Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform

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Australians are contemplating significant constitutional reform to coincide with the centenary of federation. The proposal will certainly include a republican form of government. It may also include the adoption of a new preamble – a new and inspirational introduction – to the Constitution.[1]

The Constitutional Convention of 1998 gave considerable impetus to this movement for reform, but it also signalled a subtle change in the nature of the debate. In the past, constitutional reform has tended to be the preserve of the specialist. Most of the participants in the debate have been individuals intensely interested in the business of government. Many of the proposals for reform have concentrated on technical adjustments of little interest to the Australian public generally. The chief proposals to escape this limitation have been the republic and a new bill of rights, but in each of these cases, most of the discussion has still occurred in specialist circles and has generally been technical in character.

The Constitutional Convention served to broaden the debate and in particular to place more emphasis upon the symbolic dimensions of the Constitution.[2] Increasingly one hears suggestions that the Constitution should reflect more closely the national character. It should declare who we are as a people. It should, in the words of the 1987 report of one of the Advisory Committees to the Constitutional Commission, 'embody the fundamental sentiments which Australians of all origins hold in common'.[3] It should speak with the poetry that we commonly associate with the American Constitution or the French Declaration of the Rights of Man and the Citizen.

The opening words of the Australian Constitution are often compared – unfavourably – to such texts. The US Constitution begins with the proclamation:

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1 These were the two elements recommended in Communiqué of the Constitutional Convention 1998 (13 February 1998) *Report of the Constitutional Convention*, vol 1, Report of Proceedings, Commonwealth of Australia (1998) at 42.

2 Mark McKenna in particular has observed that, as a result of the Convention, 'For the first time, Australians were imagining their constitution as a civic creed.' He has argued in favour of that development: 'Enough tax, what about the republic?' *Sydney Morning Herald* (30 September, 1998) at 17. See also McKenna M, 'First Words: the Emerging Relevance of a New Preamble to the Australian Constitution,' unpublished.

3 Constitutional Commission, *Report of the Advisory Committee on Individual and Democratic Rights under the Constitution* (1987) at 30.

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America ...[4]

The French Declaration of the Rights of Man and the Citizen begins:

> The Representatives of the French People constituted in National Assembly,
> Considering that ignorance, forgetfulness or contempt of the rights of man are the sole cause of public misfortune and governmental depravity,
> Have resolved to expound in a solemn declaration the natural, inalienable and sacred rights of man,
> So that this declaration, perpetually present to all members of the body social, shall be a constant reminder to them of their rights and duties ...[5]

The Australian Constitution is not too bad, frankly, especially when compared to the *British North America Act* which was Canada's principal constitutional text for so long, but it is nevertheless much more laboured than the American equivalent, and not terribly poetic:

> WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:
> And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen ...[6]

To many, this literary void is yet another example of the constitution's anachronism – another consequence of the fact that our Constitution was drafted at a time when Australia was not quite a nation. Surely we can do better now.

In this lecture, I want to raise a number of concerns with this line of argument. In particular, I want to speak against the idea that a constitution should seek to define the nation, translating the country's deepest commitments into concentrated

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4 Constitution of the United States, preamble.

5 Translation from Waldron J (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1987) at 26.

6 *Commonwealth of Australia Constitution Act*, 63 and 64 Vic (UK) preamble. The Canadian preamble, now found in the *Constitution Act*, 1867, reads:
Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:
And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:
And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:
And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America ....

poetic terms. I will speak in favour of a constitution that is more open and, yes, more matter-of-fact than that.[7]

More generally, I want to explore the relationship – often uneasy and tension-ridden – between symbolic and functional aims in constitutional reform. The specialist discussion – especially in law – tends to avoid discussion of symbolism, as though constitutional reform were simply about the formation of practical rules for the running of government (and I must confess that I have often fallen prey to that temptation myself).[8] Whether we like it or not, however, constitutional reform is shot through with symbolic implications, and it is time we took those implications seriously. For one thing, legal discourse is never entirely insulated from popular discussion of issues of law and justice. It serves in some ways as a specialised version of the more general discussion of these issues[9] and that general discussion shapes the evolution and interpretation of law. We ignore the constitutional provisions' symbolic charge at our peril. But more importantly, we ourselves, as specialists, are often moved more by symbolic aims than we admit or perhaps even imagine. In the interests of clarity and efficacy, we owe it to our discipline and to our country to think these issues through.

One of the purposes of this paper, then, is to show how symbolic aims are often interwoven with functional arguments – indeed how symbolic aims often dress themselves up in functional garb – to the detriment of clarity and good constitutional practice. The paper as a whole is about the interaction of symbolic and functional aims in constitutional reform: how symbolic aims shape constitutional discussion; how symbolic and functional aims might be

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7 As will become evident, this is not an argument against preambles as such, but it is an argument that preambles should be drafted in a manner that involves more reticence than is often the case. I make clear what I mean below.

8 The comments of the Constitutional Commission when, in 1988, it rejected a proposal for a new and more inspirational preamble, are indicative of this attitude: '... it seems to us that a preamble ... could be a source of passionate debate which would be a significant distraction from other substantive and more important proposals ...' *Final Report of the Constitutional Commission* (1988) vol 1 at 110.

A notable exception to this neglect is Coper M, 'Thinking about Constitutional Change' unpublished paper delivered to the 18th National Conference of the Australian Society of Labor Lawyers (Canberra, 6 October 1996). He identifies three perspectives on the Constitution, the second of which is indeed present in the popular and specialist debate, although I will not focus upon it: 'the Constitution as a symbol', 'the Constitution as textbook' (as an easily accessible description of how government works) and 'the Constitution as the formal framework for government'.

9 Legal discourse may have more autonomy from popular discourse than political theory does, but especially in the constitutional field, John Pocock's observation about the links between political theory and political discourse is largely transferable. He distinguishes the physical scientist from the political thinker on the ground that the latter's analysis is much more rooted in the specific context of his or her society: 'The political thinker is assumed to be thinking as a member, and in the context, of the political community itself, and therefore to be speaking a specialised variation of its public language.' Pocock JGA, *Politics, Language, and Time: Essays on Political Thought and History* (1971) at 16. This suggests that as specialists in legal argument, we should be alive to and concerned with the linkages between popular discussion and legal principle.

disentangled or at least brought into more healthy conjuncture; and what kind of symbolism, what kind of constitutional poetry, we should seek to achieve.

1. The Uncomfortable Role of Symbolism in Constitutional Reform

Symbolism plays a great, though often unacknowledged, role in constitutional reform. In the current Australian debate, its influence is most obvious in proposals for a new constitutional preamble. In February 1998, the Constitutional Convention resolved that a new preamble should be drafted, one that would express, in the introduction to the Constitution itself, a number of key values deemed to be of fundamental importance to Australians. These would include: 'recognition of our federal system of representative democracy and responsible government'; 'affirmation of the rule of law'; 'acknowledgment of the original occupancy and custodianship of Australia by Aboriginal peoples and Torres Strait Islanders'; 'recognition of Australia's cultural diversity'; and a variety of other things including, possibly, 'affirmation of the equality of all people before the law', and 'recognition of gender equality'. The role of the new preamble would be plainly symbolic. In fact, the Convention's Communiqué suggested, 'Care should be taken to draft the Preamble in such a way that it does not have implications for the interpretation of the Constitution.' Indeed, the text would prohibit judges from using it to interpret other provisions of the Constitution.[10] There is a real question about the efficacy and wisdom of these purported limitations on the effect of the clause, but I will address these in detail below.

The impact of symbolism is not confined to such overtly emblematic gestures, however. The move towards a republic is itself driven by overwhelmingly symbolic aims. This is patent from the principal arguments marshalled in its favour. Consider, for example, the terms in which Prime Minister Paul Keating expressed his support for the republican cause in his ministerial statement of 1995. He spoke of the republic as a natural expression of Australia's development to maturity. The creation of the republic would be an act, he said,

> of recognition: in making the change we will recognise that our deepest respect is for our Australian heritage, our deepest affection is for Australia, and our deepest responsibility is to Australia's future ....
> In proposing that our head of state should be an Australian we are proposing nothing more than the obvious. Our head of state should embody and represent Australia's values and traditions, Australia's experience and aspirations ....
> The right Head of State for Australia is one of us, embodying the things for which we stand, reminding us of those things at home and representing them abroad. We number among those things fairness, tolerance and love of *this* country. It is a role only an Australian can fill.[11]

10 See *Constitutional Convention*, n1 at 46–47.

11 Commonwealth, House of Representatives, *Parliamentary Debates (Hansard)* 7 June 1995 at 1435–36.

The symbolic character of the change is especially evident now that it is clear that the minimalist option (if any) will be adopted. Indeed, a number of public figures have gone to some trouble to argue that the republic would not affect the business of government or Australians' daily lives.[12] But even for those who embrace a more extensive republican reform, symbolic arguments bulk large. The proposal for direct election of the president is seldom justified in terms of any transformative effect on the practical functioning of government, but simply on the basis that direct election would be more democratic, because the president would be the people's choice.

Occasionally something that looks like a functional argument is introduced into the discussion. The most obvious is the frequent invocation of the dismissal of the Whitlam government in arguments for a republic.[13] But even here the functional arguments generally serve as surrogates for symbolic aims. It is very difficult to see how the minimalist republic would make any difference whatever to such situations in the future, especially now that the reserve powers of the Governor General will not be codified (and of course, if codification alone were the objective, the powers could be codified within a constitutional monarchy).[14] Indeed, the republican debate is particularly striking in that the chief arguments in favour of change are symbolic, while the chief arguments against it are predominantly functional (especially those that emphasise the possible impact on parliamentary government).[15] It is a particularly stark example of the tension between symbolic and functional aims.

The very reforms endorsed by the Constitutional Convention, then, are designed to achieve entirely symbolic objectives. But there are many other, more prosaic issues – predominantly functional in character – that also carry strong symbolic overtones, overtones that we often neglect. Those symbolic elements can deflect or undermine the functional aims. They require careful attention.

This is even true, for example, of that most prosaic of constitutional topics: federalism – the apportionment of legislative power between state and commonwealth governments. This symbolic element has not been obvious in Australian debates over federalism, but it has played a major role in other

12 See eg, id at 1437 (Keating); Hide C (ed), 'The Recent Republic Debate – A Chronology' in Department of the Parliamentary Library, *The Constitution Papers*, Parliamentary Research Service Subject Collection No. 7 (1996) at 233 (remarks of then Prime Minister Bob Hawke).

13 See eg, Hide, id at 244 (remarks of former Prime Minister Gough Whitlam).

14 Note the separation of these two issues by Keating, n11 at 1439.

15 See, for example: Kirby M, 'The Australian constitutional monarchy and its likely survival' (1993) *New Zealand LJ* 201 at 205. The anti-republican argument that the republic is a distraction from the real issues affecting Australia also focuses on function over symbol, though in a very different way.

Of course, not all the arguments are functional. Some Australians affirmatively support the monarchy for symbolic reasons. But notice how the discourse has shifted ground, so that now monarchical sentiment plays a relatively minor role. When he was in opposition, John Howard drew attention to active support for the monarchy, but significantly as part of a larger argument that the move to a republic would be divisive. See Hide, n12 at 235 (remarks of John Howard, when Opposition spokesperson for Industrial Relations).

countries. The new South African Constitution, for example, studiously avoids the language of federalism, even though it creates an essentially federal structure. 'Federalism' was rejected precisely because it had become, in many people's minds, a cipher for continued ethnic division. Other countries have shied away from the term, though not the practice, of federalism because they see it as undermining national unity. The new Constitution of Ukraine is an excellent example. The Autonomous Republic of Crimea has very extensive and constitutionally guaranteed autonomy, yet Ukraine is nevertheless proclaimed to be a 'unitary state'.[16]

The interaction of symbolic and functional aims is perhaps most pronounced, however, in debates over constitutionalised bills of rights. Lawyers almost always treat these instruments as though they were intended to be nothing more (and nothing less) than legal mechanisms for the protection of rights and liberties. But they also carry a very great symbolic charge.[17] They are commonly seen as charters of citizenship, defining the rights that all citizens have. They are taken to embody the contract between citizens and their governors, specifying the limits on governmental power. There is nothing surprising in this. Assertions of rights are intrinsically connected to ideas of citizenship, especially if one takes a broad 'social' conception of citizenship. Arguments for indigenous equality, for example, often claim that indigenous Australians are now treated, precisely because of this inequality, as 'second-class citizens'.

Usually the symbolic and the functional arguments are closely aligned, but this is not necessarily so. They can come into disjunction, so that the symbolic arguments displace and may even frustrate the objectives underlying human-rights protections. This is most evident in the uses made of the language of equality.

Most people, if asked to explain the fundamental objective of a guarantee of equality, would say that it was designed to protect against government-imposed disadvantage – that it was motivated, then, by a fundamental concern with individuals or groups suffering disadvantage within a society. But the language of equality can also be deployed in very different ways, in a manner that evinces a desire for uniformity and a hostility to difference within society. This can be seen in the two potential meanings for the phrase, 'Every citizen should be treated in the same manner; every citizen should be in the same position with respect to the state.' This can reflect a genuine concern with disadvantage: no citizen should be subject to discrimination because of their race, their culture, their origin. But it can also reflect a much more troubling concern with what it means to be a nation: one doesn't have a country unless every citizen is treated in precisely the same way; one doesn't have a real country unless everyone is the same kind of citizen. It can embody, in other words, a fundamental yearning for homogeneity.

16 Constitution of Ukraine, Article 2.

17 Perhaps ironically, this symbolic element is dominant in the Communiqué of the Constitutional Convention, n1, which recommends that equality be recognised in the preamble, where its practical impact would be negligible. This was, in some measure, a compromise between those who wanted a full bill of rights, and those who opposed an expansion in the courts' constitutional role.

This latter meaning can be profoundly hostile to any form of differentiation within the state.[18] It can, for example, pose a significant barrier to indigenous rights, and indeed we have seen the language of equality deployed against indigenous rights in just this manner. This use of equality has nothing whatever to do with a concern with disadvantage, but a very great deal to do with an abhorrent form of nationalism. The language of equality is a very important string to the One-Nation bow.

The problem is that at a symbolic level the language of equality tends to place a heavy emphasis on uniformity. Presumptively, to treat people equally is to treat them identically. We may all agree that this cannot be the case in practice. In some situations identical treatment will magnify rather than minimise inequality. We are unlikely to achieve greater equality, for example, if we withhold unemployment benefits from all people, male and female, who cease work because they are pregnant.[19] But those arguments always tend to work by way of exception. The basic presumption is that identical treatment is equal treatment. This can pose significant obstacles to the accommodation of difference, both in the broader political debate and, potentially, in the application of a bill of rights. In *Gerhardy v Brown*, the High Court was faced with a challenge to South Australia's Pitjanjatjara land rights legislation on the basis of the provisions of the *Racial Discrimination Act*. The Court denied the challenge, but it did so on grounds that stumbled over precisely the issue identified here, as my colleague Wojciech Sadurski has shown.[20]

One of the problems is that the symbolic charge of a concept like equality is so great that it can crowd out other considerations, or crowd out a more subtle and nuanced understanding of the concept of equality itself. Constitutional discourse tends to work on a level of high abstraction, and it is possible that in concentrating on those highly abstract values, one can lose sight of the more subtle demands of justice. Now, to a certain extent that is precisely what the advocates of a bill of rights want to achieve. They want to establish peremptory demands – peremptory commitments to freedom of speech, freedom of religion, equality, and other values in a manner that specifically excludes other considerations or at least results in them being weighed very differently. They often want to do this precisely for symbolic reasons; they want to emphasise just how important the general values are – so important that they should not be balanced against more mundane concerns. The symbolism and abstraction therefore work hand in hand. But we should ask ourselves whether this is likely to achieve better justice. The priority

18 For the effect of these arguments in recent Canadian debates, see Webber J, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (1994) at 141–44; Webber J, 'Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms,' (1993) 5 *Canterbury LR* 207 at 221–225.

19 Compare *Bliss v AG Canada* [1979] 1 SCR 183 and *Brooks v Canada Safeway* [1987] 1 SCR 1219.

20 *Gerhardy v Brown* (1985) 159 CLR 70; Wojciech Sadurski, 'Gerhardy v Brown v the Concept of Discrimination: Reflections on the Landmark Case that Wasn't' (1986) 11 *Syd LR* 5.

that we attach to those values might displace other less striking, but nevertheless very important, considerations.[21]

The role of symbolism can therefore undermine or distort our practical pursuit of justice by thinning out the range of considerations on which we rely. But what about those aspects of the Constitution that are not intended to have specific legal effect – that aim, as far as possible, to be purely symbolic, that are simply poetic. I am thinking of those provisions designed to 'embody the fundamental sentiments which Australians of all origins hold in common'.[22] Are there any reasons for caution with respect to them?

I believe that there are. I think that we should not attempt to use our Constitution to try to define what all Australians believe, or what this country is all about. Such efforts almost always misfire. Either they end up overdefining the nation, so that they include things that all Australians manifestly do *not* believe, or they veer into platitudes, so that they affirm values that are common to any industrialised democracy. Some of these values may be worth affirming, but they hardly amount to a definition of what makes this country Australia. And if the first option of selective definition is adopted, one is very likely to end up with a narrow and exclusive definition of citizenship. A nation's life is much richer than the terms we use to express it; it involves much more diversity and contestation. If we try to define Australia, we are very likely to end up with a caricature, a dumbed-down version of what this country is all about.

We are also likely to fall quickly into anachronism. Nations live, and in living they change. They cannot be reduced to writing. Consider what would have happened had we written a definition of this nation into the Constitution even as recently as the 1950s. Would we have been content with that definition now?

Does this mean we should rigorously avoid all symbolism, all poetry? I don't believe so. There are ways that we can capture, in Janet Holmes à Court's phrase, 'the smell of eucalyptus ... and the feel of red dust'[23] in our Constitution and that we can manage appropriately the relationship between symbolism and function in constitutional reform. It is to those matters that I now turn.

2. *The Appropriate Uses of Symbolism in Constitutional Reform*

Even if we wanted to, we could not eradicate symbolism from our Constitution. Language always carries connotations, implications, and points of resonance. These leave their impact on constitutional interpretation, just as they do on any use of language.[24]

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21 Webber J, 'Tales of the Unexpected' n18 at 221–229; Edmund Burke cautions against precisely this risk of oversimplification and inadvertent selectivity in the drafting of constitutions in Burke E, *Reflections on the Revolution in France* (1969) at 153.

22 See n3.

23 Commonwealth, Constitutional Convention, *Parliamentary Debates (Hansard)* 13 February 1998 at 952.

There are many reasons, for example, why section 92 of the Australian Constitution was held to forbid the nationalisation of industry. These undoubtedly included the judges' own hostility to state ownership and the general problem of determining when a constitutional provision protects not only its ostensible object (trade between the states) but also the conditions on which that object was premised (the existence of a free market).[25] But despite the undoubted importance of those reasons, one also suspects that the result was made more likely by the stirring language in which section 92 was drafted, requiring as it does that trade between the states be 'absolutely free'.[26]

One might try to limit such effects by differentiating between the operative and symbolic parts of a constitution. This differentiation occurs in France, where one document – the Declaration of the Rights of Man and the Citizen – has little practical impact but a strong symbolic role, and another – the Constitution – governs the practical workings of government. The same is true to a certain extent of the United States, where the Declaration of Independence carries much symbolic freight but no practical application (although of course, in the United States, the Constitution itself also plays a strong symbolic role).[27]

One might try to accomplish the same thing in Australia. In fact, the Convention's proposal for a new preamble does aim for this kind of outcome. It tries to do so by forbidding the courts from using the preamble in constitutional interpretation, thereby attempting to quarantine the symbolism from the operative parts of the Constitution.[28] One can question, however, the wisdom and the efficacy of that attempted separation.

First, the very effectiveness of symbolism can depend upon it being taken seriously, and this may mean that one has to allow it to have some consequences. In his discussion of political symbolism, Michael Walzer draws a provocative comparison to religious ritual and argues that political symbols too may require a certain acting out, an embodiment (even if figurative) in action. One has to act in some way consistent with their truth.[29] Indeed this makes intuitive sense. There does seem to be a difficulty in claiming certain principles to be fundamental to our political life, but then forbidding anyone from taking them into account. Mark

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24 For an extensive foray into the symbolic features of speech, see Langer SK, *Philosophy in a New Key: A Study in the Symbolism of Reason, Rite, and Art* (3d ed, 1957) and for the variety of connotations and points of resonance of political speech, see Pocock, *Politics, Language, and Time*, n9 at 17.

25 For one discussion of the first reason, see Galligan B, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987) at 112ff and 158–176. The second reason is less obvious, but ironically Dixon J argued against precisely this kind of confusion of enactment and assumption in *Australian National Airways v Commonwealth* (1945) 71 CLR 29 at 81, when he rejected a narrow interpretation of section 51(i) of the Constitution.

26 Coper M, has also drawn attention to the ringing character of this phrase: n8.

27 My thanks to Rod Macdonald for bringing the differential role of these documents to my attention.

28 Constitutional Convention, n1 at 47.

29 Walzer M, 'On the Role of Symbolism in Political Thought' in Strong T (ed), *The Self and the Political Order* (1992) 64 at 71.

McKenna has criticised the Convention's Communiqué for recommending a 'Clayton's preamble'.[30]

But second and more importantly, the attempt to quarantine the preamble depends upon a simplistic understanding of constitutional interpretation – a belief that constitutional provisions can be separated from broader interests and concerns. This is not so. Interpretation of the division of powers, for example, is inevitably coloured by broader conceptions about what federalism – the relationship between the states and the Commonwealth, indeed the very structure of the Australian nation itself – is all about.[31] This was patent in the period prior to the *Engineers* case;[32] it remains true since, although the balance has now shifted in favour of the Commonwealth for reasons closely related to the consolidation of a sense of Australian nationhood.[33] A constitutional text does not apply itself. It needs to be interpreted, its provisions need to be elaborated to speak to specific cases, and its various elements need to be woven into a consistent whole. The broad concepts – like federalism, the rule of law, and democracy – that we use to understand our countries' governments inevitably shape our interpretation of their constitutions. South Africa and Ukraine knew what they were doing when they refused to use the term 'federalism' to describe their new arrangements.

The broad considerations that courts inevitably use when interpreting the Constitution are precisely the kinds of considerations that the Convention proposes to write into the preamble. If adopted, those phrases will have a measure of real democratic legitimacy; they will be deliberate statements of important values for this country. Isn't it appropriate that the courts do refer to these recitals, given that they must rely upon similar kinds of principles anyway? Indeed, how can they be stopped from doing so? It would be more straightforward and more transparent if they did. We should focus on what we should write into that preamble, not chase the chimera of trying to exclude constitutional interpretation.[34]

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30 McKenna, 'Enough Tax', n2. In Canada, a similar issue arose in the late 1980s and 1990s over attempts to amend the Constitution to recognise Quebec as a 'distinct society'. That recognition was important for largely symbolic reasons, but the symbolism was itself dependent on the principle having some effect, albeit vague and difficult to predict. See Webber, *Reimagining Canada*, n18 at 129.

31 The same might be said of our sense of the appropriate relationship between legislature and executive in judicial review of administrative action, or our sense of the justifications for judicial independence, when deciding whether federal judges can serve as commissioners of inquiry. See, eg, Evans JM, *De Smith's Judicial Review of Administrative Action* (4th ed, 1980) at 31–35; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 10ff.

32 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. For an overview of the pre-*Engineers* reliance on conceptions of federalism in constitutional interpretation, see Zines L, *The High Court and the Constitution* (4th ed, 1997) at 1–7.

33 See Zines, id at 15–16 and 319ff.

34 Of course, those seeking to exclude reliance on the preamble may well have no such illusions. It is certainly possible that their interventions too are intended to operate on the symbolic plane, designed to express dissatisfaction with and discourage what is perceived to be excessive judicial activism.

That is true as long as the preamble is used for the purposes to which preambles are generally put: the setting forth of general considerations that underlie the enactment, considerations that do not have independent force of law and that are therefore not justiciable in their own right but can be used as an aid to interpretation.[35] I know that some actors in the Convention wanted to have more than that. They wanted to have a bill of rights enshrined in the Constitution, and only settled for the recognition of equality in the preamble as second best. They may still harbour the hope that the courts will use the preamble to create, by judicial interpretation, a robust guarantee of equality. The adoption of a bill of rights by stealth would not be appropriate, and if that is the objective, equality is best left out of the preamble. If the democratic process cannot produce a bill of rights by conscious action, one should not be created by covert means supplemented by judicial fiat. But even if recognition of equality is included in the preamble, I doubt very much that the courts would use it as the basis for a new set of rights. The role of preambles is clear in Anglo-American constitutional theory; they do not create independent rights and obligations, and there would be no democratic warrant for departing from that practice here.

The attempt to prevent the courts from drawing upon the preamble in constitutional interpretation is therefore misconceived. There may be other reasons, however, to separate the symbolic from the functional elements of the Constitution (to the extent that this is possible). The yardstick of symbolism is often very different from that of function. For example, those concerned with symbolic recognition may focus primarily on the amount of attention they receive in the document. Did they get four clauses when someone else got twenty-four? Were they relegated to the back of the document, when someone else's interests were recognised at the front? For those concerned with constitutions as functioning documents, such considerations are wrong-headed. It may simply take more space to say what needs to be said. There was a good example of this kind of disjuncture in Canada, during the debate over the set of constitutional amendments known as the Meech Lake Accord. That Accord focused almost exclusively on the concerns of Quebec, for the very good reason that the concerns of other groups had already been addressed in previous rounds of constitutional negotiations. But the very fact that the Accord was restricted to Quebec's concerns suggested, to many citizens, that Quebec was getting special treatment and that others were being ignored. In the popular debate that followed, little could be done to counter that impression.[36]

One can see glimpses of a similar difficulty in the Australian debate. The 1988 report of the Constitutional Commission rejected a proposal for a revised preamble in part because it heard such different opinions on what should be included and what excluded.[37] Once one includes Aboriginal people, why shouldn't one

35 The Constitutional Commission suggested that this kind of preamble would have no effect at all as long as the courts continued to take a broad approach to the interpretation of the Constitution: n8 at 109. This seems mistaken. Such a preamble would function precisely by specifying considerations that courts should take into account when pursuing that broad approach; in the absence of such a preamble, the courts could consider those matters, but no direction would be given.

36 See Webber, *Reimagining Canada*, n18 at 146ff.

37 See *Constitutional Commission*, n8 at 109–110.

recognise multiculturalism? Once one recognises multiculturalism, why shouldn't one recognise those who fought in the war? A long contest for recognition then ensues. Now I do not believe that these problems are so intractable that one should simply give up. For one thing, people will find symbolic significance in the pattern of constitutional amendments whether one likes it or not. But the complex problems of symbolic calculation may be more easily resolved if one can deal with them in a document that is set apart from and therefore unconstrained by functional objectives.

To this point, I have tended to deal with symbolism as though it were an awkward intrusion into the constitutional process – something that should be managed rather than embraced. But the simple fact that symbolism does intrude, so insistently, should alert us to the fact that it is there for a reason. We should reflect, in short, on the functionality of symbolism, if we wish to deal with it sensibly.

So why are symbols an indispensable part of people's grappling with constitutions?

To begin, symbols can be extraordinarily important in rendering concrete ideas that are otherwise abstract and diffuse, and in emphasising that they matter. One doesn't have to grasp an entire complex argument – or a complex set of constitutional provisions – in order to be concerned about one's country; the symbols stand for a set of institutions or issues that are crucial, that one cares deeply about, but that can be worried about and elaborated over time.

Michael Walzer captures this combination of the symbolic and the reflective when he says, the 'state is invisible; it must be personified before it can be seen, symbolised before it can be loved, imagined before it can be conceived.'[38] He notes, quite rightly, that these symbols are not divorced from reasoning, but rather serve as fundamental units in our process of thinking. For example, the act of voting – the physical marking of a ballot paper and the placing of it in the urn – serves as an important democratic symbol (as well as having a crucial functional role). But its very centrality as a symbol drives us to think about what it means to vote, what political participation should mean in Australia today, and how that participation might be improved. The very force of the symbol, our very commitment to it, guides our reasoning. While we might think that such symbols sometimes simplify or distort, we can't do without them. Metaphor and analogy are basic building blocks of our political or legal arguments. When we refine our concepts, we often do so by refining our metaphorical arsenal.

Note too that symbols are important as objects of attachment, objects of allegiance. This too plays an important role in our reasoning. Iris Murdoch, when

38 Walzer, n29 at 66. See also Burke, n21 at 172: '... that sort of reason which banishes the affections is incapable of filling their place. These public affections, combined with manners, are required sometimes as supplements, sometimes as correctives, always as aids to law. ... To make us love our country, our country ought to be lovely.' At a more mundane level, symbols can serve as ciphers for principles for the purposes of civic education: Hughes CA, 'The Good Citizen: Past and Futures for Political Education' (1996) 42 *Aust'n J of Politics and Hist* 1 at 3.

speaking of the act of doing philosophy, emphasises the close linkage between passion and reason, how it is our passions, our commitments, that drive the quest for greater rigour and insight. We fasten on a set of issues – often associating them with a set of classic problems or situations – and our preoccupation with those issues holds our attention, as we try to work them through over time.[39]

Countries are a lot like that, aren't they? They too hold our attention, often through the use of certain symbols or images (the sunburnt country, the bush, mateship, the Eureka stockade, Australia in Asia, the settlers' encounter with the dreamtime), and that very attachment forces us to worry over what our country should mean, what it should be doing, where it should be heading. That too is the role of the somewhat more complex symbols that exist within constitutions. They too serve as objects of allegiance – and as concepts that stand at the very centre of our engagement as citizens and as constitutional lawyers, even in our specialist debates.

Precisely because they serve that role, their precise character can make a difference to the patterns of political participation and the sense of political belonging within the population at large. I don't believe that the symbols rigidly constrain what can be done in society. The symbols generally function more as grounds for argument. But their character does shape the direction of debate, suggests implicitly what is important and unimportant, and therefore influences people's sense of involvement in or alienation from the political arena. It matters whether or not the prime minister apologises to aboriginal people because an apology would represent a clear reconsideration of and conscious break with a frankly colonial past – a re-evaluation that is crucial to aboriginal people's sense of participation in today's Australia. Symbolic gestures have very practical consequences.

So what sort of symbolism should we write into the Constitution? What sort of constitutional poetry should we have?

As I said in the first section of this paper, I believe it is a mistake to attempt to write a definition of Australia. This country is too rich and varied for that, too subject to contestation and disagreement, too subject to change and reinvention. We want to draft a constitution that retains that sense of openness and diversity, and that allows the country continually to invent itself. We want a constitution that suggests broad orientations, not one that assumes that we have already arrived.

Our symbolism, then, should be open in its implications, expressed in language that is rich in connotations and productive of interpretations, so that it can accommodate, in symbolic terms, the growth of the country.[40] One should aim for a metonymic quality, in the sense that Northrop Frye uses that term, where 'the verbal expression is 'put for' something that by definition transcends

39 This argument appears in condensed form in Murdoch I, *Metaphysics as a Guide to Morals* (1992) at 505–6, but is addressed more fully at various points in Murdoch's book. See also Walzer, n29 at 66–67 and 75 n8; Langer, n24 especially at 92–93 and 284ff.

40 Compare Langer, n24 at 281: 'The meanings which are capable of indefinite growth are symbolic meanings: connotations, not significations.'

adequate verbal expression.'[41] I acknowledge that this desire for openness runs contrary to the dominant tendency in Australian legal culture, which generally seeks to write everything down and which is hostile (at least ostensibly) to judicial interpretation. But a measure of openness is appropriate, at least in the symbolic dimensions of a constitution. Constitutions are written for the long haul, and they need to allow for the process of reconsideration and elaboration that occurs in the life of any country. Couching one's symbolism in more general and evocative terms is less likely to lead to anachronism. It is less likely to lead to definitions that soon seem skewed and partial precisely because they focused on concerns that were central at one moment, but were soon displaced or qualified by others.[42] This is one reason, I believe, why images of the land bulk so large in many countries' national imagery. They have permanence, particularity, and the quality of metonymy.

In this respect, the draft preamble proposed in February 1999 by Gareth Evans (then advanced in modified form by Evans, Natasha Stott Despoja and Bob Brown in April 1999) is superior to the government's draft of March 1999. The latter appears to preach to us about what we should believe, as in the clause:

> Australia's democratic and federal system of government exists under law to preserve and protect all Australians in an equal dignity which may never be infringed by prejudice or fashion or ideology nor invoked against achievement.

It also finds itself trapped between an attempt to state why particular aspects of Australian society are valuable on the one hand, and the inevitable constraints of space on the other. In the end, it leaves the impression of saying too much, yet at the same time saying too little, as in the phrase: 'Our vast island continent has helped to shape the destiny of our Commonwealth and the spirit of its people.'

By contrast, the Evans/Stott Despoja/Brown version glories in deliberately spare evocations:

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41 Frye N, *The Great Code: the Bible and Literature* (1982) at 15. Or compare Clifford Geertz's suggestion that all good constitutions are 'short, ambiguous, and impeccably high-minded': 'Ideology as a Cultural System' in Geertz C, *The Interpretation of Cultures: Selected Essays* (1973) 193 at 225.

42 Indeed, I doubt that the goal of a high degree of precision, in order to exclude interpretation, is appropriate in constitutional documents generally. I do think that there are limits to what courts should be asked to do in their interpretations of constitutions, and have raised doubts about charters of rights for that reason. See: Webber, 'Tales of the Unexpected,' n18. But in my view, that goes more to the scope of matters addressed in a constitution than the best form of constitutional expression and most appropriate theory of constitutional interpretation. Australian courts have come to the realisation that when they interpret the Constitution, they are doing more than was suggested by the 'strict and complete legalism' of the Dixon era ('Swearing In of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi at xiv). Nor am I convinced that a more precise form of drafting – one that seeks to exclude all potential for interpretation – really leads to more predictability. In constitutional instruments, which last for long periods of time without alteration, it often leads to anachronism or awkwardness, and that in turn leads to ad hoc devices to overcome the difficulty.

> We the people of Australia
> Proud of our diversity
> Celebrating our unity
> Loving our unique and ancient land
> Recognising Indigenous Australians as the original occupants and custodians of our land
> Believing in freedom and equality, and
> Embracing democracy and the rule of law
> Commit ourselves to this our Constitution.

Indeed, the argument for an openness of symbolism is not, in itself, an argument for extensive constitutional provisions that then provide a broad scope for judicial review of legislation. On the contrary, it tends to run in the opposite direction, arguing that we exercise some reticence in drafting constitutional poetry – that we don't try to write it all down.

It may also mean that we aim for symbols that focus on how we should go about doing things rather than who substantively we are – on process rather than content. It has always struck me as eminently appropriate that Australia should have compulsory voting, given this country's vigorous democratic ethos. Quite apart from its functional value in promoting representative government, compulsory voting constitutes a forceful image of the importance of democratic engagement. James Walter has rightly emphasised how the franchise might serve as a central symbol of Australian citizenship.[43] A similar example of such an eminently civic symbol – this time from Scotland – is the first clause of the *Scotland Act* 1998,[44] which simply states: 'There shall be a Scottish Parliament.' Donald Dewar, leader of the Labor Party in Scotland, and Neil MacCormick, legal philosopher and candidate for the Scottish National Party for the European Parliament, have both emphasised the power of that plain phrase in a country regaining its legislature for the first time in almost 300 years.[45]

Above all, the argument suggests that we shy away from attempts to proclaim 'the fundamental sentiments which Australians of all origins hold in common.'[46] We do *not* share the same values, and we do not have to in order to be part of the same political community. Indeed, it would be a pretty bland country – a pretty bland Australia – if we did. I cannot imagine such an argumentative country wanting everybody to believe the same thing! Instead, we should struggle for a form of patriotism that is at the same time more open and more complex – one that locates the definition of the country in how that country is lived, not in what it

43 See Walter J, 'Rethinking Citizen Politics' (1996) 42 *Australian Journal of Politics and History* 54 at 63.

44 *Scotland Act* 1998, Statutes of the United Kingdom, c46.

45 Mann S, 'Labour triumphs but no majority' *Sydney Morning Herald* (8 May, 1999) at 17; MacCormick N, 'Scotland: A Parliament Once Again?' (unpublished).

46 See n3.

claims about itself. And of course, that means that it locates its definition through time, not in any particular moment.[47]

Elsewhere, I have proposed the metaphor of conversation as a way of capturing both the sense of commonality and the openness of political communities.[48] The participants in a conversation do not share the same values or believe the same things. They often disagree vehemently. But they nevertheless have something very important in common – the conversation itself, marked as it is by its own unique character: the way in which the questions are posed, the methods used for resolving those questions, the common stock of arguments that have built up over time, and above all the historical references upon which the participants rely when making their interventions. The particular constellation of elements is often unique to the conversation in question. Within the Australian context, for example, issues are posed with respect to industrial justice in a way that is very different from that of any other society, with the partial exception of New Zealand. But this does not mean that every Australian believes the same thing when it comes to industrial justice. On the contrary, communities are often defined as much by the structure of their disagreements as by their agreements. Nor does it exclude the possibility of vigorous debate and change. Conversations are, by their very nature, dynamic, moving through time.

I believe that this also captures the sense of allegiance that we generally have to our communities. That allegiance is not based on the fact that we share a strong set of values. Rather, it is based on our engagement in and attachment to the specific character of our country's public debates. That attachment is not based on intellectual assent to a set of propositions, but simply on the fact that it is ours. We grew up with it (or embraced it through migration). We defined our views in its terms. It has become an integral part of our engagement as citizens.

This reveals again, of course, the importance of symbolism to political communities. Those symbols constitute the terms of our public debate, the very objects of our allegiance. It is important that we define those symbols in a way that allows those debates to continue, and that does not impose a narrow and constraining definition – even if currently attractive – of what makes one Australian.

Ironically, in some societies, a monarchy can serve this role admirably, precisely because it personifies allegiance rather than requiring that one adhere to a canonical set of principles. Now, this may seem profoundly counter-intuitive, given the fact that in the Australian debate the monarchy has come to be seen as

47 Murray G, 'Poesis and Mimesis' in Murray, *Humanist Essays* (1964) 78 at 90, speaks of a choice 'between mimesis and definition: on the one hand the instinctive comprehensive method of art, the attempt to understand a thing by making it, to learn a thing by doing it, and on the other the more exact but much narrower method of intellectual analysis, definition and proposition.' He notes that each have their sphere. The implication of this paper is that we might do best to think of our country achieving its identity more through mimesis than definition.

48 Webber, *Reimagining Canada*, n18 at 185ff. Compare the very similar but, to my knowledge, entirely unrelated use of conversation in Walter, n43 at 62.

an exclusive rather than an inclusive symbol. But a monarch can often be a more acceptable object of allegiance than the republican alternatives, especially to members of minority cultural groups. In Canada, for example, the level of support for the monarchy is very high among indigenous groups, I believe, for two reasons. First, the personal character of the monarchy can more easily accommodate a wide variety of forms of allegiance, not merely the republican citizenship of individuals, but also the allegiance of aboriginal societies that claim their own governmental autonomy. Second, the monarch can be a remote and therefore neutral figure in a way that a John Howard, Paul Keating or even Sir William Deane cannot be. Of course, the proper object of republican allegiance would be the country – 'Australia' or 'Canada' – not the individual prime minister or governor. But that is easy to say, much more difficult to establish, especially for groups that remain largely alienated from the sense of nationhood. Indeed, in the best justifications for a constitutional monarchy, the very personification allows the focus of one's allegiance to recede into the background. It plays a role analogous to Iris Murdoch's God, in which it represents a pole of attraction but not an independent, intervening presence in our lives.[49]

I am not at all certain that the monarchy has succeeded in assuming such a role in Australia, and I therefore do not want this to be interpreted as a defence of monarchy in this land. But if the monarchy is abolished, one may wish to think very seriously of how such a symbol might be recreated. Indeed, this might be one role for constitutional poetry. But in that case, it had better be good, bold and inclusive poetry – something that captures the kind of spirit represented by new Parliament House (which is itself a kind of extended symbol).

3. Conclusion

What, then, do I wish to leave you with, at the end of this extended meditation on symbol and function in constitutional reform?

At its most basic level, this address has been about the importance of taking symbols seriously, and about integrating a concern with symbolism into our work as constitutional lawyers. Constitutions are both symbolic and functional documents, and it is time we specialists began to treat them that way.

Doing so is not easy, however. The symbolic and functional demands can be very different, and indeed can be in tension. A certain measure of institutional specialisation – a separate preamble or solemn declaration upon the creation of the republic – may be part of the solution, although we should not pretend that we can banish symbolism from the constitutional text itself.

And what kind of symbolism should we seek to achieve? I will not repeat my long discussion of this point, but will leave you with a wonderful passage from the classics scholar, Gilbert Murray. In an essay on poetry, imitation, moral growth, and human conduct, he speaks of how inadequate our attempts to define the ends

49 See Murdoch, n39 at 507ff, and at greater length, 391ff.

of our own lives are. In terms applicable to attempts to define countries as well as individuals, he says:

> such words all ring false because they are premature or obsolete attempts to define, and even to direct, wants that are often still subconscious, still unformed, still secret, and which are bearing us in directions and towards ends of aspiration which will doubtless be susceptible of analysis and classification when we and they are things of the past, but which for the present are all to a large extent experiment, exploration, and even mystery.[50]

In our constitutional drafting we should make sure that we leave open sufficient room for that experimentation, exploration, and even mystery. That way we will keep faith with the open and evolving character of our communities – and, not incidentally, with their democratic character.

50 Murray, n47 at 91–92.