic theory and historical legitimacy. It is the bargain struck by the Founders and embodied in the Constitution that was ratified by the Australian people. This bargain, obviously, was a product of the intentions of the Founders, which the words of the Constitution were employed to reflect. In the absence of subsequent constitutional amendment, it continues to comprise the latest authentic expression of the will of the people of Australia on the subject of their nation's constitutional dispositions.[79] Consequently, to deny primacy to the constitutional intentions underlying that bargain would be unacceptable in democratic theory.

78 See *supra* 882; and see Craven, 'Cracks in the Facade of Literalism', *supra* n. 1. Of course, one might seek to defend textual supremacy at least partly on such grounds as certainty, and the need for the law to be known, as opposed to hidden in diverse sources of subjective intent. Nevertheless, such arguments are ultimately ancillary to that based on intention: unless textualism may eventually be traced to the authors' intent, it becomes an essentially arbitrary, almost accidental interpretative process.

79 See Craven, 'Original Intent and the Australian Constitution', *supra* n. 34, 177-8.

It may be noted in this connection that even the most determined of progressivists will be tempted to legitimize their position by arguing that the Founders intended that such an interpretative process take place, an argument addressed above.[80]

The second proposition is that it must be accepted that large portions of the Constitution are ambiguous. In other words, their language does not readily disclose the constitutional intention sought, in the sense that it is open to conflicting interpretations. Naturally, this will tend to be the case more with provisions dealing with broad and complex subjects than with those dealing with procedural, machinery and other relatively straightforward topics. Many of the placita of section 51 are classic examples of the sort of ambiguity described here, with their language being more apt to indicate in general terms a field of legislative capacity than to delineate it with any great degree of precision.[81] Such a conclusion as to the clarity of language of our Constitution ought not provoke despair, or trigger such facile reactions as 'Words have no meaning!' It has long been recognized that constitutions deal with immensely broad subjects and must necessarily employ less precise language than would be used in a Dog Act.[82] The real question for Australian constitutionalists is, having admitted the ambiguity of the Constitution and rejected the false security offered by ritual applications of *Engineers*-style concepts of 'natural meaning', how is constitutional ambiguity to be resolved? How is the hidden intention to be uncovered?

Again, this is not to say that all or even most of the Constitution is equivocal. Much of the document, especially the more machinery sections, but also a variety of important provisions, is quite clear. To such provisions, it may be accepted that a literal interpretation should be applied, not on some self-justifying basis derived from *Engineers*, but on the infinitely more valid ground that the intention sought emerges clearly from the words. But the question remains as to how the intention behind an ambiguous provision is to be elicited.

This leads on to the third proposition. In seeking to draw the intention from an ambiguous provision, the Court is entitled, and indeed obliged as a matter of constitutional duty, to have regard to the full range of materials that are potentially of use in fixing and elucidating that intention. Once it is accepted that the intention is the grail, and that the relevant constitutional language is ambiguous, there can be no excuse for the Court choosing to avert its eyes from sources which may assist it in discerning the intent behind the provision in question. At the very least, such sources would ordinarily include the Convention Debates and the Draft Constitution Bills, but there is no reason why contemporary speeches,[83] articles, newspapers

80 *Supra* n. 39 and accompanying text.

81 *E.g.* ss 51(1) (overseas and interstate trade and commerce), 51(29) (external affairs) and 51(38) (virtually unidentifiable, but see *Port McDonald Professional Fishermen's Association and Olrich v. South Australia* (1989) 168 C.L.R. 340.)

82 See *Jumbunna Coal Mine No Liability v. Victoria Coal Miners' Association* (1908) 6 C.L.R. 309, 367-8 *per* O'Connor J.

83 *E.g. Cole v. Whitfield* (1988) 165 C.L.R. 360, 387.

and even correspondence should not be relevant. Note that it is not suggested that such sources will be determinative: it is simply the case that in seeking the intention behind an ambiguous provision, the full record should be examined, and the various pieces of evidence weighed for what they are worth. One of the greatest problems with the High Court's practised literalism is that it has often in the past proceeded via wilful blindness to dubious interpretation.

Nevertheless, it would be foolish not to acknowledge that there will inevitably be occasions, probably many occasions, when a consultation of historical materials will produce no clear intention. It may be that there is simply no evidence as to the intention one way or the other, or the available evidence may reflect such a riot of conflicting points of view as to be effectively useless in determining what the words are to mean. In such circumstances it would be impossible for the Court to isolate any specific contemporary intention behind the relevant provision, and the question which naturally arises is as to where it would go from there.

The fourth proposition seeks to at least partly resolve this dilemma. Where the Court has determined that the constitutional language in question is ambiguous, and where it is unable through a consultation of appropriate materials to isolate with at least a reasonable degree of conviction the contemporary intention behind the provision, the Court should (subject to one qualification which will be advanced presently), adopt that interpretation which seems to it to best match the current interests, needs and values of the Australian people. In so doing, the Court should be explicit about the predicament in which it finds itself. It should state its finding of ambiguity, explain the unhelpful nature of the historical record, and fully articulate the policy considerations which have led it to adopt one interpretation over another. Obviously enough, it is this limb of contextualism which encapsulates the policy-choice elements of progressivism. To an intentionalist purist, the adoption of such a position may be justified on the seemingly incontestable ground that as between two competing possible intentions, each of roughly equal plausibility, the Founders could hardly have expected that the Court would do anything more than to try to do its best in the national interest. All this said, however, it is not proposed that the High Court would be entirely free to act in accordance with its perception of national needs, without any recourse to the basic intentions of the Founders as to the sort of constitutional structure within which Australian society was to operate.

Thus, the fifth proposition operates by way of restraint upon the fourth. In determining which interpretation would most closely accord with the values and needs of the Australian people, the High Court should attach great weight to the fundamental constitutional values of the Founders, which emerge not only from a non-technical reading of the constitutional document as a whole, but from an appropriate understanding of the general history of the movement for federation, and the drafting of the Constitu-

tion.[84] Clearly, the concept of 'fundamental constitutional values' is not a precise one, and reference to such values could hardly be expected to result in the automatic disposition of every thorny question of interpretation that came before the Court. But the application of such values would assist in structuring what would otherwise be naked policy choices in accordance with the basic intentions of the Founders. In a sense, recourse to these fundamental values would bear some similarities with the notion of identifying a generalized (as opposed to specific) intent familiar from the United States originalist debate.[85]

To take an obvious example, probably the clearest of the values of the Founders' was a profound belief in strongly co-ordinate federalism, a belief which runs throughout the pages of their printed Debates, and which permeates the Constitution itself.[86] An application of this value to federal division of power disputes over the interpretation of the various placita of section 51 would tend to work so as to resolve such disputes in favour of the States, rather than the Commonwealth. Naturally, there are other basic constitutional values which could be called into play: those relating to parliamentary and responsible government[87] immediately come to mind. Unquestionably, there would be room for bitter dispute as to the place of particular values within the constitutional conception of the Founders, and their relationship with one another,[88] but there is no system of constitutional interpretation which can entirely banish an element of disputation, and at least the controversies here would consist of arguments over basic constitutional values rather than battles between competing semantic assertions.

It should be apparent from this brief outline why the term 'contextualism' has been chosen as a name for this interpretative approach. Its essential method is to contextualize the whole process of constitutional interpretation in at least four ways: first, by placing the written document within the context of the actual intent of the Founders; second, by insisting that this constitutional intention be elicited through a consultation of the full historical record; third, by requiring that insoluble textual ambiguity be dealt with by placing the interpretative problem against a background of the general values, needs and aspirations of the Australian people; and finally, by mandating that even this last step take account of the fundamental contemporary values and conceptions that surrounded the making of the Constitution and the federation which it supports.

84 To a significant degree, a link could be drawn between such a process and that involved in the present practice of drawing implications from federalism: see *e.g. Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31; *Victoria v. Commonwealth* (1971) 122 C.L.R. 353; *Queensland Electricity Commission v. Commonwealth* (1985) 159 C.L.R. 192.

85 See *e.g.* Brest, *op. cit.* n. 52, 215-7; Bork, R., 'The Constitution, Original Intent and Economic Rights' (1986) 23 *San Diego Law Review* 823, 836-42; Monaghan, H., 'Our Perfect Constitution' (1981) 56 *New York University Law Review* 353, 360-3, 375-81.

86 See Craven, 'The States — Decline, Fall or What?', *supra* n. 34, 50-3.

87 The existence of which is prominently recognized in the joint judgment in the *Engineers* case (1920) 28 C.L.R. 129, 151.

88 *E.g.* arguments based on the value of 'federalism' would doubtless often be countered by those turning upon a concept of 'national unity': see *e.g. Hematite Petroleum Pty Ltd v. Victoria* (1983) 151 C.L.R. 599, 660 *per* Deane J.

It should be equally clear that contextualism contains elements of each of intentionalism, literalism and progressivism. Obviously enough, its underlying orientation is one of a moderate intentionalism. Its concession to literalism lies chiefly in the fact that it would concede that an entirely unambiguous text is a conclusive vehicle of intention. Contextualism also leans towards a modified progressivism in accepting the need for policy choice in the absence of compelling indications of contemporary intention, although this tendency is mitigated by the injection of the fundamental contemporary values of the Founders. It is worth noting that a judge minded to embrace such an interpretative approach would be able with reasonable ease to construct for it an impressive, if slightly indirect lineage in terms of precedent. For example, it would hardly be difficult to muster a battery of *dicta* for the proposition that at the heart of the process of constitutional interpretation lies the quest for intention,[89] while reference to the fundamental values of the Founders could with some justice be said to underlie much of the theory of federal implications advanced by Sir Owen Dixon and other judges.[90]

Doubtless, such an approach would not appeal to those absoloutely committed to one of the other interpretative theories considered in this article, and would thus draw sharp criticism. A strong intentionalist would regard it as impossibly soft on the question of the determinative character of Founder's intent, while a progressivist would see it as confining within far too rigid boundaries the Court's ability to make necessary social choices. To a literalist, contextualism's de-emphasis of the certainty of constitutional language, acceptance of extra-textual sources and acknowledgement of a (limited) policy role for the Court would be about equally objectionable. All that can be urged in favour of the interpretative method outlined here is that whatever difficulties of acceptance and application it might face, it does seek to provide a principled and articulated approach to constitutional interpretation, within which is reconciled (so far as is possible) the competing values perceived as being relevant in the construction of the Australian Constitution.

In any event, and whatever the specific deficiencies of contextualism, there can be little doubt that the High Court's present constitutional methodology is increasingly in a state of disarray. As the literalism of *Engineers* becomes progressively more threadbare, and as the competing influences of progressivism and intentionalism contend to fill the gap, the whole process of constitutional interpretation will tend to become unstable and unpredictable. In the midst of this chaos, one can at least be comforted by the thought that whatever interpretative theory the High Court may eventually come to accept, it could hardly be less intellectually appealing than literalism.

89 As stated above, literalism itself depends ultimately on some concept of intention. See also Dawson, 'Intention and the Constitution — Whose Intent?, *supra* n. 34, 93-6.

90 *Supra* n. 84.