This paper attempts to explain the recent activity in the High Court's developing constitutionalism. By reviewing the traditional schools of constitutional interpretation of originalism, legalism, and progressive interpretation. The paper suggests that the High Court has been actively promoting a re-invigoration of our theory of government from one based on the principle of parliamentary sovereignty to one determined by popular sovereignty. That is, a constitutionalism and mode of government which is responsive to and mindful of the subjects it governs and serves. It is argued that the Court has been able to introduce this renewed notion of government through a change in its constitutional interpretation. The use of proportionality as a governing ethic of constitutional legislative validity is discussed through the prism of recent constitutional cases – most notably the decisions in ACTV, Nationwide News, Cunliffe, Leask, Lange and Levy. On a broader plain, and as a part of a wider project, this paper suggests that the change in our constitutional jurisprudence is perhaps suggestive of the introduction or strengthening of a republican theory of government, one of community action, involvement, discussion and enfranchisement. At worst, this is an argument which asks of institutions of power in society to achieve the ends which justify their existence.

Introduction

"Putting principles of rationality and proportionality at the centre of the story of what constitutional law is all about shifts the whole focus of the inquiry 180 degrees. Justification, not interpretation, becomes the leitmotif of constitutional review. Rather than empowering individuals and governments to do various things,
the rules of constitutional law actually impose limits on how those entrusted with the powers of state can behave ... The rules of constitutional law are directed to the politicians and their agents, and they speak about the duties and obligations they owe to the people whose lives they control."

Beatty’s opening quote sets a strong tone for the discussion of the new constitutionalism sweeping Australia. These developments are timely, given the fast approaching centenary of Federation and formalised constitutionalism in this country. It seems apposite, thus, that we stop and reflect on our constitutional past and developments and, in light of this, whether reformation and amendment is necessary. Indeed, such contemplation may be the hallmark of a mature, post modern society. Creative reflection and inspired growth are surely strong aims for a community. If a less abstract reason is needed, then Finn’s reminder that one of the basic functions of a court, especially a Constitutional Court, is to regulate power in society is sufficient.

What direction that growth should take is, however, hotly contested. Arising out of our British based heritage, social change and modification is not easy. It is too easy to suggest that the accepted and tried method for governance and delimitation of political power and responsibility are sufficient and do not need re-evaluation. To do this and act in such a fashion is to perpetuate a notion of sanctioned stagnation. Such a possibility should not be an option. Hence, the fact that this discussion is occurring (whether one is for or against new notions of constitutionalism) is a good thing; it gives

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2 This is despite his being Canadian.


5 Certainly in constitutional change this is true with the high demands made by section 128 of the Constitution.

6 And perhaps tired.
evidence to the notion of our polity and system of government as truly being "a living force."  

This discussion raises central themes of our political dimension. Indeed, if this is to be a genuine attempt at evaluation of our mechanisms of government (and in this I include the Court in its constitutional and administrative jurisdictions), then nothing should be spared. This discussion raises notions of the power of institutions over individuals and the very real threat to liberty (social or economic) which that can pose. It will also necessitate a re-evaluation of the concept of parliamentary sovereignty and the sway that it, as a theoretical doctrine, has over the court system. Important in this discussion is an evaluation as to its use in a formal, written constitution such as ours or whether it is made redundant because of its foundation reason - that of the unwritten, implied Constitution of the United Kingdom. Should a doctrine which reflects so little of a contemporary society hold so much sway over the way that society is governed? Some see this issue as even more pressing because of the breakdown in the traditional justification for entrusting so much power in a parliamentary body. With the decline of responsible government into a notion of "elected dictatorship" by the executive the institution of parliament itself no longer can be seen as the strict guarantor of rights and liberty as it was when Menzies characterised it as such in the 1950's. The advent of party politics has meant that there is a need for new impetus in the broader constitutional debate. Indeed, as Fitzgerald states, there is an awareness that there is a need for a political theory to underpin Australian constitutional law.

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7 Theophanous v Herald and Weekly Times (1994) 182 CLR 104, at 171 per Deane J.
8 By necessity, thus, this article must be broad in approach; it is an evaluation of first principles drawing wide thematic foundation from schools of law and politics.
10 See on this Ross, A, "Diluting Dicey" (1989) 6 Auckland University Law Review 176. This work will be discussed further in the article.
If we accept Bogan's argument that a constitution can only be interpreted in specific situations and contexts then it becomes apparent that in the wider scope of reassessing our constitutional interpretation, the notion of the federal compact and its importance becomes paramount. The traditional "yardstick" of balancing federal powers is being reassessed with the increasing move to centralist government. With the departure of the federalist ideal a new test for determining constitutional legislative validity needs to be developed. This appears to be the principle of proportionality with some perceiving an undertone of the reserve powers doctrine as well. Regardless, this can serve as a useful case study in the High Court's novel, though not dangerous jurisprudence. It demonstrates how the Court has taken control of the decline in institutional decay to ensure that rights and liberties are protected where they would otherwise fall victim to circumstances which can not be otherwise controlled.

In acting in this way the Court has introduced other concepts into Australian governmental jurisprudence which, while they have always been lurking, have not been given explicit recognition. The introduction, adoption and use of notions of government acting on public trust and the continual relocation of sovereignty from the parliament to the people signal a revisionist agenda to reclaim constitutional law and

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15 First given grounding in Mabo v The State of Queensland (No 2) (1992) 175 CLR 1 by Toohey J but since expanded greatly by Mason CJ and Deane J in Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106.
repose it in the hands of those it is intended to serve - the Australian people.\textsuperscript{16} It is in this that we can see the development of the notion of “deliberative democracy”\textsuperscript{17} and the preparation for it to take the centrepiece of our democratic process.

The preceding comments can be considered to act as meta­themes of this article. They are the strings of thought which run through the following discussion and they provide a skeletal backdrop to the conclusions reached. They are in some respects embryonic but are visions to strive for. Visions, given the recent repositioning of the Court on constitutional power and interpretation which are tantalisingly within reach.

As such, the aim of this article is to question whether there is a new ethic of governmentality and constitutionalism arising out of the changed modes for constitutional interpretation which the Court has adopted (explicitly) over the last five years. I will seek to show that the change in approach to the Constitution, the power it imparts and permissible uses of that power, represent a change which returns sovereignty to the people. This is the political theory of which Fitzgerald speaks.\textsuperscript{18} Moreover it represents an ethic of government which aims to ensure that exercise of power in Australia is “to the point, clear, precise, necessary and respectful of Constitutional guarantees.”\textsuperscript{19} In essence, I argue that there is a major re-assessment of the use of governmental power and the role of the Court in governing such activities. In the words of Deane J:

"The provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called Commonwealth and States derive their authority."\textsuperscript{20}

\textsuperscript{16} For a fuller expansion of this argument see Detmold, M, “The New Constitutional Law” (1994) 16 *Sydney Law Review* 228. Detmold’s thesis will also be revisited later in this article.


\textsuperscript{18} See note 11 and accompanying text.

\textsuperscript{19} Fitzgerald, already cited n 11, p 269.

\textsuperscript{20} *University of Wollongong v Metwally* (1984) 158 CLR 447 at 477. This notion has been revisited in the recent case of *Leeth v The Commonwealth* (1992) 174 CLR 455.
To demonstrate this notion, this article will adopt the following structure. In part 1, I will look to traditional notions of constitutionalism in Australia. This will encompass a discussion of modes and theories of interpretation, the role of parliamentary sovereignty, and traditional conceptions of the Court's role in setting the tone for constitutional adjudication. Remaining within this section, I shall also discuss the increasing willingness for the Court to look outside these preset boundaries. To use some licence, it is judicial activism and constitutionalism. Moreover, it is justified. This is important in that it establishes the notion of a new and developing constitutionalism. The important point in this section is the recognition of the Constitution as a political document and the further realisation that the way this document is interpreted and given life will effect the nature of our polity. As Szantyr argues, this modified notion of judicial action means that "legalism has been exposed as unworkable [and] the Court's decisions can be understood from a realistic perspective that takes into account social and political objectives."

From this I shall progress onto an assessment of these traditional boundaries of sovereignty and assess their continued applicability to modern Australia. In is within this contemplation that traditional ideals of federalism, responsible/representative government, parliamentary sovereignty, Ministerial responsibility and the role of the Constitution will be contrasted with modern actualities and in doing so, these notions and ideals will be critically assessed. To borrow from Ross the courts are having to re-assess their functions in traditional tripartite constitutionalism. The failure of traditional conceptions are, I submit, a prime reason for the courts re-evaluating their response to boundaries and nature of political power. It is in this sense that a notion of public

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21 See Graglia who stridently argues against this sort of reform by the Courts - Graglia, L, "It's Not Constitutionalism, it's Judicial Activism" (1996) 19 Harvard Journal of Law and Public Policy 293.

22 Recall Dixon J's words in Melbourne Corporation v The Commonwealth (1947) CLR 31 at 82.


24 Ross, already cited n 10, p 195.
trust and deliberative democracy can be seen to be most virulent.

From the foundational discussions in the first two sections of the article the third will look to an example of how the Court is affecting this change in thinking about government and law - the developing notion of proportionality in determining legislative validity and the development of the implied rights of freedom of political communication. In tandem with this, I will assess claims that this principle is usurping the role of parliament and the Court is acting in too broad a fashion. By looking at later cases in the proportionality saga it is evident that strict limits have been placed on its operation. Zines has described this as the determining of the place of a "constitutional court in representative democracy and whether and to what extent the supremacy of parliament needs to be qualified." In this, the notion of deliberative democracy and public trust is seen to shine through as opposed to any extra judicial yearnings for power.

This discussion will close my article and I shall draw my conclusions. In doing so, I aim to bridge the theoretical divide between governmental politics and judicial review by a re-evaluation of the dominant constitutionalism of Australia. Therefore, I am returning to first principles and looking at their efficacy. I begin by suggesting that they are failing in their proscribed role. Accordingly, in the words of Sampford, "we must seek to re-design our institutions so that they are more likely to serve the needs, desires and interests of citizens." 26

**Traditional notions of constitutionalism and the new regime**

Former Chief Justice Mason has noted that common law interpretation has evolved from prior misconceptions of judges

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“discovering law” into a realisation that judges “make law and have been doing so in the common law tradition for 800 years or more.”27 In the same fashion, he questions why there is such consternation over the modern mode of contextual interpretation adopted by the High Court. This is the theme of this section of my article. It will attempt to show that we have moved from a Dixonian notion of “strict and complete legalism”28 to a situation whereby the Constitution is seen as “people focused”29 and an “illustrative document” as opposed to a “definitive document” based on legalist principles.30

To fully appreciate these changes in constitutionalism and its result of the Constitution being understood as a political document, it is necessary to look at possible methods of interpretation: traditional modes of determining legislative validity and generic notions of constitutional adjudication. To merely debate the merits of judicial activism here is not enough. If we accept Scott’s notion that “there is no such thing as an a-political legal role for the Court because law is inescapably part of the political and social environment,”31 then it becomes apparent that the notion of adjudication, its reasons and effect are inevitably part of the political landscape.

Methods of constitutional interpretation
Griffin32 has noted that a constitution cannot be expected to self perpetuate. It is not, as Kammen would suggest, a machine “that would go of itself.”33 It remains relevant and of

force through the interpretation afforded it. Accordingly, the link between modes of interpretation and the effect of a constitution is evident. As Lajoie and Quillinan suggest, interpretation defines the meta rules of this type of jurisprudence; "the value system behind the rights and liberties guaranteed by the [constitution]." Therefore the determination of how these meta-rules are themselves determined provides important insight into how the court has effected change in governmental theory and practice in Australia, or effect the aspirations of that system.

Mason has given several excellent overviews of the traditional schools of constitutional interpretative thought. It is prudent to follow his divisions as they mirror well the development of the High Court's approach as a complete entity.

**Originalism / Intentionalism**

Mason states that originalists have the belief that the Constitution has a "fixed meaning which does not change over time and that is the meaning the Constitution had when it was adopted." This has been expanded upon, with the notion that the meaning was to be given in light of the "context, purpose and structure of the Constitution." Mason notes the initial attraction of the theory because of the primacy he sees it affording the text. However he realises that this can be illusory as it "claims more than it can deliver." This is picked up by others, such as Craven, who notes that originalism is "检察 the Constitution - Coming Soon to a Court Near You?" (1990) 6 *Australian Bar Review* 93. On intentionalism, see Dawson, D, "Intention and the Constitution - Whose Intention?" (1990) 6 *Australian Bar Review* 93.
up by Sampford, who notes this mode of interpretation is limited in utility. He writes:
"Make no mistake; if Commonwealth legislation is invalidated by the original intent of the Constitution, the parliaments elected according to late twentieth century democratic ideals are being trumped by the democratic ideals of the late nineteenth century." 41

Despite these concerns, it would appear that a present majority of the Court favours this mode of interpretation. 42

A sub factor of originalist movement is that of intentionalism. This, Mason suggests, is no more than attempting to give effect to the intention of the founders of the Constitution. However, he sees it as labouring under the same difficulties as originalism, namely that one can not easily discern the founder's intention and that there now exists problems not contemplated during convention debates. He borrows from Dworkin in arguing that discovering intention is impossible without making a choice of "political morality" and it is that issue which intentionalism aims to avoid. 43

Legalism
This "middle ground" between originalism and progressive interpretation is often misunderstood. Straddling these two interpretative poles, legalism offers itself as a viable common ground. However it has not enjoyed the modern appreciation that progressive interpretation has. This, according to Dawson, is because of a misunderstanding of its meaning and operation. 44 He argues that legalism is often confused and

41 Sampford, already cited n 26, p 289.
44 Dawson, D, "Do Judges Make Law? Too Much?" (1996) 3 Judicial Review 1 at 2-3. This thesis of courts looking in a wider arena to decide cases while retaining established legal principles as its core directive has received legislative approval in terms of the Acts Interpretation Act 1901 (Cth) and in Queensland under the Acts Interpretation Act 1954 (Qld) - see especially section 14A and 14B.
taken to mean literalism or originalism as outlined above. Dawson rejects literalism as a successful mode of constitutional interpretation, however, he is an advocate of legalism as he sees it as a theory which can “fashion new rules [while remaining] in conformity with the requirement of underlying legal principles.”45 This means that judges do have access to contemplate wider sociological jurisprudence in their decision making and can formulate new rules of legal discourse but these rules must have their genesis in an existing train of scholarly work. Hence this enables a court to “make law” but it does not sanction judicial legislation. As well, it does not confine the court to outdated and possibly unfair doctrine. As Dawson J argued:

“The common law has an inbuilt capacity for development. But the change must be part of a reasoning process which the law itself recognises and not be abrupt or arbitrary, being merely the preference for a different result in the name of progress.”46

Hence, this is a more comprehensive understanding of legalism as a school of interpretation which draws on a wide range of legal tools but presents an answer rooted in discernible legal principles. I submit, however, that the High Court has moved on from this method to one in more direct contact with contemporary values and principles - progressive or purposive interpretation.

**Progressive interpretation**

This method of constitutional interpretation takes its foundation from Deakin’s notation that the formal Constitution provides only the framework of government47 - it is necessary for the Constitution to retain its stature as a “living force”48 to be interpreted in such a fashion as to imbue it with the notion of relevance and applicability to modern

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45 id, p 4.
46 id, p 12.
48 Already cited n 7. Posner has also used the term a “living constitution” to describe the end result of a progressive interpretation. See Posner, R, “Bork and Beethoven” (1990) 42 *Stanford Law Review* 1365, p 1373.
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situations. Mason sees this notion as resting at the core of progressive interpretation - that the framers were building a document for the ages, not temporal expediency. As McHugh J stated in *Theophanous v Herald and Weekly Times* "the meaning that the Constitution has for the present generation is not necessarily the same meaning it had for earlier generations or for those who drafted the Constitution."50

It is within this sphere of purposive interpretation that the seeds of the new Australian constitutionalism can be found. It is within the notion of interpretation for relevance and applicability that the seeds of a new approach can be discerned. This new approach, I submit, is centred on notions of deliberative democracy and participation in public sphere.51 This has been championed by particular theorists and Mason outlines some of the central arguments. He notes that Posner is an advocate of pragmatic interpretation, that is, the aim of constitutionalism is to better society and its members.52 Mason cites Dworkin as promoting an interpretation which supports and extends liberal democratic government.53 Ackerman is presented as a supporter of the notions of public trust and public accountability, much the same way that Finn has argued in Australia for these concepts.54 Mason also

49 (1994) 182 CLR 104.
50 id, p 197. This is an interesting comment given McHugh J's stance against extended implied rights in the constitution; one would have cast him as an originalist who was dedicated to the preservation of the 'holy text'.
51 I use this term, conscious of the overtones it carries from feminist scholarship. I submit, however, that in such a new mode of constitutionalism, it would be assumed that traditional modes of gender division would be made redundant. At the least, this would not be as glaringly explicit as has been the case. Again, this is perhaps an aspirational comment more than an empirical observation. For a comprehensive summary of the issues surrounding the public private divide in feminist theory see House of Representatives Standing Committee on Legal and Constitutional Affairs. *Half Way to Equal*, Australian Government Publishing Service, Canberra, 1992.
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discusses Sunstein whose proposals for government by discussion and rejection of the status quo as a valueless foundation from which to adjudicate constitutional matters holds, I believe, the key to understanding the turn around in Australian constitutionalism and how we presently think of government and governance.55 Finally, Mason looks to Detmold, who enunciates the fundamental base to understanding the change in approach for Australian constitutionalism. He interpolates the mood in the recent cases and provides a definitive theory on how we should be interpreting our Constitution to give effect to our political ideals and aspirations. He states that:

"We, the citizens, have a Constitution. Granted that premise, we have it equally. And, having the Constitution equally, we have the power that it generates equally."56

Thus, Mason recognises Detmold as an advocate of the "new constitutional law"; viewing the Constitution as a genesis of rights as opposed to a mere division of governmental powers. This is at the core of the change in Australian constitutionalism.

While the abstraction of the different modes of interpretation above may seem unnecessary, an understanding of them and their effect on how we view the Constitution is vital as that will determine the extent to which the Constitution can be seen as a "living force." It is these differing notions of interpretation and their cyclical fashion which develop conceptions of constitutionalism. It is to these that I now turn.

Developing Constitutionalism - From Tradition to Innovation

The choice of interpretative method we choose (progressive, legalist or originalist) is linked to the scope of effect our Constitution can have in modern politics. Because of this, and because of the shift towards an increasingly progressive

56 Detmold, already cited n 16, p 229
constitutional interpretation we are seeing more topics covered and, I believe, a re-invigoration of government and the polity. As Aroney has stated, we are looking outside the scope of the strict constitution; we are “going beyond the Constitution” to look at political, social and economic developments.

This should not be a surprise. Winterton has noted that principles such as “federalism, responsible government, separation of powers, democratic representative government and Commonwealth-State intergovernmental co-operation” have all been a part of the High Court’s constitutional jurisprudence. None of these concepts fall within the explicit terms of the Constitution but are used as guides during a time of originalist interpretative method. Why then has there been the change? It is prudent here to recall Lord Reid’s famous quote:

“There was a time when it was thought almost indecent to suggest that judges make law - they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave is hidden the common law in all its splendour, and that on a judge’s appointment there descends on him (sic) knowledge of the magic words “open sesame.” Bad decisions are given when judges muddle their passwords and the wrong doors open. But we do not believe in fairy tales any more.”

This link between constitutionalism, institutions and socio-political dynamics is, I submit, indisputable; it is the essence of our polity and its functionality. For an expansion of this concept see Walker who discusses this notion in relation to the emerging constitutionalism of nations in the European Community. See Walker, N, “European Constitutionalism and European Integration” (1996) Public Law (Summer) 266.

Aroney, already cited n 42, p 194.


The same notions can be said of constitutional interpretation. Perhaps, there has been no change at all. Rather, we are no longer under the apprehension that constitutionalism can be developed in a vacuum; that the *grundnorm*\(^\text{62}\) of a society can be developed without recourse to that society. Thus, we have Allan commenting that legislative validity (a fundamental function of Australian constitutional law) can not be determined “except in its context which includes the oral and social values prevalent in the community.”\(^\text{63}\)

This approach has also found increasing favour in the United States. United States constitutional jurisprudence is as important in this type of analysis as that of the United Kingdom for two main reasons. First is the conceptualisation of Thompson’s\(^\text{64}\) “Washminster” mode of government and law as being the dominant paradigm in Australia. Secondly, as Kirby J has noted, the Australian Constitution as a whole can be reflective of a continuing struggle between governance theories and jurisprudence of these two nations.\(^\text{65}\) Thus, the fact that American jurists are suggesting that constitutional interpretation relies on the entire matrix of law available (presumably not all of it contemplated within the text) is of major interpretative guidance. Indeed, some suggest that “specific words of the text play at most a small role” in divining constitutional interpretation.\(^\text{66}\) Importantly, it is argued that:

"Originalist approaches often find themselves in the position of being unable to account for some of the most prominent features of constitutional order ... [Progressive interpretation] accepts, without apology, that we depart from past understandings,

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that we are creative in interpreting the text. These practices need not be carried on with a sense that they are somehow inappropriate ... they identify what is truly at stake."67

Hence, we should not be telling fairy tales when there is a serious message to impart.

One of the prime causalities in this self perpetuated myth has been the ignoring of the interests of the people in constitutional adjudication.68 This is a notion established by Gillman in relation to the American situation. He argues that their "constitutional tradition has ignored communitarian concerns in favour of a socially corrosive dedication to protecting property and negative liberty."69 In this light, Aleinkoff's aim of balancing a "commitment to rights against a desire to accommodate the interests of the community"70 seems wise counsel. However can this be achieved through the use of old, text based interpretation which draws its power from a time before concepts of the politics of the individual and global notions of human rights? Is this feasible to use such a construction as a basis to divine such a compromise? I cannot see it as bearing fruit. A new regime has to be instituted to effect this fundamental change in the meta theory of the grundnorm. That must arise out of progressive interpretation of our Constitution to provide us with a progressive constitutionalism.71

67 id, p 935.
68 I shall return to this in part 4 of the article as this is where I see the evidence of the High Court's new constitutionalism as being of a kind to impart a new mode of governance based on the notion of communitarianism and deliberative democracy - that the people are sovereign and paramount in determining legislative validity. This is the "binding tie" between the notion of renewed government and constitutional interpretation.
71 Or, in the terms of Gillman, a constitutionalism which too occasionally, and too often in dissent, invokes notions of civil rights and the promotion of democratic politics. See Gillman, already cited n 58, p 77.
Therefore, if we accept West’s notion of a dichotomy of progressive and conservative constitutionalism it is important to see how those schools of thought have evidenced themselves in Australian constitutionalism and how the trend towards progressive interpretation is causing a re-evaluation of government and governance. As West argues:

"Should the Constitution be read as a vehicle to preserve existing social and private orderings against majoritarian political change or should it be read and implemented in such a way as to facilitate continuous, inventive challenges to the dominant social private order, making it a guarantor of progressive inspiration, if not progressive change?"

The key to this may be a greater concentration on “defining the sovereign, not sovereignty.” With this in mind, consideration of the Australian position can commence.

**Australian Constitutionalism - ‘morphing’ into new dimensions**

Traditionally constitutional law has rested on the foundations of parliamentary sovereignty, federalism and literal interpretation. Such definite certainty no longer exists. We have begun, it would seem, a “clean slate review of our fundamental political architecture.” It is a fair assessment to propose that recently we have enjoyed a sustained period of progressive interpretation, beginning with *Tasmania v The Commonwealth*, reinvigorated by *Davis v The Commonwealth*.

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The Australian approach has evolved from a position based on the courts, through strict interpretation, being unable to protect individual rights, thus reducing one's "sphere of liberty." This is demonstrated by Dixon's assertion that a court is only empowered to give effect to the tenor of a statute. This raises the notion of characterisation, or, in the terms of Fitzgerald, legislative validity. It is in this arena of the law, that of determining validity which notions of progressive and extended interpretation take root. It may be that "characterisation invites new principles of constitutionalism into the process of legislative validity." I take this argument further into the political sphere and suggest that if legislative validity is being reconstructed, this can not but have an effect on the legislative process and our notions of government in the Australian polity. It is in this function of the court's jurisdiction that we have seen the development of the repudiation of parliamentary supremacy; the diminution of the federalism compact as the guiding force of characterisation in favour of an assessment of the means and ends of the legislation; of the introduction of the public trust doctrine into our constitutional jurisprudence and finally the re-positioning of the sovereignty as resting within the Australian people.

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77 (1988) 166 CLR 79.
78 (1997) 146 ALR 126.
81 Fitzgerald, B, "Proportionality and Constitutional Legislative Validity" Unpublished Manuscript, June 1995. This notion of the change in characterisation will be dealt with to a greater extent in part 4 of this article to demonstrate the new constitutionalism in action; it is there that the threads of popular sovereignty over parliamentary sovereignty and federalist interpretative methods will be discussed fully. Importantly, the themes that Fitzgerald highlights have been picked up by Kirk in his recent article. See Kirk, already cited n 13.
Traditional characterisation is epitomised by Dixon J (as he then was) in *Melbourne Corporation v The Commonwealth*\(^8^3\) where he argued that::

"once it appears that a federal law has an actual and immediate operation within a field assigned to the Commonwealth as a subject of legislative power, that is enough."\(^8^4\)

The new interpretive method is demonstrated by Deane J in *Theophanous v Herald and Weekly Times*\(^8^5\) in his stating that in characterising a law the court needs to take account of contemporary social and political circumstances.\(^8^6\) This is understood to operate in a broad context as limitation of the Commonwealth incidental power by "equating reasonableness and appropriateness of a measure with questions of fairness and justice."\(^8^7\) In the words of Zines:

"[there is] an increasing boldness in the areas of traditional liberty, and an increasing readiness to limit the power of parliament to that end. The traditional concept of the supremacy of parliament in the view of some judges should give way to other important interests."\(^8^8\)

In turn, I submit, this must have an effect on the dominant theory of Australian polity leaning to a change centred on republican/communitarian notions. That is, there is a recognition of the need for poly-vocality in relation to our governance and how that is carried out. These political/constitutional themes call for wider participation of the population than is presently encountered. McDonald views the link as one by which the court actively protects "actual participation in the exercise of governmental power by

\(^{8^3}\) (1947) 74 CLR 31.
\(^{8^4}\) id, p 79.
\(^{8^5}\) (1994) 182 CLR 104.
\(^{8^6}\) id, p 174.
the governed."89 The issue then evolves into an evaluation of whether the courts should have such a right to demand such “fairness and reasonableness” where there is no directive for statutes to be expressed in such terms.90 As Forsyth has argued, it may be valuable that the judges protect democracy and fundamental rights, but this task should be allocated by the people rather than it be a notion of self appointment.91

Regardless, these are the hallmarks of the new constitutionalism in Australia; they are “a reflection of a shifting into place of a balance of forces between the users and the subjects of executive power.”92 Doyle summarises them thus:

- The Court is creative;
- The Court relies upon current community values;
- The Court adopts purposive constitutional interpretations;
- The Court will be less deferential to parliament and more wiling to invalidate law because of means chosen to effect ends;
- The Court will promote and protect rights; and
- The Court will imply personal rights when such implication can be drawn.93

91 Forsyth, C, “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review” (1996) 55 Cambridge Law Journal 122 p 140. This has lead one New Zealand commentator to claim that:

"the judicial lions discontented with their position under the throne, claim the right to leap up onto and prance about upon the seat of government and to jostle aside that seat's rightful occupants."

93 Doyle, J, “At The Eye of the Storm” (1993) 23 Western Australian Law Review 15 p 30. Doyle has revisited these themes of judicial law making
We as a society need to ask how this has come about; what pressures have caused these ruptures and spurred the High Court to institute change. This is re-enforced in the appreciation of Griffin’s conception of constitutionalism. He states that:

"constitutionalism is the idea that just as it is desirable to restrain and empower individuals through the rule of law, so it is desirable to restrain and empower the state."\(^{94}\)

It is now time to look to our political sphere to see why “the restraint and empowerment” (in the guise of determining constitutional legislative validity) of parliament has become a de facto operation of the court, and a necessary one at that. In this we can begin to understand the ‘how and why’ rights can trump democracy.\(^{95}\)

**The Downfall of traditional governmentality in Australia - a faulty transplantation?**

The development of the new constitutionalism and the “supra legal”\(^{96}\) notions attached to it herald significant change to conventional thought about government and the nature of governance in Australia. Moreover, it is interesting and illuminating to note how these traditional notions and their “bastardisation” have in some way lead to this more inclusive constitutionalism. We should not be surprised by this; Himsworth has argued that Constitutions (such as the Australian Constitution) which define the limits of public power necessarily presuppose a model of a state in which it

\(^{94}\) This is a term adopted by Horrigan to explain a court’s deviation from strict legalist thought; the concepts are notions of supra legalism; ideas that float above the strict rule of law. See Horrigan, B, “Paradigm Shifts in Interpretation: Reframing Shifts in Constitutional Reasoning” In Sampford, C and Preston, K (eds), *Interpreting Constitutions*, Federation Press, Leichhardt, 1996.
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can have effect.\textsuperscript{97} Hence, it should be no revelation that if the state and its nature changes constitutional divisions of power should also be modified. In such an event, it is necessary however to ask whether "our institutions match the principles which make them credible."\textsuperscript{98} The significance for Australia in this process of readjustment is a modification from state based power, regulation and review to one where those qualities are being reinvested in the people while being disinvested from traditional holders, namely, the Parliament.\textsuperscript{99} This is a rejection of the deference to parliament theorem\textsuperscript{100} and is reflective of Bogan's observation that in Australian politics, a citizen has a duty to participate in government.\textsuperscript{101}

While such a "reinvestment" seems appropriate and reasonable in today's post modern society we must realise that it is a fundamental reconsideration of our polity. Wolfe has stated that:

"The founders did not rely on the judiciary as their primary institutional mechanism for protecting rights. Rights were to be protected by the ordinary democratic process, emphasising the principle of majority rule and the moderating effects of a

\textsuperscript{97} Himsworth, C, "In a State No Longer: The End of Constitutionalism?" (1996) \textit{Public Law} 639 p 648.


\textsuperscript{99} Zoller sees this as the core principle of constitutionalism, whatever nation is in focus. She states that:

"There is no such thing as one size fits all in constitutional law. Constitutional rules have to be tailored to each country ... Constitutionalism has been devised for the good and right of human kind ... [W]e must never forget that the starting point and the end result of constitutionalism is indeed the human being."


\textsuperscript{101} Bogan, D, "Telling the Truth and Paying for It" (1996) 7 \textit{Indiana International and Comparative Law Review} 111 p 112. Bogan made this observation on outlining the recent electoral law case of \textit{Langer v The Commonwealth} (1996) 186 CLR 302. As an American, it is not surprising that he finds this a novel feature of a polity.

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multiplicity of interests in an extended republic. Courts were to be an auxiliary precaution, protecting a limited number of specified rights."102

This conceptualisation of governmentality has, in essence, been reversed. Why is this so? This can be answered with reference to a number of specific areas of governmental theory. The central themes along which reform seems to operate (and hence claim its legitimacy) is that of the failing of responsible (i.e. representative) government and the notion of parliamentary sovereignty.

Responsible government theory argues that members of parliament and in particular Ministers of Departments are responsible to the parliament and if they are negligent in their duties, or fail to perform in their portfolio, the parliament will act to address the problem. For a minister this will usually take the form of resignation from her or his ministry.103 Therefore, responsible government is, as Parker suggests, a term defining the institutions and relations between the cogs of the political machine which provides a mode of organising and executing political power in a responsible fashion.104 Emy and Hughes note that the central element remains the causal chain which links bureaucratic accountability through

102 Wolfe, C, *Judicial Activism; Bulwark of Freedom or Precarious Security?*, Brooks/Cole Publishing Company, Pacific Grove, 1991 p 124. While Wolfe is talking of the United States here the analogy is not too difficult to draw. Indeed, his reference to majority rule draws ire from other commentators who see this novel brand of constitutionalism as over riding that practice in favour of rule by 'elites' who are not in touch with general society. This sort of "tub thumping" approach to constitutionalism is well demonstrated by another American, Graglia who argues that the new approach to interpretation renders the American people "powerless and subordinate." See Graglia, L, "It's Not Constitutionalism - It's Judicial Activism" (1996) 19 *Harvard Journal of Law and Public Policy* 293 p 295. These themes are also capitalised on in a review of Sunstein's *Partial Constitution*, which has as its core the principle of deliberative democracy and novel constitutional interpretation. See Rivkin, D, "The Partial Constitution or the Sunstein Constitution?" (1995) 18 *Harvard Journal of Law and Public Policy* 293.


members of parliament to the House itself. This is seen as
the optimal way to ensure accountability among members of
parliament and the tenured, anonymous administration -
"public servants are responsible to Ministers; Ministers are
responsible to parliament; parliament is responsible to the
electorate." 

This last point is important as it leads on to the second main
feature of our parliamentary system, the notion of
parliamentary sovereignty. As an extension of the notion of
responsible government, and to give full effect to it, a system
had to be instituted so that the decisions made under the
rubric of responsible (and thus unquestionable and
representative) government would be long standing and widely
applicable. Enter the notion of the supremacy or sovereignty of
parliament. This principle, championed by Dicey proposes that
the parliament, when constituted correctly, can make or
unmake any law it so desires. This has been a fundamental
plank of our communal governance up until very recent times.
However it would appear that while it has remained a part of
our institutional structure, there are problems in its
transplantation from an unwritten constitution (such as in the
United Kingdom) into a written constitution as in Australia
with the competing demands of Federalist agenda. Clark
has made such claims explicitly, arguing for government
under the rule of law, not a notion of arbitrary power. Such
a case must remain argumentative however, given the tangible
evidence of almost a century of sovereign parliamentary
activity. Regardless, it is important to realise the effect of this -
that parliaments have not laboured under a check of their
power and their impact on rights of the people. In the terms of
Fitzgerald, rights have been subject to the "political process,
unprotected from arbitrary interference through constitutional
law and the judicial process." We are only now beginning to

108 Fitzgerald, already cited n 81, p 7.
110 Fitzgerald, already cited n 81 p 11.
ask if this is sufficient and acceptable. Increasingly the answer is no.

There has been a concerted argument by academic and court findings alike that traditional governmental notions of accountability and procedure fall short of the expectations and standard deserved by the community. Sir John Laws notes a similar realisation in the United Kingdom. He states that "it is a condition of democracy’s preservation that the power of a democratically elected government be not absolute." This reflects Finn’s assertion that we must look on government and parliament as our (the community’s) servant, not our master; without a greater check on the use of public power we leave ourselves vulnerable. It is almost irresistible to think that it was this line of reasoning; of reclamation of sovereignty and public power and placing it in the hands of the people that has informed the High Court’s thinking in the recent cases. Indeed it seems to correlate directly with Mason CJ’s comment in Australian Capital Television Pty Ltd v The Commonwealth that “sovereign power resides in the people.”

This notion raises the issue of fundamental individual rights as guiding constitutionalism and thus placing tacit limits on governmental action. I shall address this fully in the next section of this article. However it is important to note that such notions pose a viable alternative to parliamentary sovereignty. A slight formulation of this is proposed by Barnes in his arguing that the repudiation of a fundamental communitarian right or a particularly pernicious law could call

111 Witness, for trite example, the Fitzgerald Report in Queensland in 1989 and the WA Inc Report in Western Australia among others. If these inquiries and Royal Commissions are to tell us anything it should be that our tried and tested institutional arrangements may not be the best available. Accordingly, we seem to be redefining sovereignty, returning it to the people and recognising that any power to govern is given on a fiduciary basis. I shall expand on this later.


113 Finn, already cited n 54, p 225 – 227.


115 id, p 137 – 138.

116 Sir Robin Cooke, Former President of the Court of Appeal in New Zealand, now Lord Cooke of Thorndon, has been a passionate advocate of this stance. His views and those of his Court, which are of fundamental importance, will be canvassed later in this article.

117 On these "other theories" of sovereignty see Conaglen, already cited n 25.
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for extreme action by the court in rejecting its validity. The rationale for this view is that as both parliament and the courts derive their power from the rule of law, neither can lay claim of sovereignty over it. Allan extends this position, going as far to say that where parliament enacts laws out of tenor with the political and social morality they are acting outside of their power and thus lose what vestiges of sovereignty they may have been thought to have. Some, however, see this argument as pointless, claiming that there are sufficient checks on parliament without the need for a court to ever question the use of power. I can not concur with this position. History has demonstrated that when a government acts in such a way as to invoke Allan's notion of judicially imposed legislative validity such checks on power have failed; indeed a court may find itself powerless. In this light, Wass's logic is instructive. He argues:

"That the Diceyian concept of the constitution has survived the emergence of a dominant all pervasive state and a large public sector is perhaps due to the fact that those who have held public office have refrained from abusing the powers which their command over Parliament has conferred on them." Wass, D, "Foreword", in Harden, J and Lewis, D, The Noble Lie, Hutchinson, London, 1986, p i.

This seems a tenuous protection of rights - hoping a government will not act in disrespect for past conventions. Hence, perhaps this new constitutionalism we are seeing

118 Woolf, already cited n 90, p 68 - 69. The much flaunted example of a pernicious law would be a law requiring the killing of all blue eyed babies. For a fuller evocation of laws falling into this category see Oppenheimer v Cattermole [1976] AC 249 at 278 per Lord Cross.

119 ibid.

120 Allan, T, "The Limits of Parliamentary Sovereignty" (1985) Public Law 614 p 621. The theme of Allan's work is that parliamentary sovereignty rests only on an analysis of the political morality which gives parliament its authority (p 627).

121 See Lee, S, "Comment on The Limits of Parliamentary Sovereignty" (1985) Public Law 632, p 635.


123 If the events in the Queensland Parliament in 1997, when the then Attorney General remained in office despite a successful vote of no confidence, are any indication one should not place much faith in the protection afforded by this theory.
develop is an answer to a dilemma noted in 1776 by Burgh when he stated that:

"Our ancestors were provident; but not provident enough. They set up parliaments as a curb on kings and ministers; but they neglected to reserve to themselves a regular and constitutional method of exerting their power in curbing parliaments when necessary." \[124\]

Perhaps, the High Court of Australia is beginning to try to solve this problem through a re-orienting of the sovereignty principle in Westminster constitutionalism. Perhaps. \[125\]

This argument has caused many to re-evaluate the other ideal of our governmental system as outlined above, responsible government. \[126\] Responsible government has been lauded by many as sufficient protection for the people and their entitlements. Former Chief Justice Dixon, in an extra-judicial statement has asked:

"why should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people sitting in the federal parliament all legislative power, substantially without fetter or restriction?" \[127\]

The question posed by Dixon is answered by another Chief Justice, with Brennan CJ arguing that


This is given some credence by Lumb’s noting that in the history of the Constitution it has possessed a “legal-evolutionary nature” and has not had one consistent overarching method of effecting change. This may indicate our constitutionalism having a flexibility and organic nature so that these issues can be resolved, for the betterment and improved governance of the Australian polity. See Lumb, R, “The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change” (1988) 15 The University of Queensland Law Journal 3, p 5.

Which, by definition, includes the principle of representation of the population.

"A danger to human rights and fundamental freedoms is posed by the dominance of the Executive Government, supported by its bureaucracy, over the Parliament. This dominance has undermined the theory that the Westminster model of responsible government effectively guarantees democratic control of executive power."128

As such, a prime concern has been that a great deal of power and legislative force is delegated and thus vests in "unelected and unaccountable bureaucrats" thus frustrating the chain of responsibility as explained earlier.129 Others have extended on this, noting the contamination of the process by the use and dominance of political parties.130 Ratnapala has argued that "electoral politics has hopelessly corrupted the democratic ideal" and that judges in their proper constitutional role can prevent the threat of administrative despotism.131 The end result of this is, as Evans has predicted:

"[M]embers of parliament regard themselves not primarily as legislators or as controllers of the executive but as representatives of parties which are either in or out of power. The distinction between executive and legislative powers has

130 It is interesting to note, and perhaps somewhat of an explanation that political parties are not mentioned in the Constitution apart from section 15 which relates to the filling of casual vacancies of Senate seats. Indeed, this was only included after the constitutional crisis in 1975. Could it be that our constitutional institutions are incapable of dealing with political parties and the realities they bring to the politics of the Constitution? Is this another reason for the extended jurisdiction of the High Court?
131 See Ratnapala, S, Neoconservative Constitutionalism: Welfare State or Constitutional State?, Centre for Independent Studies, St Leonards, 1990 as outlined by Fraser, already cited n 129, p 388.
entirely disappeared; both functions are exercised by one body - the majority party."132

It is because of this conceptualisation of modern politics and polity that Finn has argued that the Australian people are “the forgotten cause of our system of government.”133 This is a notion at the core of much of Finn’s work and a main reason for his stance advocating a reappraisal of the theory government from one based on traditional notions of parliamentary sovereignty and responsible government to those themes being tempered by a republican notion of deliberative democracy.134 The failings of the present system are becoming all too obvious.

If we accept that the foundation for re-orienting sovereignty has been recognised by the High Court as epitomised by Mason CJ’s comments in ACTV then similarly a reconceptualisation of the mantras of responsible government can find foundation in Deane and Toohey JJ’s statement in Nationwide News v Wills135 that “the powers of government belong to and are derived from ... the people of the Commonwealth.”136 The reasons for the failure to realise this potential have been outlined by many, most of all Finn.

Initially, he sees a main problem as resting on the “capture and debasement of parliaments by executive governments.”137 In doing so, often the voice of the individual, the poly-vocality which was seen to be the foundation of the democratic system, was lost in the division along party lines.138 Because of this, Finn makes the link by stating that the exercise of executive

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133 Finn, already cited n 54, p 225.
136 id, at 72.
137 Finn, 1994, already cited n 134, p 44.
138 To suggest this is a problem particular to Australian legislatures would be misleading; it is a phenomena which is mirrored around the world.
power can limit the legitimate functioning of a duly elected parliament. The result is "sausage style legislation with a lack of consideration bordering on a wilful neglect of responsibility to the community."139 Coupled with this are the modern developments of an extended bureaucracy and Constitution which is naive of political parties.140 In essence, the assumptions on which responsible government were built no longer exist. A "modern notion" of responsible government is painted by Birch in his arguing that:

"a government is acting responsibly not when it submits to parliamentary control but when it takes effective measures to dominate parliament. Perhaps this reversal of meaning indicates as well as any description the gap between the doctrine of collective responsibility and the practice of contemporary politics."141

In so far as the parliament is unable to govern the work of the executive,142 it appears we have forgotten the "fabric and systems of public government to which we aspire."143 The executive function of government has been reformulated.144 That this has happened largely without our consent and perhaps to our detriment is of significant concern.

This notion of a mutated executive has found a common appreciation among other writers. Sir John Laws has been forceful in his stance arguing that the power of the Executive has "loosened the ties between the people and their rulers. The benign force of democracy is diminished."145 This comes about not only through the dominance of the Executive, but also because public discussion and the "public sphere" is increasingly being viewed as "extra political." That is, it is not

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140 Save for the sections dealing with Senate vacancies - see note 130.
143 Finn, 1992, already cited n 134, p 257.
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a part of the legitimate arena of politics but a side arena where
the public can express concerns without any notion of those
concerns having a tangible impact on the polity. Taylor
explains that the "extra political is supposed to be listened to
by power, but it is not itself an exercise of power.\textsuperscript{146} Indeed,
Taylor states that it is this exclusion and alienation which has
lead to the failure of traditional governmental theory.\textsuperscript{147} It
would appear that courts through activist and expansionist
rulings are not willing to let this proceed any further.\textsuperscript{148} That
some take umbrage at this is, I submit, surprising and
disappointing.

In many ways this perception has been reflected in the
findings of various inquiries around the country, especially
the "WA Inc" Report. As one of its key findings, it stated that
"some Ministers elevated their personal or party advantage
over their constitutional obligation to act in the public
interest."\textsuperscript{149} To remedy this, some see a need to return to
basics and re-evaluate our approach to government. Implicit
in this is not only the notion of greater emphasis on
"deliberative democracy" but the notion of the public trust;
that power is given to parliamentarians and officials on the
basis that it is exercised in the best interests of those who
cede it. Clark\textsuperscript{150} has argued that this concept is entirely
consistent with traditional responsible government theory;
indeed, a possible tool for refreshing this failing ideal. This is
also a notion explicitly referred to by the WA Inc Report. It
stated that traditional accountability methods were linked to a
system of government which no longer existed in manner or
form in a modern polity.\textsuperscript{151} Moreover, it is suggested that there
was an active attempt by the Commission to "draw attention
away from traditional accountability mechanisms" because of

\textsuperscript{146} Taylor, C, \textit{Politics and the Public Sphere}, in Taylor (ed), \textit{Philosophical

\textsuperscript{147} \textit{id, pt 207}.

\textsuperscript{148} See Dal Pont, G, "An Ethical Responsibility for Governmental
Responsibility to the Electorate" (1994) 10 \textit{Queensland University of

\textsuperscript{149} Western Australia, \textit{Report of the Royal Commission into Commercial
Activities of Government and Other Matters in Western Australia}, (1992), p
1.2 and 1.1.2.

\textsuperscript{150} Clark, K, "Do We Have Enough Ethics in Government Yet: An Answer

\textsuperscript{151} Already cited n 149, 3.1.2.
their seeming ineffectiveness. \(^{152}\) Uhr agrees, arguing that this reborn notion of the public trust has arisen out of the:

"fading lines on existing maps of accountability ... the community is powerless in that it lacks both the general power and specific competence to govern itself, yet arguably it has a legitimate stake in government." \(^{153}\)

Galligan also adopts this standpoint, noting that the public debate over government accountability has been partial and failed to take account of the full regimen of possibilities open to us. \(^{154}\)

The attitude that "parliament seems to have become regarded as a nuisance: necessary for certain purposes but to be avoided if possible" \(^{155}\) is increasingly taking root in the Australian polity. The task of reformation is being taken up by the courts, increasingly willing to implement the challenge of creating "a constitutional legitimacy based on the empowerment of a participating democracy." \(^{156}\) The intricacies of this approach can be spelt out in contemplation of the Court's decisions in the next section of this article. Suffice to say that the goals of broad participation, realistic goals, regular comparative analysis, sensitive implementation mechanisms and an open mind are paramount. \(^{157}\) This dovetails with Taylor's plea that we seek a political life "fostering freedom and self government under conditions of

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153 Uhr, J, "Redesigning Accountability" (1993) 65 *Australian Quarterly* (Winter) 1, p 1 - 2.


157 This list of goals is suggested by Cullen, R, already cited n 75, p 28. These themes are also reflected by Boehringer where she argues that participatory democracy would modify social institutions for the better. See Boehringer, K, "Against Clayton's Republicanism" (1991) 16 (6) *Legal Service Bulletin* 276, p 278.
equality." This is part of a "reorientation strategy" of the policy of our polity and method of governance. It is a strategy that:

"is remarkably basic. By thinking through the design principles implicit in that word "public", and by drawing on the institutions and practices associated with "the public account," we can regroup and begin afresh the task of devising an appropriate theory of accountability."

Having now given expositions on the theories of constitutional interpretation and the failings of our governmentality, it is appropriate to continue and consider how the courts have accepted the challenge to begin this task of devising an appropriate theory of accountability through the organic nature of common law. It is to this that I now turn.

**Enter proportionality - the capacity of the High Court to correct institutional malaise?**

Having covered the changing mode of constitutional interpretation and the methods deemed acceptable by the courts as well as the failings of the system of government which were seen to protect individual rights and entitlements, one can now move on to look at how this change is being effected by our courts and the concepts they are using to institute this revolution in the governing themes of our polity. If we accept the truism that the method of constitutional interpretation has a direct impact on the nature and ethos of a political environment then we must accept the corollary that to the extent that the Court is changing its approach to determining constitutional legislative validity, it will have an impact on our theories and mode of politics and governance. Principle in the new interpretative mechanisms is proportionality. The extent of the "infiltration" of this principle

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159 Stone, already cited n 152, p 14.
160 Kirby J has stated that the common law in the *Mabo* decision has a unique capacity to "correct itself from errors and right most wrongs." I believe this to be another fruitful area for the common law. See Kirby, M, "In Defence of Mabo", in Goot, M and Rowe, T (eds), *Make A Better Offer: The Politics of Mabo*, Pluto Press, Leichhardt, 1994.
can be seen in the statement of Gummow J that "in Australia, the proportionality doctrine has taken root."\textsuperscript{161}

The notion of legislation being proportionate in its means to ends is not new; indeed it is only the terminology that is novel. Traditionally this aspect of determining legislative validity was a process of asking whether legislation was "appropriate and adapted" to its head of power.\textsuperscript{162} While this term became a stock feature of such cases, the Court was always careful to ensure that it did not embark on a "merits review" of legislation passed by the Commonwealth. This was evidenced by Kitto J's comment that:

"How far they should go was a question of degree for the Parliament to decide and the fact that the Parliament has chosen to go to great lengths - even the fact, if it be so, that for many persons difficulties are created which are out of all proportion to the advantage gained - affords no ground of constitutional attack."\textsuperscript{163}

Increasingly this approach has come under attack, with a Court which has recognised the need to take account of greater features of society and ensure a degree of context relevance to its decisions. Indeed, the opening words of section 51, "subject to this Constitution", have become an avenue through which the court has been able to expand its jurisprudential horizons. This was first mooted by Murphy J when, in dissent, he argued that the nature and structure of our society and institutions meant that there were some rights which were inalienable and inextinguishable by the legislature.\textsuperscript{164} It is in this light that the full role for proportionality is presented; it is the tool available to the Court to ensure that fundamental rights are not over ridden by an over zealous legislature. It is the notion of "proportionate laws" which provides the scope and flexibility

\begin{footnotes}
\item[161] Minister for Resources v Dover Fisheries (1993) 43 FCR 656 at 576.
\item[162] Jumbunna Coal Mine NL v Victorian Coal Miners Association (1908) 6 CLR 309; Burton v Honan (1952) 86 CLR 169.
\item[163] Herald and Weekly Times v The Commonwealth (1967) 115 CLR 418 at 473. Importantly, this was a notion on which Taylor, Menzies, Windeyer and Owen JJ concurred.
\end{footnotes}
for determining legislative validity in accordance with fundamental rights of the people, and moreover, the ability for the court to widen their jurisprudence when determining legislative validity.165

What role has proportionality to play in the question of constitutional validity? Fitzgerald166 states that there are two possible roles, each dependant on what type of power is at the heart of the issue.167 The two roles are proportionality as necessity (are the means appropriately adapted to the ends without encroaching on fundamental freedoms) and strict proportionality (whether a law is excessive in its operation and is contra to fundamental common law freedoms). It is this second stance which is of fundamental concern here. That is, the Court is asking:

1. Is the law reasonable and appropriately adapted to its head of power; and
2. In determining if this is satisfied, it is necessary to ask whether the law goes beyond what is reasonably necessary to achieve its legitimate object.168

On a wider scale, Jackson has noted that this approach has developed out of the parliament's stretched use of its powers under the federal compact.169 It is out of this notion that we are provided with the definition of proportionality as a concept: "ingrained with the notion of governing in the interests of the people ... It is an ethic which says that good government is government which is to

166 Fitzgerald, already cited n 81, p 22.
167 By this he means i) a purposive/incidental power or a core power which in execution has fallen foul of implied constitutional guarantees or ii) merely core powers of the Constitution.
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the point, clear, precise and necessary and, in the context of constitutional guarantees, respectful of those guarantees. The ethic of proportionality requires that government objectives be carried out only in the most direct way, and in doing so, instils a respect for the citizen that Dicey's paradigm ignored.170

This principle has had an organic progression in constitutional case law. It has been noted171 that Deane J in Commonwealth v Tasmania172 first proposed proportionality as a guide for government.173 Then in Richardson v The Commonwealth174 a majority of the court agreed with this direction for governmental action.175 From these beginnings,176 it is important to exposit the cases where this principle has taken root in Australian constitutionalism and from this note the capacity for it to effect change in our political landscape.

*Australian Capital Television v The Commonwealth (No. 2)177*

In this case the government attempted to enact legislation prohibiting political advertisements during an election campaign. In place of this, a system was proposed whereby each political party would be allocated equal time dependant on conditions of style and content. The result of this was, as Fitzgerald states, the severe restriction of the freedom of citizens to discuss public and political affairs.178 Thus the approach of the court was to determine whether within the text of the Constitution there was an implied right to freedom of speech and, in light of that, whether this new law was disproportionate in quashing such a right. The implied right was found to reside in sections 7 and 24 of the Constitution;

170 Fitzgerald, already cited n 19, p 268, (emphasis added).
171 id, p 277.
176 As well as the prior mentioned tests of legislation being “appropriate and adapted” as held in Airlines of New South Wales v New South Wales (No 2) (1965) 113 CLR 54 at 86 per Barwick CJ.
177 (1992) 177 CLR 106.
178 Fitzgerald, already cited n 19, p 286.
the sections which call for a polity based on the notions of responsible government and for the Senate and House of Representatives to be elected at periodic intervals.

In light of this, Mason CJ reviewed governmentality in terms of the problems noted above and the need to reinvigorate it with notions of deliberative democracy. This is the now famous reinterpretation of Australian sovereignty, passing it from the parliament (Dicey) to the people.\textsuperscript{179} It was in this light that it became clear to Mason CJ that this law imposed an unreasonable burden on this right of political communication and as a result was outside of legislative power.\textsuperscript{180} Brennan J (as he then was) formulated this test in a more explicit fashion. He asked whether the law restricting political communication was "in proportion" to the legitimate interest which the law intended to serve.\textsuperscript{181} Deane and Toohey JJ explained the process of assessing proportionality, holding that the law's provisions went beyond what was reasonably necessary for the preservation of an ordered and democratic society.\textsuperscript{182} This was mirrored by McHugh J in his stating that the regulation of the right to participate in the electoral process must not be "disproportionate to the object to be achieved."\textsuperscript{183}

Thus, this indicates the stirring of a new method of determining legislative validity with a clear commitment to assessing the connection between means and ends. This movement was given greater impetus in \textit{Nationwide News v Wills}.

\textit{Nationwide News v Wills}\textsuperscript{184}

In the "sibling case"\textsuperscript{185} to \textit{ACTV} the issue concerned a restriction on writings which may bring the Industrial Relations Commission into disrepute. It was in this case that

\begin{itemize}
  \item[179] See \textit{ACTV}, (1992) 177 CLR 106 at 138 – 140.
  \item[180] id, p 142.
  \item[181] id, p 157. It should be noted here that Brennan J did include a large scope of deference to parliament in his decision. Regardless, the test he uses remains instructive.
  \item[182] id, p 169.
  \item[183] id, p 234.
  \item[184] (1992) 177 CLR 1.
  \item[185] They were handed down on the same day and reported consecutively in most of the reports.
\end{itemize}
the real reformatory zeal of the proportionality concept became apparent. It was signposted in Mason CJ's finding that to determine constitutional legislative validity one was not only to look to the now accepted "appropriate and adapted to the head of power" formula but also to whether the means employed by the parliament were "reasonably necessary or conceivably desirable for the achievement of the legitimate object."\textsuperscript{186} This introduces the notion of the courts taking action to determine the appropriate methods of implementing government action. Again, this is a fundamental change in our constitutionalism and is demonstrative of the link which has been proposed between constitutional legislative validity and theories of government. Brennan J also accepts this notion of means being excessive to ends\textsuperscript{187} with Deane and Toohey JJ finding much to celebrate in this approach. However they went further, noting the heretofore unrealised importance of the words "subject to this Constitution" in section 51. They used this phrase to cement their implied rights theory. That is, wider constitutional implications could not be ignored by the execution of a section 51 power. The court used proportionality to ensure that over enthusiastic government legislation could not over ride such entitlements by \textit{de facto} means.\textsuperscript{188} This approach also found favour with Gaudron J.\textsuperscript{189}

Therefore the result of these two cases is well summarised by Fitzgerald in his arguing that:

"ACTV and Nationwide inform us as to how government power is to be exercised in the purposive realm of the legislative sphere. A law will not be characterised as one pursuing a legitimate legislative purpose if it is disproportionate in execution; while one that is reasonably proportionate will be characterised as such."\textsuperscript{190}

From this beginning the High Court has continued to develop proportionality as an interpretative tool, in some instances placing severe fetters on its use and applicability. It is to these cases that I now turn.

\textsuperscript{186} Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at 31.
\textsuperscript{187} id, p 51 - 53.
\textsuperscript{188} id, p 76.
\textsuperscript{189} id, p 94.
\textsuperscript{190} Fitzgerald, already cited n 19, p 296.
The plaintiffs in this case were lawyers practicing in New South Wales and the ACT who, along with regular legal services, provided immigration assistance for a fee. Under the Migration Act 1958 (Cth) one could only provide such assistance if one was registered as a migration agent. The lawyers held no such registration and therefore were found guilty of an offence under the Act. In defence, the plaintiffs tried to claim that the law was not a valid exercise of power as in its construction it was claimed that it stifled the freedom of political communication as outlined in the earlier cases.

The court rejected this supposition by majority, stating that as the power was sufficiently linked to a core non-purposive power in section 51 of the Constitution it was not necessary to proceed with further consideration of the issue. However the comments by Mason CJ are worthy of exposition in that they flesh out the possible role that proportionality can play in a "broader characterisation" of legislative validity. While Mason CJ accepted that the first stage was to determine attachment to a head of power he noted a second stage which arises out of the consideration that the use of power in section 51 is "subject to the Constitution." He stated that:

"[I]t is material to ascertain not only whether the provision goes beyond what is reasonably necessary for the achievement of the legitimate end sought to be attained but also whether the provision causes adverse consequences, including infringement of fundamental values, unrelated to the achievement of that object or purpose ... There is a need to ensure that a law does not unnecessarily or disproportionately regulate matters beyond power under the guise of protecting or enhancing the legitimate end in view."
This approach is supported by Deane J in his move to determine legislative validity in the context of the entire Constitution, focusing on the "subject to the constitution" requirement. In this, some see Deane J as proposing a greater focus on proportionality as necessity, thus recognising human rights claims and the right of the citizen in the polity. This gives credence to the idea that the court can be a protector of fundamental common law rights - even when the legislature acts in a dissimilar fashion. This is reflective of the change spoken of earlier in the article about realigning governmental realities by judicial findings. This is also the approach of Toohey J. Indeed he appears to strongly advocate the necessity test for all questions of validity.

Brennan J (as he then was) understood Mason CJ's approach but could not accord such significance to the second element of legislative validity because he believed that a test of proportionality was unnecessary in evaluating validity of a core, non purposive power. He stated that when dealing with a core power, the "central and peripheral aspects do not evoke different tests of validity." This is a view echoed in strong terms by Dawson J. However in finding that purposive powers are seen to labour under the requirement of proportionality while other powers do not opens these decisions to claims of creating a false dichotomy of determining legislative validity. Such an accusation is strengthened when there is no apparent reason offered for the differentiation.

It is from here that the story of proportionality begins to diverge. One party seeing proportionality as a tool for use only in the characterisation of purposive powers or those outside of the placitum of section 51. The alternative view, championed by former Chief Justice Mason was that we should use our constitutionalism and interpretative methodology as an instrument for recognising rights and entitlements in society; rights which are so sacred that any attempt to remove them

196 id, p 335.
197 Fitzgerald, already cited n 81, p 44.
198 See also on this Toohey, J "A Government of Laws - Not of Men" (1993) 4 Public Law Review 158.
200 id, p 351 – 352.
201 And as we shall see, perpetuated by Toohey and Kirby JJ.
carte blanche will be struck down as an invalid exercise of legislative power. This dichotomy\textsuperscript{202} has been played out in the very recent cases where proportionality played a part.

**Leask v The Commonwealth\textsuperscript{203}**

It was this case which introduced "smurfing" to constitutional law.\textsuperscript{204} This case was centred on the rule under the *Financial Transactions Reports Act 1988* (Cth) regarding transactions which were constructed to remain under the $10,000 mandatory reporting requirements. It was declared that it was an offence not to report a series of transactions where it was reasonable to conclude that they had been constructed to avoid the reporting requirement.

With Mason CJ having retired from the court, the outcome of this case was different indeed. Some may put this to the fact that this was an "intra section 51" case and thus not effected by extraneous notions of guarantees in the Constitution. However this can only be taken so far. Brennan CJ began his adjudication by noting that:

"the basic test of validity remains one of sufficient connection between the operation and effect of the law on the one hand and the head of power on the other. If the head of power is itself purposive (for example, the defence power), the existence of a connection may be determined more easily by comparing the purpose of the law and the purpose of the power. But if the relevant head of power is non-purposive (as the taxation and currency powers are non-purposive) the validity of the law is more likely to be determined by reference to its operation and effect."\textsuperscript{205}

\textsuperscript{202} Even if a false one as I suggest.

\textsuperscript{203} (1996) 187 CLR 579.

\textsuperscript{204} In a discourse which continually refers to fripp, implication, placeta and purposiveness this novel terminology should not be as much of an entertainment as it has been - see Watts, N, "Smurfing, the Tax Man and the Commonwealth Constitution" (1996) 22 *ALMD Advance* 1 (20 November 1996).

Further, he argued that proportionality as a concept was of little utility in some aspects of constitutional law. He states that:

"[proportionality] has no application to the determination of the character of a law under our Constitution where the law does not affect an immunity of a kind which a limitation on legislative power is designed to protect."206

These were notions which Dawson and Gummow JJ applaud. He also raises the continued danger he perceives in the proportionality concept - that of the court adopting a de facto merits review of legitimate legislative action.207 This concern is supported (in separate judgments) by Toohey, Gaudron and McHugh JJ, with the latter stating that:

"If there is a sufficient connection between a subject of federal power and the subject matter of a federal law, it matters not that the federal law is harsh, oppressive, or inappropriate or that it is disproportionate or ill adapted to obtain the legislative purpose."208

Under this construction, proportionality will not play a part in constitutional adjudication unless the law is said to give effect to a purpose of a head of power and that purpose may infringe other constitutionally entrenched guarantees.

206 id, p 594 - 595.
The one glimmer of hope for a responsive and rights conscious court in this regressive formalism is the judgement of Kirby J. His Honour tellingly makes the point that to divide the application of proportionality along an imaginary division is merely an exercise in semantics and language manipulation. He argues compellingly for the wider contemplation and application of this concept on legislative power. He states that:

"It is difficult, in principle, to embrace the proposition that proportionality might be an appropriate criterion for some paragraphs of s 51 of the Constitution yet impermissible in respect of others. The same basic question is in issue in every case: namely where the boundary of federal constitutional power lies ... [it is a] a useful test of general application."

It is this approach which sits best with the aspirations of the Australian people and a renewed notion of constitutionalism and legislative governance. As a general principle, applied widely, proportionality would not suffer from the claims that it was judicial activism tacitly usurping the role of parliament. Instead, it would be seen as any other legal consideration. A dichotomous approach is likely to engender an alternative perception. The notion of one constitution, two constitutional interpretive methods is outmoded and does not reflect the modern approach to law and politics of the Australian people. This is calling out for change.

**Lange v Australian Broadcasting Commission**

This recent case refocussed the issue of the High Court and its protection of rights of the Australian people. Again, this was under the rubric of freedom of speech. The facts here were simple. The ABC had published allegedly defamatory material about former New Zealand Prime Minister David Lange. Under suit, the ABC claimed that it was protected by the implied constitutional freedom of speech in that the report related to the efficacy of government and one's fitness to be a member of parliament. While not determining legislative validity, this case allowed the court to revisit the concept of proportionality.

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209 id, p 635, (emphasis added).
as a tool for assessing whether a statute intruded on the constitutional freedom.\textsuperscript{211} In outlining the appropriate use of proportionality in such cases the court, in a unanimous judgement, stated that we need to ask whether:

"the law is reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government."\textsuperscript{212}

Therefore, this is the clear application of a proportionality as necessity approach - the court asking whether all such measures are necessary and required to effect the purpose of the law. Thus, to the extent that the law is over enthusiastic or impinges on areas of social activity which are outside the scope of the law, it will be declared invalid. Given this strong and sensible decision, it is difficult to understand why the Court refuses to extend this status and interpretative method to the entire regimen of legislative powers enacted under the Constitution.

An important feature of this decision is, however, the formal notation of the inapplicability of the Diceyan notion of parliamentary sovereignty to a federal, written constitution which specifically allocates powers under which parliament can make laws.\textsuperscript{213} The Court stated that:

"The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature."\textsuperscript{214}

This is an important acknowledgment and a great step in tying the link between constitutionalism and governmental theory. It asserts and holds as its truth the realignment of

\textsuperscript{211} Albeit unintentionally.
\textsuperscript{212} Lange \textit{v} Australian Broadcasting Commission (1997) 145 ALR 96 at 112.
\textsuperscript{213} It is to be recalled that the mantra of Dicey was that parliament could make or unmake any law it wishes; by having such limits placed on the powers of the legislature this mantra is seen to be oxymoronic. This has, to some extent been demonstrated by Kartinyeri \textit{v} The Commonwealth (1998) 152 ALR 540 (the Hindmarsh Island Bridge case).
sovereignty, political and legal, in the people of Australia. It recognizes the attempt by the former courts to make a square peg of descriptive constitution fit into the round hole of a 19th century political theory formulated for a polity with an unwritten constitution.\textsuperscript{215} Moreover, in recognising this false foundation it sweeps it aside past constitutional conceptions of government and starts afresh. This is the core of the theme of this article; constitutional interpretation and adjudication as providing a new direction and foundation thought for governmental theory and policy.

\textit{Levy v The State of Victoria}\textsuperscript{216}

This is the last case in the litany of significant decisions which has explored the notion of proportionality as an interpretative tool and an instrument for determining legislative validity. Here, there was a claim by a Victorian animal rights activist who claimed that regulations preventing him from protesting against duck shooting in the hunting grounds on the opening weekend of the was a fetter on his freedom of political communication. The court had little difficulty in conceptualising this issue as one within the realm of political speech, however the judgments in this case are noteworthy because they represent the real use of proportionality as a balancing tool for the broader rights of society against fundamental individual liberties. This is the essence of proportionality and its use as a broader protector of rights; it is the evocation of proportionality as necessity - that any restriction of liberty must be done out of necessity and not over arching in application.

The court delivered separate judgements, however the following comments were thematic of the approach taken.\textsuperscript{217} Brennan CJ noted that a law which is:


\textsuperscript{216} (1997) 146 ALR 248.

\textsuperscript{217} For the record, it was decided, unanimously, that the regulation was a restriction on the implied freedom of political communication. However because of the use of the proportionality doctrine the Court found that
"appropriate and adapted to a legitimate purpose is not invalidated by limitations of legislative power implied from the terms and structure of the Constitution merely because an opportunity to discuss matters of government or politics is thereby precluded."218

Rather, what was important to estimate was whether "the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose"219 That is, are the means proportionate. This was an approach followed by Dawson J who adopted the two stage test from Lange and used the second stage of that test, the evaluation of the extent and effect of the legislation, to declare the regulations as proportionate and thus valid. He states the process is:

"First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and

the regulations were a sufficient mix of protection for society and the hunters so that the legislation was valid.


219 Levy v The State of Victoria (1997) 146 ALR 248 at 252. Brennan CJ's refusal to use the language of proportionality is frustrating when what he argues for in such lugubrious prose is encapsulated in the word 'proportionality'. Or, as Kirby J has states, of the choice of nomenclature:

"It is a concept of growing influence upon our law. It is no more question-begging than the phrase "appropriate and adapted". It springs from a richer jurisprudential source. It is certainly less ungainly."

the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people ... If the first question is answered 'yes' and the second is answered 'no', the law is invalid."220

This is the very sort of assessment of legislative enactments he continually warns against. This is also recognised by Toohey and Gummow JJ where they more plainly state that "the reasonable balance which the regulations strike saves them from invalidity."221 While the use of this methodology and the employment of proportionality in this way is strong, it is difficult to understand why there had been such aversion to the use of proportionality in this fashion. What the Court did in using proportionality in Levy was the exact practice it rallied against in Cunliffe and Lange. Such inconsistencies need to be addressed; the High Court needs to stop being afraid of the scope of its original jurisdiction afforded it under section 76 of the Constitution - to interpret this document and ensure it remains a living force in our polity.

Therefore the preceding cases show us that the High Court has seen the genesis of a new principle of constitutional interpretation. Moreover they attempted to impose fetters on the use of this principle. This was done in limiting the type of constitutional powers which could be evaluated under the rubric of proportionality. This transparently false dichotomy was eventually removed and shown to be inapplicable in the Levy case where the decision of the court was one emphasising the balancing and protective nature of the proportionality principle. That they had little trouble applying the principle in that case suggests that there would be little difficulty in applying proportionality as a principle of general application as Kirby J suggested in Leask.222 Again, I believe this is an issue to be determined by the future development of the court, and of the court not being afraid of its constitutionally entrenched power.

Lord Devlin once wrote that:

220 Id, p 262.
221 Id, p 264. This type of approach was adopted by the entire Court; the notations above were the best example of this form of reasoning.
"There is always a host of new ideas galloping around the outskirts of a society's thought. All of them seek admission but each must first win its spurs; the law first resists, but will submit to a conqueror and become his (sic) servant."223

I believe this well summarises the path of proportionality in recent cases and years. Appearing in tangible form in ACTV and Nationwide; scaled back in Cunliffe and Leask but its potential beginning to be realised in Levy we are seeing the birth of a new star in the common law constellation.224 Moreover this is one which will have a tangible and positive effect on our governmental theory and ethic. I return to my assertion and theme that the two are mutually effective; proportionality demonstrates this fact. We must realise the potential and benefits this new, but not novel, principle offers us - as a legal community and one which is concerned with the governance and mode of rule in a polity. In Leask Kirby J said that:

"The verbal tests afforded by the Court's past authority are not precise enough to command a single, simple solution. The most that they can offer are techniques by which to test the impugned law. They provide expressions which point the decision-maker in the direction of some of the considerations which, in the past, have been found to be useful for the ultimate judgment which has to be made."225


224 This is even demonstrated in the recent case concerning the stolen generation where Gaudron J continued to outline her thoughts and approach to this issue. Continual thought, review and reflection will purify this concept for the digestion of it by Australian law. This is an important step forward. See Kruger v The Commonwealth (1997) 146 ALR 126. See especially Gaudron J at 206 - 207 where she discusses the characterisation process and the role of proportionality in that determination. It is noted that despite Gaudron J's discussion, proportionality was not of great significance in this case.

It is my submission that a full and unfettered application of the principle of proportionality would fill the void and inconclusive jurisprudence of which Kirby J speaks - it presents a simple, single solution. It is a viable principle with the recognition in *Lange* that parliamentary sovereignty is inconsistent with the Australian political institutions and the pressures which fashion them. To continue to accord undue deference to parliament under a theory which the court itself has debunked is inimical to progress and strong constitutionalism. The court needs to continue moving, to provide itself with the "spurs" not only to engender the new and progressive governmental theory but to provide protection to a nation which is otherwise dependant for its rights on notions of responsible government and ministerial responsibility - themselves notions under siege.

**Conclusion**

"We shall not cease from exploration
and at the end of our exploring
will be to arrive where we started
and know it for the first time."^{227}

The story of Australian constitutionalism and legislative governance is not yet completed; it is not a "finished fact to be categorically assessed."^{228} What I have attempted to show in this article is that we are on a journey which will continue to expand and develop our constitutional notions. There is no reason why our constitutional theory cannot develop in a fashion which supports a new and reinvigorated theory of government. I believe that we are already seeing the fruits of this approach. In essence, this reflects the aim with which I started this article. That is, to show that there is a new ethic of governmentality and constitutionalism arising out of the changed modes for constitutional interpretation which the court has adopted (explicitly) over the last five years. I submit that with the decline in the utility and effectiveness of the response of our governmental systems the court has acted to

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^{226} Devlin, already cited n 223 and accompanying text.


protect the Australian population. This is a fundamental shift not only in the method (and purpose in mind) we use to interpret our Constitution but in the meta theories of how our society is structured. It is, as Detmold claims, the returning of the sovereignty of Australian legislative and political power to the people; it is a realisation that we own the Constitution and the power it confers. As a result, it must be used in our best interest. The importance and impact of this change can not be understated.

To demonstrate the realisation of this theory, I initially outlined the various possible interpretative methods open to the court when dealing with constitutional questions. This touched on the theories of literalism, originalism, legalism and progressive interpretation, among others. From this foundation, I attempted to show the distinct shift in the court's reasoning which has moved it from a stance of "strict and complete legalism" to one where the spirit and nature of the law is contemplated; where the validity of a law is not determined by a formalistic application of long expired theories whose utility to a modern nation state was being questioned. Clearly we have entered into a domain whereby the court is no longer willing to be as restrained as in the past. Moreover, the court is willing to look at the effect government action is having and whether, through its decisions, it can reinvigorate the Australian polity and re-enfranchise its constituents. This is a positive development.

From this I turned to the second part of the article which was an assessment of why the court is needing to consider such activities. Here, I outlined the failure of the standard notions of governmental institutions and structure to "achieve the ends which justify their existence." We have seen in many Royal Commissions and Inquiries that the traditional strengths of parliamentary representation/responsibility, ministerial accountability and real policy deliberation by the houses of debate in our bicameral structure have been supplemented and made redundant because of the prevalence of party political allegiance. It has (d)evolved into a situation of executive dictatorship whereby methods to keep the public

229 Detmold, already cited n 16.
230 To borrow from Sir Owen Dixon.
231 Sampford, already cited n 9, p 214.
included and relevant in the political process have been, albeit surreptitiously, swept aside. Accountability to and citizen participation in the democratic process at election time only is not enough. Through the finding of implied rights in the Constitution and the increasing willingness of courts to protect “fundamental common law rights” it is increasingly redressing this problem. This has been championed by Sir Robin Cooke and is epitomised by his argument that:

"some common law rights may go so deep that even Parliament can not be accepted by the Court to have destroyed them."232

This approach is increasingly being mirrored by Australian jurists, in particular Justices Kirby and Toohey.233 As Tushnet has argued:

"We simply have to live with the fact that the power that we hope will benefit us - whether it is the power of the legislatures or the judges - might also hurt us. [We must] do what we can to make it more likely that the people with power will help rather than hurt."234

In looking at the Australian “free speech” cases noted above and their counterparts235 in the United States, Bogan has supported and re-invigorated this debate. He has argued that:

"Accepting the idea that the objective of the law is crucial to its constitutionality, no law should be immune from review for compatibility with the Constitution. General applicability alone does not negate the possibility of an impermissible objective ... The neutrality and general applicability of a law

232 Fraser v State Services Commission [1984] 1 NZLR 116. For an Australian perspective on this see Doyle, already cited n 165. One approach of the High Court to effect its rights based jurisprudence has been to rely on international norms as well as treaties and conventions to which Australia is a signatory - see Fitzgerald, B, “International Human Rights and the High Court of Australia” (1994) 1 James Cook University Law Review 78.


235 In the field of religious freedoms.
serves as an indicia that it is compatible with the free exercise of religion and freedom of speech but it is not a guarantee of consistency even if those human rights are viewed in terms of the legitimate and illegitimate purposes of government. Unless we demand strong reasons for restrictions that apply to [fundamental human rights], as well as to other matters, we may find our freedoms wane."236

The strength of this argument is, I submit, compelling.

The final section of the article moved on from this position to look at the development of the court’s novel jurisprudence in providing for this reinvigoration of the political landscape. This has been through the implied rights cases, in particular the development of and instituting of the proportionality concept. What we have seen in these cases is a Court which is willing to redefine sovereignty in our political landscape and constitutional interpretation. It can be put no clearer than McHugh J did in McGinty v Western Australia237 in stating that the political and legal sovereignty of Australia now resides in the people of Australia.238 This is the epitome of the seachange in our constitutionalism and as a result, the way we think about our legislative governance and the theory which underpins it.

Give these precepts, I think there are several conclusions about the changing nature of our polity. Moreover I think there is a link between our changing constitutionalism and the evolution of these reforms. As Griffith has argued, the interplay between the executive, parliament and judiciary is at the core of every constitution. Moreover, "the nature of the relationships between these bodies determines the nature of the working constitution."239

The initial change I see is the introduction and growing acceptance of the public trust idea as a viable method of

237 (1996) 186 CLR 140.
238 id, p 237.
accountability. This is reflected not only in the findings of many Royal Commissions and inquiries but also in academic writings and opinions. In tandem with this is a realisation that this tool of the public trust can be of wider significance as a head of quasi legislative review, albeit one which presently remains poorly enunciated and not yet formally ratified. This aspect is continually being emphasised in relation to Indigenous rights and protection of interests. Perhaps this development and ensuing changes is best encapsulated by MacPherson in his Biography of Edmund Burke where he noted the belief that "all political power [is] in the strictest sense a trust; and it is the very essence of every trust to be rendered accountable." It is this, more than anything else, which will operate to protect "fundamental common law rights." Its armoury is the proportionality of legislation.

A second impact is the already mentioned reorientation of sovereignty in the Australian people and because of this a definite shift towards the republican theories of government as propounded by Ackerman, Sunstein and Madison. This will

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240 Finn seems to be the main proponent of this but he is well supported by other writers such as Uhr and Stone.

241 See the following articles for a strong explanation and argument for the use of the public trust as a means of protecting indigenous interests: Malbon, J, "The Fiduciary Duty: The Next Step for Aboriginal Rights?" (1994) 19 Alternative Law Journal 72; Blowes, R, "Governments: Can You Trust Them With Your Traditional Title? Mabo and Fiduciary Obligations on Governments" (1993) 15 Sydney Law Review 254; Slattery, B, "First Nations and the Constitution: A Question of Trust" (1992) 71 Canadian Bar Review 261. Some seek to take this principle further with the use of fiduciary duties and public trust as binding the actions of government employees. This was given credence by McHugh JA (as he then was) at trial stage of the "Spycatcher case" where he stated that "governments are constitutionally required to act in the public interest" - Attorney General (UK) v Heinemann Publishers Australia P/L (1987) 10 NSWLR 86 at 191. For the United States position on this issue, see "The Fiduciary Duty of Former Government Employees" (1980) 90 Yale Law Journal 189. This has been judicially considered in Snepp v The United States 100 S. Ct. 763 (1980). For a more comprehensive coverage of the issues in Snepp see Birks, P, "Restitutionary Damages for Breach of Contract: Snepp and the Fusion of Law and Equity" (1987) 4 Lloyd's Maritime and Commercial Law Quarterly 421.

242 MacPherson, C, Burke, Oxford University Press, New York, 1980, p 32. This is perhaps growing exponentially in after the finding that where a private body exercises and enforces a public power that body will be held to the same review requirements as a public body would be - see R v Panel on Takeovers and Mergers; Ex Parte Datafin PLC (1987) 2 WLR 699.
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lead to an inclusion of the people in political decision making; a re-enfranchisement of the population so that they own the political process which governs them. Greater involvement and movement towards deliberative democracy will mean that the stranglehold of the tyranny of the executive may be lessened and our institutions reflect their purpose - legitimate debate over laws and their effect on the population rather than a prize to be captured and wielded by a political party, sometimes irrespective of the consequences. In the words of Hamilton, Madison and Jay:

"The accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few, or many and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."243

It is my submission that the introduction of proportionality as a tool for determining legislative validity and the accompanying changes in our governmental theory accentuating deliberative democracy and undercurrents of communitarianism will prevent our system becoming the agent of tyranny of which Hamilton et al speak. The rejection of the paradigm of parliamentary sovereignty for popular sovereignty is implicit and vital to this project. It is a vision to strive for; the High Court has begun our journey.

In closing I refer back to the dominant themes of this article. Initially, I see a direct link between the methods we use to interpret our Constitution and the fabric of our governmental theory and institutional landscape; the governing document of our polity has an immeasurable effect on the nature of our polity. Second, and as an extension of the first theme, to the extent that our constitutionalism is changed and adapted by the new tools of legislative validity (in particular proportionality) the legislative process can be seen to be infused with a new ethic of action and responsibility. To stress again, the tenants of proportionality are to infuse government with the notions of necessity, preciseness, clarity, efficiency,

243 Hamilton, H, Madison, J and Jay, W, The Federalist Papers, Penguin, Harmondsworth 1961, p 301. In Australia, at present, it would appear that two of the three can be said to be in line with Madison's description.
responsibility and accountability in legislative requirements and use of power. This is a positive development. It is a development which would see our constitutionalism as an attempt to "legitimate and justify legislative and bureaucratic social organisation in the face of concerns that these structures pose a threat to the interests they were created to serve." Fitzgerald presents this movement in the following way:

"[Parliamentary sovereignty] seemed to place fundamental values at the mercy of the parliament with no safeguard whatsoever. The authoritarian and exclusive effects of parliamentary sovereignty have started to wane and a respectful multi-voiced and cultured constitutionalism has started to arise. The voices that parliamentary sovereignty helped exclude are being invited into the emerging Australian constitutionalism which is premised partly on the sovereignty of the people." We can achieve this by transferring our custom of proportionality into law. This is what Beatty means when he argues for placing "principles of rationality and proportionality at the centre of the story of constitutional law." We must now embrace and enculturate this approach; we must remain "at the eye of the storm."

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245 Fitzgerald, already cited n 81, p 56 - 57.

246 id, p 57. On the issue of a customary activity and requirement being passed into substantive law see Loftus, P, "The Rise and Rise of Proportionality in Public International Law" (1997) 1 Southern Cross University Law Review 165.

247 Beatty, already cited n 1, p 17.

248 Doyle, already cited n 93.