Politics of Interpretation

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The recent decisions of the Australian High Court reveal an institution that is shaping and defining to an unprecedented extent the contours of liberal democracy in Australia. If indeed the court is augmenting its federal judicial review with a more ambitious liberal-democratic jurisprudence one is compelled to ask whether it has a comprehensive liberal-democratic vision of the regime or whether its decisions are determined and constrained by a range of institutional and practical limitations. This paper explores an important aspect of this question, the court's choice of the principles of interpretation and the political implications of such a choice.

The High Court has recently announced that it does not 'declare' the law, it 'makes' it. This admission has raised a number of profound questions concerning the legitimacy of judicial review, requiring the court to reconcile its lawmaking role with the principle of the rule of law. The court has attempted to do this by elaborating a dynamic and progressive interpretation that relies on community values to guide and limit judicial discretion. Does such a theory of interpretation resolve the tension between rule of law and judicial discretion? Is there a new political vision implicit in the new method of interpretation? These are the major questions that will be examined in this paper.

The first part of the paper examines the court's earliest and most authoritative formulation in the *Engineers'* case[1] of the proper way to interpret, drawing out the political settlement implicit in such a view. The paper then explores the political and institutional changes that necessitated the abandonment of this principle of interpretation by the High Court, in favour of a new 'lawmaking' jurisprudence. Finally the court's espousal of a dynamic interpretation is examined to reveal the implicit political settlement anticipated by the new jurisprudence. Though the resort to community values appears to be a neutral standard of interpretation, placing the judiciary in a subsidiary and instrumental role within the regime, I would argue that it does not resolve the problem of reconciling individual discretion with the demands of the rule of law. Perhaps more significantly, it would appear that such a standard has opened the court's jurisprudence to a range of fundamentally different political visions and settlements without allowing it the means to reconcile or negotiate between them.

1. Clear and Natural Meaning

The problem of how to interpret the Constitution was addressed by the High Court in its early years in the context of deciding the extent to which the Commonwealth and the states could control each other's operations. According to what came to be

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1 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (hereinafter *Engineers'*).

known as the doctrine of immunity of instrumentalities, the court held that states could not control the operations of the Commonwealth, and reciprocally, some types of Commonwealth rules did not apply to the states.[2] Similarly, the implied doctrine of state reserved powers was relied upon by the court to limit the powers conferred upon the Commonwealth Parliament.[3]

As the judgment of Griffith CJ for the court in *Baxter's* case reveals, these decisions presupposed a method of interpreting the Constitution:

> If it is suggested that the Constitution is to be construed merely by the aid of a dictionary, as by an astral intelligence, and as a mere decree of the Imperial parliament without reference to history, we answer that that argument, if relevant, is negatived by the preamble to the Act itself.... That is to say, the Imperial legislature expressly declares that the Constitution has been framed and agreed to by the people of the Colonies mentioned, who, as pointed out in the judgment of the Board in *Webb v Outtrim*, had practically unlimited powers of self-government through their legislatures. How, then, can the facts known by all to have been present to the minds of the parties to the agreement be left out of consideration?[4]

This way of interpreting the Constitution, which looked to American precedents, was prepared to take into account the political and legal context of the founding, relying on the historical facts and circumstances to give meaning to the text.[5] Importantly, implicit in this method of interpretation was a political vision of a co-sovereign federalism that was largely consistent with the views of the framers of the Constitution. This is not surprising given that the justices on the bench, Griffith CJ, Barton and O'Connor JJ, had taken part in political life, had been delegates to the constitutional conventions and had contributed to the drafting of the Constitution. For them the Constitution was more than an act of Imperial parliament; it represented a compact between states, an instrument of government.[6]

A. Engineers' *Case*

This view of the Constitution was to change fundamentally with the High Court's decision in the *Engineers'* case. *Engineers'* overturned the doctrine of implied prohibition as well as the doctrine of reserved powers. Significantly for our

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2 *D'Emden v Pedder* (1904) 1 CLR 91; *Federal Amalgamated Government Railway & Tramway Service Association v NSW Railway Traffic Employees Association* (hereinafter *Railway Servants* case) (1906) 4 CLR 488.

3 *Peterswald v Bartley* (1904) 1 CLR 497; *Attorney-General for NSW v Brewery Employees Union of NSW* (hereinafter *Union Label* case) (1908) 6 CLR 469; *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

4 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1093.

5 The Court's jurisprudence relied heavily on the decisions of the United States Supreme Court, in particular the decision of Marshall J in *McCulloch v Maryland* (1819) 4 Wheat 316.

6 Latham J, 'Interpretation of the Constitution' in Else-Mitchell R (ed), *Essays on the Australian Constitution* (1961) 1; Goldring J, 'The Path to Engineers' in Coper M & Williams G (eds), *How Many Cheers for Engineers?* (1997).

purposes, it formulated a new basis for interpreting the Constitution that was to exercise far-reaching influence on the High Court's jurisprudence.

At issue in the *Engineers'* case was whether the Commonwealth's power to make laws with respect to conciliation and arbitration of industrial disputes was binding on the states.[7] The High Court held that the Act establishing the Conciliation and Arbitration Court was a valid exercise of the power in the Constitution and that there was no basis to exclude the states from the operation of the Act.[8] On what grounds did the court reject its previous decisions? According to the majority, no clear principle could account for the cases previously decided by the court:

> They are sometimes at variance with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or any recognized principle of the common law underlying the expressed terms of the Constitution but on implication drawn from what is called the principle of 'necessity', that being itself referable to no more definite standard than the personal opinion of the Judge who declares it.[9]

The need for consistent, impartial adjudication was undermined by recourse to implications in the interpretation of the Constitution:

> An interpretation that relies on 'an implication which is formed on a vague, individual conception of the spirit of compact' can only lead to divergences and inconsistencies because it is 'rebuttable by an intention of exclusion equally not referrable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the Court on the opinions of judges as to hopes and expectations respecting vague external conditions.'[10]

In the *Engineers'* case the High Court states that it is returning to 'settled rules of construction,' which means giving words their 'natural' meaning:

> The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally and in the light of circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which proceeded it, then *lucet ipsa per se*.[11]

The greater emphasis on the strict reading of the Constitution meant that the court was limited in the material it would rely upon in interpreting the terms of the

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7 In the *Engineers'* case Western Australian government enterprises had been served a log of claims by the Amalgamated Society of Engineers. When the Society commenced proceedings in the Commonwealth Arbitration Court the government of Western Australia challenged the proceedings on the grounds that the federal Act establishing the Court could not apply to state government enterprises.

8 The joint judgment of Knox CJ, Isaacs, Rich and Starke JJ was delivered by Isaacs J. Higgins J delivered a separate judgment agreeing with the majority. Duffy J dissented.

9 Above n1 at 141–142.

10 Id at 145.

11 Id at 152.

Constitution. It adopted Lord Haldane's remarks regarding the 'golden rule' or 'universal rule:'

> In endeavouring to place the proper interpretation on the sections of the statute before this House sitting in its judicial capacity, I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe a particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.[12]

A natural reading which resulted in consistent, definite and clear decisions required the Constitution to be interpreted as any other act of Imperial parliament.

To understand the decision in the *Engineers'* case it is important to recall that the Constitution as a federal arrangement was an American innovation that differed, in a number of important respects, from the dominant understanding of law and constitutionalism. It was a fundamental or 'constitutive' document in a way that was unknown in evolutionary English constitutionalism. Its establishment of a federal union with separate sovereign authorities was again an innovation in parliamentary tradition. And importantly, it put into place federal judicial review, giving the judiciary power to overrule parliamentary enactments.[13] This form of judicial review, which required a novel form of adjudication, appeared to be contrary to the tradition of common law and statute law. Where the Griffith High Court was prepared to take up such a jurisprudence, the court in the *Engineers'* case, now made up of lawyers who had not been involved in the framing of the Constitution and who had little political experience, wished to return to the settled rules of construction.[14] The High Court in the *Engineers'* case declined to take on federal judicial review that could be construed to be 'political.' In doing so it preferred the authority of the Privy Council over the American precedents, disengaging itself from the jurisprudence of the United States Supreme Court. Thus *Engineers'* can be seen as the decisive juncture where conventional rules of interpretation asserted their dominance over the innovation of federalism: the Constitution was seen not as a 'constitutive' enactment but as any other act of parliament, part of the fabric of the law of the constitution that preceded federation.[15]

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12 Id at 149.

13 Warden J, 'The Fettered Republic: The Anglo-American Commonwealth and the Traditions of Australian Political Thought' (1993) 28 *Australian Journal of Political Science* 83; Stokes M, 'Federalism, Responsible Government and the Protection of Private Rights: A New Interpretation of the Limits of the Legislative Powers of the Commonwealth' (1986) 16 *Fed LR* 135; Galligan B, *Politics of the High Court* (1986) at ch 2.

14 Knox CJ, Rich and Starke JJ were lawyers with little political experience. As Goldring notes, Isaacs and Higgins, who took part in the framing of the Constitution, never ceased to look at the Constitution from the perspective of lawyers: Goldring, above n5 at 39.

15 Contrast Meale D, 'The History of the Federal Idea in Australian Constitutional Jurisprudence: A Reappraisal' (1992) 8 *Aust J L & Soc* 25; Fraser A, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (1990).

The reference to the fabric of common law suggests that the court in *Engineers'* returned to the common law form of adjudication. Classical common law, as outlined in the works of Coke, Blackstone and Hale, was unwritten, having its origins in custom and immemorial usage. Being from time immemorial, the common law represented the refined experience and wisdom of successive ages. The superiority and hence the authority of the common law was founded upon the 'artificial reason' of the law. Unlike the natural reason possessed by individuals, artificial reason and judgment of the law was acquired by long study of the common law. Therefore, knowledge of the laws of the land justified the role of the judge.[16] Judges did not make the common law; in the famous words of Blackstone, they are 'depositories of the laws; the living oracles.' As oracles of the common law, judges did not decide cases according to their own private judgments or sentiment but in agreement with precedents, not making new law but maintaining and expounding the old. Where a judge's decision was manifestly absurd or unjust the common law did not regard it as bad law but rather as no law at all.[17]

This self-understanding of the classical common law exhibited a number of strengths. It reconciled the competing demands of the rule of law and judicial discretion. It was flexible enough to accommodate change within a timeless, immemorial common law. Significantly, in defending the authority of the common law it justified the judicial role as an exercise of a superior artificial reason, supplying a formidable basis for judicial independence.[18] Nevertheless, classical common law was subjected to sustained criticism, both political and philosophical.[19] Consequently, at the time of the Australian founding classical common law contended with a powerful Benthamite utilitarianism that rejected the justice and efficacy of an immemorial common law.[20] Two of the most influential thinkers at the founding, Bryce and Dicey, were utilitarians who accepted the Benthamite critique of the common law. Bryce was the pre-eminent authority at the founding; his *The American Commonwealth* became the sourcebook on American government and federalism for the founders, while his *Studies of History and Jurisprudence* introduced the concept of flexible and rigid constitutions to constitutional thought.[21] Dicey, a colleague of Bryce at Oxford,

16 *Calvin's* case (1608) 7 Co Rep 1 at 3b; *Prohibitions del Roy* (1608) 12 Co Rep 1.

17 Blackstone W, *Commentaries on the Laws of England* (1765) at Introduction, s2.

18 See generally, Lobban M, *The Common Law and English Jurisprudence: 1760-1850* (1991); Simpson AW, 'The Common Law and Legal Theory' in Simpson AW (ed), *Oxford Studies in Jurisprudence* (1973); Twining W (ed), *Legal Theory and Common Law* (1986); Davies M, *Asking the Law Question* (1994).

19 One of the earliest critics of the common law, anticipating many of the modern 'philosophical' objections, is Hobbes: see his *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (1971), as well as *Leviathan* (1968). For a response to Hobbes, see Hale's *Reflections by the Lord Chief Justice Hale on Mr Hobbes his Dialogue of the Law* (1945).

20 Postema G, *Bentham and the Common Law Tradition* (1986).

21 Bryce J, *The American Commonwealth* (2nd ed, 1919); Bryce J, *Studies of History and Jurisprudence* (1901). With respect to the importance of these concepts for the High Court's understanding of sovereignty see, for example, *Clayton v Heffron* (1960) 105 CLR 214; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

wrote the influential *Introduction to the Law of the Constitution* which was relied upon by the founders and became the seminal text on constitutional law in England and Australia. In the *Law of the Constitution* Dicey distinguished between rules that are enforced by the courts, which are called laws, and customs and conventions. The laws of the constitution are animated by two principles, the sovereignty of parliament and the rule of law. Dicey's formulation of parliamentary sovereignty, the rule of law, and the dependence of conventions upon the law of the Constitution exercised a major influence on the High Court.[22]

Thus the Diceyan distinction between the political and the legal, which can be traced to the influence of Bentham, can be seen clearly in the *Engineers'* case. According to the court the doctrine of 'implied prohibitions' is incapable of consistent application because:

> 'necessity' in the sense employed – a political sense – must vary in relation to various powers and various states, and indeed, various periods and circumstances. Not only is the judicial branch of the Government inappropriate to determine political necessities, but experience, both in Australia and America, evidenced by discordant decisions, has proved both the elusiveness and the inaccuracy of the doctrine as a legal standard.[23]

To abandon legal standards, to venture into political issues – 'a labyrinth to the character of which they have not sufficient guide' – is to accede to the personal opinions of the judge who declares the law; it is in effect to deny the rule of law.

The demarcation between the legal and the political did not preclude Dicey from accepting that judges make laws, even though judicial law making had a number of limitations.[24] But over time the High Court went beyond Dicey on this issue by claiming that judges did no more than declare the law. This was arguably a return to the common law declaratory theory, albeit now incorporating a new positivism. For Dicey such a stance was explicable in terms of the legalism that was the spirit of federalism, and the natural tendency of modern judges to prefer certain and fixed rules over laws which are liable to change or modification. The substantial general appellate workload of the Australian High Court may also have been a contributing factor.[25]

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22 Dicey AV, *Introduction to the Law of the Constitution* ((1885) 8th ed, 1915); Dicey AV, *Lectures on the relation between Law and Public Opinion in England.* ((1914) 2nd ed, 1926). See generally *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; Sugarman D, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science' (1983) *Mod LR* 102; Loughlin M, *Public Law and Political Theory* (1992).

23 Above n1 at 151.

24 *Law and Public Opinion in England*, Lecture XI and Note IV in the appendix. According to Dicey the limitations of judicial law-making include the fact that the judiciary cannot openly declare a new principle; statutory principles cannot be simply set aside; established principles cannot be amended; judicial legislation can exhaust principles; and the law has a hypothetical character until confirmed by the highest court: Note IV.

25 Contrast Galligan's claim in the *Politics of the High Court* (1986) that legalism was an intentional rhetorical device employed by the Court. See in this context the debate between Galligan and Goldsworthy in (1989) 18 *Fed LR* 27.

The difference between the 'legal' and the 'political' justified the role of the judiciary as a neutral expositor of the law. It also presupposed a political settlement. In the *Engineers'* case the court assumed not only the common law but also a common sovereignty of the Commonwealth and responsible government.[26] A sovereign, responsible parliament was the essential counterpart to a judiciary that relied on legal reasoning. The judicial role was limited because of the availability of political remedies:

> [T]he extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts. ... If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper.[27]

Therefore the court's reassertion of 'settled rules of construction' in the *Engineers'* case was a confirmation and endorsement of the primacy of parliamentary, responsible government – indeed, one presupposed the other.

B. Political Consequences of the Engineers' case

The decision in the *Engineers'* case was subsequently regarded by the High Court as a definitive statement on the principles of constitutional interpretation and as an authority for literalism and legalism on the court.[28] As a result, the *Engineers'* case had a profound political influence on Australian constitutionalism.

The major political consequence of the decision concerned the way it redefined the federal balance in Australia. A literal reading of the Constitution, combined with the view that the terms of the Constitution should be interpreted broadly, resulted in an expansive interpretation of the express federal powers, at the expense of the state residual powers. A growing sense of Australian nationalism on the court may also have contributed to the growth of central power.[29] At any rate, the court's subsequent decisions on taxation, excise, commerce and external affairs, to name a few, significantly shifted the federal balance in favour of the Commonwealth.[30]

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26 Zines L, *The High Court and the Constitution* (1997) at ch 1.

27 Above n1 at 151–152.

28 See for example the judgments of Latham CJ in *South Australia v Commonwealth* (the *First Uniform Tax* case) (1941) 65 CLR 373 at 409; the often quoted praise of 'strict and complete legalism' by Sir Owen Dixon on his appointment as Chief Justice ((1952) 85 CLR xiv); and the praise of 'legal reasoning' by Barwick CJ in *Attorney-General (Cth); ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 17. It should be noted, however, that the way these terms were subsequently employed were at some distance from the strict literalism: see above n26 at 424–432; Booker K & Glass A, 'What Makes the *Engineers* case a Classic' in Coper M & Williams G (eds), *How Many Cheers for Engineers?* (1997).

29 *Victoria v Commonwealth* (the *Payroll Tax* case) (1971) 122 CLR 353 at 396 (Windeyer J); Zines, above n26 at 14–15.

The Engineers' case also had significant political implications for the authority and legitimacy of the court within the regime. A 'natural' reading of the text was the essence of legal reasoning; it distinguished and characterised the legal method. Therefore a literal reading of the text justified judicial authority in Australia. In contrast, the resort to 'implications' betrayed an attempt to augment a clear legal reading with personal preference or opinion: it marked a movement from the legal to the unbounded political. It was true that as the adjudicator of federalism the court now faced questions that were inherently political and potentially divisive. Yet it was essential for judicial office to be, and appear to be, impartial and unbiased, for the authority of the court and for the safety of the federal Constitution. The principles of interpretation adopted by the court in the *Engineers'* case were meant to meet this challenge. By limiting its decisions to the legal aspects of the case the court solved the apparently intractable problem of partiality and bias. The political role of the court was incidental, or indirect – it was political in the way the judge deciding a case of breach of contract could be said to be political. Adjudication by the court was a legal act, far removed from the complexities and dangers of the political debates on the wisdom or expediency of legislation.[31] In deciding major federal disputes the court was no more than an umpire, applying the rules determined by another. In the words of Sir Owen Dixon on the occasion of his swearing in as Chief Justice, 'the Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on another.'[32] Therefore the overturning of state or Commonwealth legislation by the court was not a political act, it was no different from the interpretation and application of any other act of parliament.

As we have seen this justification of judicial review presupposed a legitimate forum that would consider the wisdom and expediency of legislation. The political settlement or vision assumed in the *Engineers'* case – sovereignty of parliament, representative democracy, responsible government – was the foundation and justification of the court's jurisprudence. In turn, this political vision was given texture, substance and authority by the decisions of the High Court, which gave as much authority to parliament as possible.[33] The American 'suspicion' of government was rejected, constitutional grants of power were given extensive

30 See generally Galligan, above n13; Lee H P, 'The High Court and External Affairs Power' in Lee H P & Winterton G (eds), *Australian Constitutional Perspectives* (1992). The *Engineers'* case decision regarding reserved powers has been followed in subsequent cases: see for example *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. But the principle of intergovernmental immunities rejected in the *Engineers'* case has since been revived: see *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Re State Public Services Federation; ex parte Victoria* (1995) 184 CLR 188.

31 See for example, *First Uniform Tax* case, above n28 at 409 (Latham CJ); *Australian National Airlines* case (1945) 71 CLR 29 at 70 (Rich J); *McKinlay's* case, above n28 at 17 (Barwick CJ).

32 (1952) 85 CLR xii–xiv.

33 See Gageler S, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Fed LR* 162.

operation. As a consequence, civil liberties provisions that limited such powers were given a restricted reading.[34] The Constitution was seen as the barest structure necessary to found a federal union and accommodate a changing and growing body politic. It certainly was not a comprehensive, constitutive enactment by the people that attempted to limit government or secure inalienable rights. Rather, responsible government and the rule of law were the foundations of liberty. Though the extent to which this political vision accurately reflected the realities of Australian constitutionalism is contested,[35] few would deny its power and influence in directing the course of Australian constitutionalism.[36]

2. *Reasons for Change*

The recent decisions of the court suggest that it is moving away from the principles of interpretation established in the *Engineers'* case.[37] Before investigating the differing interpretive methods developed by the court, and their political implications, it is necessary to understand the reasons for this change. Such an understanding brings to light the factors that influence the court as an institution and explains how they have substantially influenced the character of the interpretive principles that the court has favoured in its recent decisions.

The move away from legalism and literalism can be traced to important changes in Australian constitutionalism that took place in the course of the twentieth century. These changes had important institutional consequences for the court, significantly reformulating its role within the polity. Australia's development into an independent, sovereign state was a gradual, evolutionary process, signposted by major enactments such as the *Colonial Laws Validity Act* 1865 (UK), the *Commonwealth of Australia Constitution Act* 1900 (UK), and the *Statute of Westminster* 1931 (UK). Perhaps the most important enactment, at least in terms of its symbolism, was the passing of the *Australia Acts* in 1986 which

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34 *R v Federal Court of Bankruptcy; ex parte Lowenstein* (1937) 57 CLR 765 regarding trial by jury; *Attorney-General (Vic); ex rel Black v The Commonwealth* (1980) 146 CLR 559 on religious freedom; *Henry* v *Boehm* (1973) 128 CLR 482 and contrast *Street v Queensland Bar Association* (1989) 168 CLR 461 regarding equal rights of residents in different states. In general see Hanks P, 'Constitutional Guarantees' in Lee H P & Winterton G (eds), *Australian Constitutional Perspectives* (1992); Mason A, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Fed LR* 1 at 6–11.

35 See Irving H, *To Constitute a Nation: A Cultural History of Australia's Constitution* (1997); Davidson A, *The Invisible State: The Formation of the Australian State 1788–1901* (1991); Detmold MJ, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985); Kercher B, *An Unruly Child: A History of Law in Australia* (1995).

36 For an indication of its strength see Menzies R, *Central Power in the Australian Commonwealth* (1967) at 52–54; Dixon O, Address at the Annual Dinner of the American Bar Association (1942) 16 *ALJ* 192; Galligan B, 'Australia's Rejection of a Bill of Rights' (1990) 28 *Journal of Commonwealth and Comparative Politics* 344; Fraser, above n15.

37 For the various views regarding this proposition see generally Coper above n5; Craven G, 'The Crisis of Constitutional Literalism in Australia' in Lee HP & Winterton G (eds), *Australian Constitutional Perspectives* (1992); Williams G, '*Engineers* is Dead, Long Live the Engineers!' (1995) 17 *Syd LR* 62.

formally terminated the power of the United Kingdom Parliament to legislate for Australia. These changes in Australian constitutionalism were mirrored in the increasing authority of the High Court within the Australian legal system.[38]

One of the most important changes was the gradual transformation of the High Court into the final court of appeal in Australia. Though the majority of founders intended the High Court to be a supreme court of appeal in Australia, appeals to the Privy Council in certain cases were retained in the Constitution as a result of compromises that were implemented at the time the Constitution was formally enacted in Westminster.[39] As a result the High Court was not a final court of appeal in Australia and appeals to the Privy Council though few, were pursued by litigants. This meant that English judicial opinion, especially of the House of Lords and the Court of Appeal were considered authoritative in Australia. For example, in *Piro's* case, a decision handed down in 1943, the High Court held that in cases of conflict the decision of the House of Lord would be binding on the High Court, effectively placing the House of Lords at the apex of the Australian legal system.[40]

But twenty years later things had changed. In *Parker* the High Court announced its judicial independence and held that it was free to consider issues independently of English authority.[41] By this time strong nationalist sentiment regarded appeals to the Privy Council as contrary to the status of Australia as an independent nation. The *Privy Council (Limitation of Appeals) Act* 1968 (Cth) and the *Privy Council (Appeals from the High Court) Act* 1975 (Cth) were enacted limiting the right of appeal to the Privy Council. As a result of these decisions the High Court held in *Viro* that it would no longer be bound by the decisions of the Privy Council.[42] The remaining avenue of appeal to the Privy Council was abolished by the *Australia Acts*. Thus by 1986 the High Court was effectively the final court of appeal for all courts in Australia.[43]

The independence of the court was accompanied by changes that emphasised its role as a national court. The Federal Court of Appeal was established in 1976 with the specific purpose of freeing the High Court to decide constitutional issues and appeal cases of national importance.[44] A successful referendum made possible the enactment of the *Constitutional Alteration (Retirement of Judges) Act* 1977

38 See generally Galligan, above n13; Bennett J M, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (1980); Sawer G, *Australian Federal Politics and Law: 1901–1929* (1956); Sawer G, *Australian Federal Politics and Law: 1929–1949* (1963).

39 The appeals to the Privy Council were favoured by the British Colonial Office, a group of colonial chief justices and retired judges, and English investors. See La Nauze JA, *The Making of the Australian Constitution* (1972) at 173, 220–221, 248–249.

40 See *Piro v W Foster & Co Ltd* (1943) 68 CLR 313.

41 *Parker v The Queen* (1963) 111 CLR 610. See also *Skelton v Collins* (1966) 115 CLR 94; Menzies D, 'Australia and the Judicial Committee of the Privy Council' (1968) 42 *ALJ* 79.

42 *Viro v The Queen* (1978) 52 ALJR 418.

43 In theory a right of appeal to the Privy Council remains under s74 of the Constitution. However, such appeals require a certificate from the High Court and the court has, since 1914, declined all such requests. In *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461, the court described s74 appeals as obsolete.

(Cth) which ended life tenure for judges, imposing a mandatory retiring age of 70 years. By the *High Court of Australia Act* 1979 (Cth) the court was given maximum independence to manage its building, staff and finances. The increasing importance of the court had its symbolic confirmation in the construction of a new High Court building in proximity to Parliament House in Canberra. The building, which was opened by Her Majesty the Queen on 26 May 1980, was also important for practical reasons; sophisticated court reporting services using audio-visual resources were installed in the building as was the court's extensive library.[45] Its procedures also reflected its growing stature as a court at the apex of the federal legal system as well as a general court of appeal in Australia. The court was now in charge of its own docket: it would hear appeals by leave only, in the most serious of cases. It also looked different, as a constitutional court it decided that it would no longer appear in traditional wigs.

At the time of these changes the court continued to insist that it was no more than an impartial adjudicator of the law, declaring the common law without making it. Desirable changes to the law were left to the discretion of Parliament.[46] The court's stance was in contrast to developments that were taking place in other courts of final jurisdiction in the common law world. The most important source of change in these other jurisdictions was the entrenchment or adoption of bills of rights which fundamentally transformed their jurisprudence, altering their methods of interpretation as well as their role within the polity. The European Court of Justice and the decisions of the European Court of Human Rights had a major influence on the interpretation of law in England, undermining the strength of the declaratory theory to such an extent that by 1972 the judicial members of the House of Lords were willing to admit publicly the reality of judicial creativity, Lord Reid claiming that it was an 'open sesame' form of interpretation, a 'fairytale' no-one believed any more.[47] In Canada, after a false start with the Canadian Bill of Rights, the entrenchment of the *Charter of Rights and Freedoms* in 1982 justified the Supreme Court in adopting a new jurisprudence of human rights. In the United States the decisions of the Warren Court in the 1960s placed the bill of rights at the forefront of its jurisprudence. Similar developments could be discerned in India, Ireland and New Zealand.

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44 The constitutional role of the court was anticipated by Sir Garfield Barwick as early as 1964: see Barwick G, 'The Australian Judicial System: The Proposed New Federal Superior Court' (1964) 1 *Fed LR* 1; 'The State of the Australian Judicature' (1979) 53 *ALJ* 487; Bennett, above n38 at 82ff.

45 A competition to design the building took place 1972–73 and construction began in 1975. Its first hearing took place in June 1980. The Court is now a major tourist attraction. Its web site (http://www.hcourt.gov.au) is a popular and sophisticated introduction to the building and the work of the court.

46 See *Dugan v Mirror Newspapers Ltd* (1979) 142 CLR 583; *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617; *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; McHugh M, 'The Law-making Function of the Judicial Process' (1988) 62 *ALJ* 15 (Part I) at 20–24.

47 McHugh, above n46; Lord Reid 'The Judge as Lawmaker (1972) 12 *Journal of the Society of Public Teachers of Law* 22; Lester A, 'English Judges as Law Makers' (1993) *Public Law* 269; Sturgess G & Chubb P, *Judging the World* (1988) at 257–293.

In contrast, the Australian High Court appeared to stand outside the mainstream of changes to courts of final jurisdiction. Part of the problem was of course the fact that Australia did not have a bill of rights; the various attempts to entrench a bill of rights had been singularly unsuccessful.[48] In spite of the absence of a bill of rights, Australia was nevertheless increasingly committing itself to a number of international human rights covenants and conventions. The gradual opening up of the Australian legal system to the world and the increasing importance of human rights within international law exposed the High Court to international influences. As a court of final jurisdiction the High Court became the institution that would mediate international changes, compelling it to adopt a more extensive and profound role in the adjudication of constitutionalism in Australia.[49]

These developments, combined with the absence of a bill of rights, compelled the judiciary to reconsider the adequacy of the political institutions of governance in Australia in protecting human rights. The orthodox theoretical framework of responsible government and parliamentary democracy that protected individual rights and thereby justified a limited role for the judiciary no longer seemed valid. The reality of party government, executive dominance and the administrative state appeared to represent an unchecked and unaccountable power in Australian politics. Consider, for example, Brennan J's argument that the increasing prevalence of bureaucratic and institutional power may now require new checks and balances:

> If the risk of discriminatory exercise of power to the disadvantage of minorities and the weak and the risk of oppressive exercise of power by the political branches of government are sufficiently grave, and if there is no other means available to avoid or diminish those risks, then a case can be made for casting on the Courts a supervisory role, albeit a role which is radically different from the role which Courts have been accustomed to exercise.[50]

Thus the court's abandonment of the declaratory theory and its turn to a jurisprudence of individual rights and freedoms, a jurisprudence that saw the Constitution as a constitutive enactment, was justified as much by an acknowledgment that the political settlement that protected civil liberties and

48 See in general Charlesworth H, 'The Australian Reluctance About Rights' (1993) 31 *Osgoode Hall Law Journal* 195; Galligan, above n36 at 344.

49 Bailey P, *Human Rights: Australia in an International Context* (1990); Tenbensel T, 'International Human Rights Conventions and Australian Political Debates: Issues Raised by the "Toonen Case"' (1996) 31 *Australian Journal of Political Science* 7; Charlesworth H, 'Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (1991) 18 *MULR* 428.

50 Brennan G, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response', paper delivered at a conference on Human Rights, University House, Canberra, 16 July 1992 at 9. See also his conditional agreement with Lord Hailsham that '[w]e live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice' in 'The Parliament, the Executive and the Courts: Roles and Immunities', paper presented at the School of Law, Bond University, 21 February 1998.

therefore justified judicial deference no longer operated in Australian political life as international developments.[51]

These factors would not by themselves be sufficient to account for the change in direction in the court's jurisprudence. What made them decisive, however, was a theoretical perspective that was predicated on the need to accommodate change. Here it is necessary to acknowledge the powerful influence of Roscoe Pound, Julius Stone and sociological jurisprudence in the shaping of the court's view of its role within the regime.

Sociological jurisprudence came of age in the United States in the first decade of the twentieth century, at a time of declining faith in the economic and social philosophy of laissez-faire. The increasing need for state involvement and the subsequent demands for regulation were acknowledged in the writings of Roscoe Pound by the recognition of the reality of conflict and the primacy accorded to social interests. As well, the pace of social change was recognised in his works by the need for reform in political and legal fields. Yet the emphasis by Pound on laws as rules preserved the notion of law as an autonomous phenomenon; it preserved the practitioners' perception of the law. From this perspective law is seen as an instrument that has normative or purposive content and the task of legal theorists and practitioners is to intervene when the legal system is malfunctioning, when there is a gap between the goals of law and their social consequences.[52]

Pound's sociological jurisprudence and his pragmatic theory of justice and law was developed and applied by Julius Stone in his major works, *The Province and Function of Law, Social Dimensions of Law and Justice* and *Human Law and Human Justice*.[53] According to Stone in any given society at a given time individuals are asserting interests as worthy of protection by the law of that society. It is not possible to distinguish or rank these claims for interests because all demands are good. Thus in any given society the legal system represents an attempt to adjust the interests of individuals with each other and with the interests asserted on behalf of society and the state, with the least possible sacrifice to the whole. Law is a compromise or reconciliation of the range of demands; justice is such an adjustment of relations and ordering of conduct as will make the goods of existence go round as far as possible with least friction and waste.[54] Here we see the egalitarian bias of sociological jurisprudence – all demands merit attention, the aim is to maximise interests.

The conception of law as social control or social engineering has important implications for judging. Judges do not apply clear, definite rules because there are

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51 Mason A, 'A Bill of Rights for Australia' (1989) 5 *Aust Bar Rev* 79; Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response', above n50; Toohey J, 'A Government of Laws, and Not of Men?' (1993) 4 *PLR* 158.

52 See generally Hunt A, *The Sociological Movement in Law* (1978) at ch 2.

53 Stone J, *The Province and Function of Law: Law as Logic, Justice and Social Control* (1961); Stone J, *Social Dimensions of Law and Justice* (1966); Stone J, *Human Law and Human Justice* (1965). For a bibliography of the published works of Julius Stone see Blackshield A R (ed), *Legal Change: Essays in Honour of Julius Stone* (1983) at 335–344.

54 Stone, *Social Dimensions of Law and Justice*, above n53 at ch 1, 4.

limits to formal logic in legal reasoning. As Stone notes, all judging is to this extent indeterminate and relies on creative judicial law making; judges always take into account 'policy' considerations.[55] But how is a just decision to be reached? Judging as an adjustment of interests requires resolving interests so that the solution does least injury to the scheme as a whole. The first step is to observe the interests that are being pressed for recognition by the law. This comprehensive picture will reveal 'jural postulates', fundamental principles presupposed by the interests and demands. Jural postulates are a rationalisation of these claims but cannot represent all of them. The postulates are employed to alter legal institutions of a particular society to bring them into harmony with the actual demands made in that society. In addition, the jural postulates applied to interests will set up a 'scheme of interests' which will enable a number of de facto claims to be eliminated. Judging can be said to be evaluating conflicting interests in terms of the scheme of interests as a whole.[56]

Though sociological jurisprudence has been subjected to extensive criticism, for our present purposes it is sufficient if we note important themes within the theory concerning interpretation.[57] The first concerns the ascertainment and status of demands and interests. Demands and interests are articulated in, and assume, a civilisation in a certain time and place. Yet the formulation of time and space for evaluating demands remains fundamentally elusive.[58] As well, the apparent reluctance to evaluate interests by accepting all demands as good (to be pragmatic rather than a priori) becomes questionable when it is seen that the majority of interests are to be accommodated, a process that is more than a quantitative exercise.[59]

Moreover, 'jural postulates' and the 'scheme of interests' seem to suggest that there are inherent or fundamental principles within the law; that bringing the law into harmony with the conditions of the time improves the law. But jural postulates and schemes of interests do not have such a fundamental status, so that unless a progressive civilisation is assumed there is no reason to think harmonising the law has any higher claim than that of consistency. This difficulty is faced in its acute form when there is a period of transition where one set of postulates is no longer accepted and the others are speculative.[60]

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55 See generally Stone, *The Province and Function of law*, above n53 at ch vi, vii, regarding fallacies of the logical form in legal reasoning. The specific fallacies include the legal category of meaningless reference, concealed multiple reference, competing reference, concealed circuitous reference and indeterminate reference.

56 Stone, *The Province and Function of Law*, above n53 at ch xv, 358–361; Stone, *Human Law and Human Justice*, above n53 at ch 9.

57 Refer to the critique in Stone, *The Province and Function of Law*, above n53 generally, and Hunt, above n52.

58 Stone, *The Province and Function of Law*, above n53 at ch xv, 365–366; Stone, *Human Law and Human Justice*, above n53 at ch 9, 269–277.

59 Stone, *The Province and Function of Law*, above n53 at ch xv, 363–365; Stone, *Human Law and Human Justice*, above n53 at ch 9, 275–277

60 Stone, *The Province and Function of Law*, above n53 at ch xv, 362–367.

Finally, justice understood as resolution of conflict seems to deny any substantive content to claims of right – pragmatic justice appears to be no more than procedural justice. Yet an evaluation of the practical implications of such an interpretation reveal in Pound a distinctive vision of an American regime in 1919.[61] As Hunt notes, 'Poundian theory is the reflex of the conservative progressivism of Theodore Roosevelt, explicitly structured within the framework of a capitalist economy and seeking to give a new "socialised" form to the traditional individualistic creed.'[62] A similar vision is reflected in Stone's concerns with a post-war settlement between individualism and socialism.[63] Sociological jurisprudence, though claiming to have no inherent, natural or absolute 'values,' discloses in its emphasis on practical justice and social reform its social democratic inclinations.

As Professor of Jurisprudence at the University of Sydney and later at the University of New South Wales, Stone was an inspiring teacher who had a lasting influence on generations of students.[64] As Kirby J has noted:

> Through Stone, Pound's practical and realistic approach to jurisprudence, entirely compatible with the spirit of English common law, found acceptance amongst the young lawyers of Australia and New Zealand in the 1940s, 1950s, 1960s and beyond. Those young lawyers came in time to positions of influence in the law and its institutions in the antipodes. It is only now that the impact of Stone's jurisprudential teachings upon lawyers of Australia is coming to full flower.[65]

One of these students was Lionel Murphy who was Attorney-General in the Whitlam Labor Government and was appointed to the High Court in 1975. In Murphy J's judgments we see the first application on the High Court of the principles of sociological jurisprudence.[66] But Murphy was unable to gain significant support on the Bench. This was due, in part, to his reluctance to persuade (his generally brief judgments tended to assert or declare rather than demonstrate the strengths of his position). His ambition for reform inclined him

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61 Id at 366–368.

62 Hunt, above n52 at 39.

63 Compare the jural postulates outlined by Pound in Stone *The Province and Function of Law*, above n53 at ch xv, 367 with the general discussion by Stone in *The Province and Function of Law*, above n53 at ch xxi, xxii; Stone, *Social Dimensions of Law and Justice*, above n53 at ch 6–8.

64 For an indication of Stone's influence see the essays in Blackshield (ed), above n53; Walker G de Q, *The Rule of Law: Foundation of Constitutional Democracy* (1988) at 175; Sturgess & Chubb, above n47 at 13, 15; Star L, *Julius Stone: An Intellectual Life* (1992).

65 Kirby M, 'Law Reform as 'Ministering to Justice'' in Blackshield AR (ed), *Legal Change: Essays in Honour of Julius Stone* (1983) at 201. As Kirby demonstrates, Stone was also influential in shaping the course of institutional law reform in Australia.

66 For Murphy not only did judges make law, they had a positive duty to do so; the judicial role supplemented the parliamentary and political. He argued that the Constitution was based on the sovereignty of the people, and that it implicitly protected a number of fundamental rights including the right to vote, free speech, movement and equality. See Ely J & Ely R, *Lionel Murphy: The Rule of Law* (1986); Scutt J (ed), *Lionel Murphy: A Radical Judge* (1987); Hocking J, *Lionel Murphy: A Political Biography* (1997); Williams J, 'Revitalizing the Republic: Lionel Murphy and the Protection of Individual Rights' (1997) 8 *PLR* 27.

towards undue haste, and he thought the justice of his position was a complete answer to, and would vindicate, the overturning of precedents. Though Murphy's long term influence on the court is contested, it cannot be denied that he shifted the boundaries of debate, facilitating the changes that were soon to be adopted by the court. [67]

One of the earliest intimations of the forthcoming changes was the first Menzies Lecture in 1986 by Sir Anthony Mason, a student of Julius Stone at the University of Sydney who became Chief Justice of the High Court in 1987. In this lecture, which has as a major theme the problem of constitutional interpretation, we get a glimpse of the aims and ambitions of the future Mason Court. [68]

According to Mason, the usual controversy that surrounds the High Court concerns the interpretation of the Constitution as a federal document – the limits of federal and state powers. But of greater importance for Mason is the dominance of what he calls the doctrine of legalism which is based on the concept of parliamentary supremacy and the supremacy of the rule of law. The problem with legalism is that it may be a 'cloak for undisclosed and unidentified policy values.' Also, '[l]egalism, when coupled with the doctrine of stare decisis, has a subtle and formidable conservative influence.'[69]

Mason advocates a new approach to interpretation which he describes variously as a 'dynamic' or 'policy' approach. This new method of interpretation requires judges to take into account community values, especially in the interpretation of a constitution. Constitutions are not blueprints but a framework for government and therefore should be interpreted dynamically and liberally. The difficulty with amending the Constitution supports and justifies this view of constitutional interpretation. Perhaps more fundamentally:

> Because policy oriented interpretation exposes underlying values for debate it would enhance the open character of the judicial decision-making process and promote legal reasoning that is more comprehensible and persuasive to society as a whole. This development would lead to a better understanding of constitutional judgments and, no doubt, to a greater capacity and willingness to criticise them. But criticism is a small price to pay if the approach is one that contributes, as it seems to have done in the United States, to a stronger sense of constitutional awareness on the part of the community and a more accurate appreciation of the issues arising for decision.[70]

Dynamic interpretation will change the formal rules of statutory interpretation: sovereignty of the people will replace Imperial sovereignty; extrinsic material will be allowed in interpreting the terms of the Constitution; the Constitution will not be confined to its meaning in 1900, it will be read as an 'instrument of national government.'[71] These changes in interpretive technique will not change the court's

67 See generally Coper M & Williams G (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (1997).

68 Mason, above n34. For similar views published around the same time consider McHugh M, 'The Law-making Function of the Judicial Process' (1988) 62 *ALJ* 18 (Part I) and 116 (Part II).

69 Mason, above n34 at 5.

70 Id at 28.

71 Id at 24–27.

jurisprudence of federalism; dynamic interpretation is unlikely to arrest the decline in the authority of the states. It will, however, provide a new focus for future controversy – fundamental rights. Mason implicitly raises the possibility that a recourse to community values may lead to an American jurisprudence of rights. Though anticipating such a development he makes it clear that he would prefer to have a formal bill of rights to authorise such jurisprudence.[72]

3. *Dynamic and Progressive Interpretation*

The recent decisions of the High Court show a marked shift in the court's methods of interpretation. It is now prepared to look at the general context and purpose of an enactment in interpreting its terms. It will take into account decisions in other jurisdictions as well as principles of international law. It sees the Constitution as more than an Imperial enactment, and is prepared to articulate the principles that are implicit in its terms or general structure. Perhaps most importantly, it has rejected the view that the court merely declares the law, describing it as a 'fairy tale.'[73]

The admission that the court in some sense 'makes' the law has raised a number of difficulties. If indeed the court makes the law then its impartiality, neutrality and lack of bias come into question. The difficulty this poses for the legitimacy of the court is exacerbated by the argument that in a democracy lawmaking should only be undertaken by the representatives of the people. In fact, a judiciary that has authority to invalidate parliamentary enactments and appropriates for itself the right to make laws appears to overturn the rule of law and assume supreme authority in the polity.

A. Community Values and the Common Law

There have been many attempts to formulate theories of interpretation that will justify the court's role as lawmaker. Though the declaratory theory continues to have minority support on the Bench, the dominant view on the court has been that it has a proper and legitimate role in repairing and keeping up-to-date the law with changing and fundamental community values.[74] The influence of sociological jurisprudence in this formulation is evident. Indeed, as we will note, the strengths and weaknesses of the court's preferred formulation mirror those of sociological jurisprudence.

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72 Id at 11–13.

73 Craven G, 'After Literalism, What?' (1992) 18 *MULR* 874; Craven G, 'Cracks in the Facade of Literalism: Is there an Engineer in the House?' (1993) 19 *MULR* 540; Fullagar I, 'The Role of the High Court: Law or Politics?' (1993) *Law Inst J* 72; Lindell G, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Lindell G (ed) *Future Directions in Australian Constitutional Law* (1994); Lane P, 'The Changing Role of the High Court' (1996) 70 *ALJ* 246.

74 See generally Preston K & Sampford CJG (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996); Thomson J A, 'Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes' (1982) 13 *MULR* 597; Mason A, 'Trends in Constitutional Interpretation' (1995) 18 *UNSWLJ* 237; Mason A, 'Courts and Community Values' (1996) 6 *Eureka Street* 32; Brennan G, 'A Critique of Criticism' (1993) 19 *Mon LR* 1; Gleeson M, 'The Role of the Judiciary in a Modern Democracy', paper delivered at the Judicial Conference of Australia Annual Symposium, Sydney, 8 November 1997.

The community values argument appears to have a strong case in the interpretation and formulation of the common law. If the common law is viewed not as the declaration of an immemorial law but as 'judge-made' law, then the role of judges as law makers appears unavoidable. But if judges are no longer living oracles, if they exercise judgment to develop the law, are there any limits or constraints on judicial law-making? The court's response has been to defend judicial law-making as repair and upkeep of the common law: judge-made law – an area of specialised, if not arcane knowledge and expertise – should be altered by judges in order to keep up with the changes in society. Accordingly, common law judicial lawmaking relies not on the discretion of individual judges but on community values. If community values shape, guide and constrain the judiciary then it is possible to justify judicial lawmaking as a form of representative governance. By construing the community to include practitioners, scholars and the larger deliberative community it may be possible to have more representative and therefore authoritative decisions by the court. Clear judgments that are a consequence of public debate and discussion are more likely to reach an outcome that is in accord with the principles of the regime. At the very least they will have more significant support and acceptance in the community. As a consequence of adopting this method of interpretation the court has been more willing to expose itself to what it considers informed criticism, making its judgments clearer and more accessible to the general public.

Though this interpretive position offers a number of advantages to the court, including justifying its judgments as a form of consensual elaboration of the direction sought by the community as a whole, there are a number of difficulties that recall the theoretical limitations of sociological jurisprudence outlined above. If in referring to community values the court does not have in mind surveys and polling, the stuff of politics, but is more concerned with informed criticism and debate, then the difficulty lies in evaluating the extent to which such criticism (whether through scholarly works, media commentary or even political criticism) may be said to represent the community. Perhaps the community holds no views on a matter, or its views are fundamentally divided. It is not evident that the judiciary is well placed to discern community values, especially where the common law is not merely extended or applied by implication to related areas, but is radically altered or even overturned, as it was, for example, in the court's decision in *Mabo*.[75] Political silence or inactivity may represent an impasse or indifference. In short, it is not always evident whether the judiciary is at the van or the rear of changing community values.

Moreover, who or what constitutes 'the community' is problematic in a larger sense. For example, the court has stated that where there is uncertainty in the common law it may turn to jurisprudence from other countries as well as to international laws and conventions to inform its deliberations. The resort to these

75 *Mabo* v *Queensland (No 2)* 175 CLR 1 (hereinafter *Mabo*). *Mabo* demonstrates the extent to which common law cases can have fundamental importance to the regime, being decisions that may go to the make-up of the nation and therefore in effect become constitutive or constitutional cases.

international developments will certainly over time tend to produce an international common law and thereby a community of liberal democratic regimes influenced and directed by their courts of final jurisdiction. But this would suggest that these courts are bringing into being such a community rather than taking their bearings from such communal values. Community values in this sense would appear to impose few restrictions on judicial lawmaking.[76]

The court's attempt to rely on community values to justify its common law jurisprudence tends towards a definite political vision. It sees the regime as democratic, evolving and progressive, where change is determined by discussion, debate and deliberation. It justifies the judicial role as a sophisticated form of representative governance that is open to the concerns of an informed community. Importantly, it places the regime within an international community of like-minded and favourably disposed states that are evolving towards greater freedom. But there persists within this understanding of the common law a view that draws upon, or reintroduces, the classical common law.[77] For example, in *Mabo* the majority distinguishes between a common law that can be altered and changed, and fundamental principles – such as the doctrine of tenures which Brennan J calls a 'skeletal' principle – that cannot be altered. The notion of a skeleton and thereby the body of the common law returns us to the more ancient metaphors of the common law, the tree or stream that remains the same while changing over time.[78] This limitation on judicial discretion may perhaps be explained as no more than a jural postulate that guides and limits the recognition of interests. If so, it is a powerful reminder of how difficult it is to negotiate and distinguish between core and peripheral principles.

There is, however, a conception of the common law that does appear to limit radically the judicial task of progressive interpretation. According to a minority on the court, there are deep and enduring values in the common law that cannot be altered at all, neither by the judiciary, parliament nor the people.[79] Though the

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76 Kirby M, 'The Role of Internmational Standards in Australian Courts' in Alston P & Chiam M (eds), *Treaty-Making and Australia: Globalisation versus Sovereignty?* (1995); Saunders C, (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) at part II. For example, almost all human rights conventions were the result of compromise and negotiations in the course of their drafting and adoption. Therefore, there are potentially a range of conflicting principles enshrined in each enactment, authority for a range of differing outcomes.

77 Of course to abandon the declaratory theory is not to abandon the way common law proceeds in general eg, the incremental nature of the adversarial system, the requirement and limitations of stare decisis or precedent, the need to hear cases and issue judgments, to take into account all the procedural requirements of adjudication. In fact, these requirements have posed problems as well as representing opportunities for the court in developing its jurisprudence.

78 Sandoz E (ed), *The Roots of Liberty* (1993); Pocock JGA, *The Ancient Constitution and the Feudal Law* (1987).

79 For an early formulation of this possibility see *Union Steamship Co of Australia Pty Ltd v King*, above n21. Deane and Toohey JJ rely on this argument in *Leeth v Commonwealth* (1992) 174 CLR 455 and in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. For the majority view rejecting this see *Kable v Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51. See also Zines, above n26 at ch 16, 418–420.

claim that the common law is the foundation of the Constitution has been advanced before,[80] this view goes further by claiming that legislative and executive power of parliament is limited by the common law rights; that the common law prevails over the Constitution. This suggestion is reminiscent of Coke's famous statement in *Doctor Bonham's* case that the common law will control acts of parliament, as well as his response to James I in *Prohibitions del Roy* that the artificial reason and judgment of the common law is superior to the natural reason of individuals.[81]

This argument can be said to reintroduce the common law and elements of the declaratory theory into the court's jurisprudence. To the extent that the common law reconciles fundamental principles and change (acknowledging such a tension in its use of metaphors of tree or stream) it may be possible to retain an interpretation based on community values within this conception. However, where these fundamental principles are not conceived within the framework of the common law tradition, it would appear they would limit, if not oust, a jurisprudence based on community values. Here the judiciary becomes the guardian of fundamental values, guiding and directing community values accordingly. The nature of the regime anticipated by such a theory of interpretation will depend on the character of the fundamental principles being interpreted. Where such principles reject parliamentary supremacy or popular sovereignty, or are not derived from 'nature' or 'humanity,' this theory no longer necessarily favours or secures a liberal-democratic regime.

B. Interpreting the Constitution

The theoretical difficulties with the admission that the court makes laws become more acute in the case of constitutional interpretation. How is the court to interpret the Constitution? Clearly the answer to this question has far-reaching legal and political consequences. This is especially so in Australia where few attempts at amending the Constitution have been successful and therefore the court's constitutional decisions have assumed even greater importance, becoming for practical purposes the definitive interpretation and formulation of its terms.

The Constitution itself is silent regarding the way it should be interpreted. But the fact that it can only be altered by a majority vote of electors in the majority of states (s128), suggests that in constitutional adjudication the court has a duty to interpret and apply the law, not make it. That is, the founders' intentions, and the intentions of the electors who have amended the Constitution, should have a paramount role in the interpretation of the Constitution. The High Court has to some extent accepted this argument, variously termed originalism or

80 Dixon O, 'The Common Law as the Ultimate Constitutional Foundation' in Dixon O, *Jesting Pilate: and other papers and addresses* (1965); *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 521; *Cheatle v R* (1993) 177 CLR 541 at 552; Zines, above n26 at ch 16, 400–402; Mason A, 'An Australian Common Law' (1996) 14 *Law in Context* 81; Brennan G, 'Courts, Democracy and the Law' (1991) 65 *ALJ* 32; Castles A, *An Australian Legal History* (1982) at ch 17.

81 *Doctor Bonham's* case (1610) 8 Co Rep 114; *Prohibitions del Roy*, above n16. For Coke's view of 'higher law' see Stoner J, *Common Law and Liberal Theory* (1992) at ch 1–3.

intentionalism, relying on the convention debates, drafts of the Constitution and other historical material to ascertain the meaning of constitutional provisions.[82]

The more prevalent view, however, has been that the Constitution is not a rigid blueprint, a detailed and exhaustive statement of the founders' intentions, but rather 'a set of general principles designed as a broad framework or outline for national government.'[83] The Constitution as a framework of government – as a living instrument – justifies a dynamic or progressive interpretation of its terms; the Constitution should be interpreted in accordance with community values and standards. From this perspective the intentions of the framers become less important and in some cases seem like the 'dead hands' of the framers, 'reach[ing] from their graves to negate or constrict the natural implications' of the Constitution's provisions or doctrines.[84] The debate between those who favour a progressive as opposed to an originalist interpretation of the Constitution need not be as intransigent in Australia as it is in North America, especially if it can be shown that the founders supported a progressive interpretation. But a recourse to the founders' views would also reveal, as noted above, that they were prepared to leave most matters of public import to the political processes, locating in the Constitution the minimal requirements of a federal union.

A dynamic or progressive interpretation of the Constitution raises profound questions concerning the legitimacy of judicial lawmaking. By taking into account community values and other fundamental values in the community in interpreting the Constitution the judiciary can be said to 'constitutionalise' them. By transforming what was previously conventional or political in a broad sense into a justiciable matter the judiciary in effect augments its authority and responsibility. For example, by construing the Constitution as more than a federal enactment the court introduces into its general jurisprudence a judicial review based on human rights. Importantly, this process of constitutionalising exposes the court to profound political, philosophical and social arguments that go to the very make-up of the regime, giving it the ability to alter the nature of the Constitution and thereby the potential to reorder or refound the regime. In this context one is compelled to ask whether dynamic interpretation, especially in the interpretation of the Constitution, effectively relieves the judiciary of the demands and constraints of the rule of law. Do the concepts of community or fundamental values impose any significant limits on the individual choice and discretion? These questions in fact return us to the difficulties noted above concerning the formulation and use of 'jural postulates' and 'scheme of interests' in judicial lawmaking, inherent in the underlying principles of sociological jurisprudence. To see how the court has

82 See for example *Cole v Whitfield* (1988) 165 CLR 360; *New South Wales v Commonwealth* (1990) 169 CLR 482; Craven G, 'Original Intent and the Australian Constitution – Coming to a Court Near You'? (1990) 1 *PLR* at 166; Goldsworthy J, 'Originalism in Constitutional Interpretation' (1997) 25 *Fed LR* 1; McCamish C, 'The Use of Historical Materials in Interpreting the Commonwealth Constitution' (1996) 70 *ALJ* 638 at 648; Dawson, D 'Intention and the Constitution – Whose Intent?' (1990) 6 *Aust Bar Rev* 93.

83 Mason, 'Trends in Constitutional Interpretation', above n74 at 238.

84 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (hereinafter *Theophanous*) at 171 (Deane J).

confronted them in practice it is necessary to consider its decisions on implied rights and separation of powers.

The consequences of resorting to community values and fundamental principles in interpreting the Constitution became evident in the series of controversial decisions on political speech handed down by the Mason Court. Though there is no express provision in the Constitution protecting freedom of speech, the High Court struck down Commonwealth and state legislation that unduly limited political discussion on the grounds that political speech was essential for the system of representative democracy guaranteed by the Constitution.[85] Thus these decisions, relying on the postulate of 'representative democracy,' 'constitutionalised' the right of political speech.

But the concept of representative democracy used in this way appeared to give the judiciary a significant means for constitutionalising a range of other rights. In other words, dynamic or progressive interpretation appeared to provide a judicial carte blanche.[86] Aware of these criticisms, the court subsequently moved away from the notion of representative democracy as the conceptual basis for interpreting rights, preferring instead to rely on the specific provisions in the Constitution regarding the election of members of the House of Representatives and the Senate. Implications would have to be drawn from the structure of the Constitution or from the express terms derived by logical or practical necessity.[87] Similarly, the court has relied upon the concepts of separation of powers and the rule of law to impose limits on both the Commonwealth and the state, 'constitutionalising' aspects of criminal law including due process, fair trial and determination of guilt.[88] In these cases the court has in fact relied on Chapter III (The Judicature) and specifically s71 of the Constitution to ground the notions of judicial power and the rule of law. Nevertheless, the potential for unbounded judicial discretion through the use of these concepts as interpretive principles is evident in certain minority judgments. For example, though there is no provision in the Constitution limiting Parliament's power to enact retrospective legislation, a minority in the *Polyukhovich* case held that the enactment of retrospective criminal laws amounted to a usurpation by Parliament of judicial power because it amounted to legislative judgment of guilt.[89] Similarly, Gaudron J in *Leeth* held

85 *Nationwide News Pty Ltd v Wills*, above n79; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous*, above n84; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

86 See the various articles in the Symposium on Rights in (1994) 16 *Syd LR* 145; Doyle J, 'Constitutional Law: "At the Eye of the Storm"' (1993) 23 *UWALR* 15; Horrigan B, 'Is the High Court Crossing the Rubicon? – A Framework for Balanced Debate' (1995) 6 *Public LR* 284; Blackshield A R, 'The Implied Freedom of Communication' in Lindell G (ed) *Future Directions in Australian Constitutional Law* (1994); Williams, above n37.

87 *McGinty v Western Australia* (1996) 186 CLR 140.

88 *Leeth v Commonwealth*, above n79; *Chu Kheng Lim v Minister for Immigration*, above n22; *Dietrich v R* (1992) 177 CLR 292; *Polyukhovich v Commonwealth* (1991) 172 CLR 501; Hope J, 'A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System' (1996) 24 *Fed LR* 173; Winterton G, 'The Separation of Judicial Power as an Implied Bill of Rights' in Lindell G (ed), *Future Directions in Australian Constitutional Law* (1994).

89 *Polyukhovich*, above n88 at 608 (Deane J), 705 (Gaudron J).

that fundamental to the judicial process was the concept of equal justice: 'a concept which requires the like treatment of like persons in like circumstances, but also requires the genuine differences be treated as such.'[90] This formulation of equality before the law introduces the concept of substantive due process: not only will the courts ensure procedural due process is observed, now they are in a position to review the rationale for discrimination. By determining the character and scope of 'genuine difference' the court becomes the arbiter of all legislation and determines the wisdom and efficacy of parliamentary enactments.

As in the court's implied rights jurisprudence, these decisions confirm the potential of a dynamic interpretation based on community values or fundamental principles to move from the concepts such as representative democracy, separation of powers and the rule of law to larger claims that appear to impose no restrictions on judicial review. They reveal a court concerned with its legitimacy, grounding its jurisprudence in the specific provisions or the structure of the Constitution itself.

What political vision is implicit in such a dynamic interpretation of the Constitution? It cannot be denied that the court has discerned in the Constitution and thereby established in Australia a form of representative democracy. In doing so, however, it has presented its vision in its barest outlines. There is little substantive content to the representative democracy depicted by the court. As a consequence, it has put itself forward as a defender of the Constitution, a protector of democratic processes and not an advocate of any specific substantial democratic version of the regime. As a variation of 'representation reinforcing' judicial review, the courts uphold the general structure of the regime and superintend the political processes, while political life and all the substantive concerns of the polity stand outside the purview of the courts. Not only does this division legitimate the role of the judiciary, it also provides an almost unlimited scope to democratic politics. Politics is to be left to politicians and the direction it takes cannot be second-guessed or restrained by the court.[91]

This view arguably reproduces a more sophisticated version of the political settlement effected in the *Engineers'* case. But as the decisions above show, neutral, process-based judicial review will slip into a more substantive liberal-democratic jurisprudence.[92] This would suggest that the court's implied rights jurisprudence, though relatively restrained in its scope and ambition, nevertheless anticipates not only a representative democracy that is progressive, enlightened and rational, but in some instances a democracy that is limited by liberal rights and freedoms.

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90 *Leeth v Commonwealth*, above n79 at 502; Saunders C, 'Concepts of Equality in the Australian Constitution' in Lindell G (ed), *Future Directions in Australian Constitutional Law* (1994).

91 Tucker D, 'Representation-Reinforcing Review: Arguments About Political Advertising in Australia and the United States' (1994) 16 *Syd LR* 274; Galligan D, 'Judicial Review and Democratic Principles: Two Theories' (1983) 57 *ALR* 69; Ely JH, *Democracy and Distrust: A Theory of Judicial Review* (1980).

92 See in this context Tribe L, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *Yale LJ* 1063; Ackerman B, 'Beyond Carolene Products' (1985) 98 *Harv LR* 713; Berger R, 'Government by Judiciary: John Hart Ely's 'Invitation'' (1979) 54 *Indiana LJ* 277.

C. *Sovereignty of the People*

The other significant development in the court's method of interpretation has been its view that sovereignty resides in or derives from the people and therefore the Constitution is founded upon popular sovereignty. It is arguable that from the beginning the Constitution represented the sovereignty of the people: it was drafted in Australia, debated in conventions, and finally adopted by means of popular referenda. The acknowledgment in s128 that the Constitution could not be amended except by the vote of electors confirms the autochthonous nature of the enactment.[93]

As we have seen, this view was not accepted by the court; until the passing of the *Australia Acts* 1986 (Cth and UK) it held that British Parliament retained power to legislate for Australia (for example by passing the *Statute of Westminster* 1931(UK)), and British legislation applying by paramount force could invalidate repugnant state legislation pursuant to the *Colonial Laws Validity Act* 1865 (UK). According to this view the Constitution was an Imperial Act of the British Parliament.

But for a number of justices on the court the passing of the *Australia Acts* 1986, which formally declared that Great Britain would no longer legislate for Australia, has marked the end of the legal sovereignty of the Imperial Parliament and recognised that the ultimate sovereignty resides in the Australian people.[94] This argument appears to make for an easy transition from Imperial sovereignty to popular sovereignty, bringing constitutional interpretation up-to-date with the changes in political and legal developments. In this light popular sovereignty appears to be consistent with Burkean or Millian incrementalism, the result of keeping up with the evolutionary changes at the core of English constitutionalism.

But the move from Imperial to popular sovereignty is more than an incremental change. As a legal concept sovereignty of the people is fundamentally different from Imperial sovereignty or the sovereignty of Imperial parliament.[95] The shift from parliamentary sovereignty to sovereignty of the people in fact represents a theoretically radical departure with major legal and political ramifications. For the court itself, sovereignty of the people introduces a more complex form of judicial review. The court no longer simply ensures that the processes of parliamentary

93 Murphy J argued along these lines: see *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 236–237. See generally Detmold, above n35; Winterton G, 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Fed LR* 223 at 235–238.

94 *Australian Capital Television Pty Ltd v Commonwealth*, above n85 at 137–138 (Mason CJ); *Nationwide News Pty Ltd v Wills*, above n79 at 70 (Deane & Toohey JJ); *Theophanous*, above n84 at 180 (Deane J); *McGinty* v *Western Australia* (1996) above n87 at 230 (McHugh J). See Zines, above n26 at 393–7; Winterton G, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Fed LR* 1; Wright H G A, 'Sovereignty of the People – The New *Grundnorm*?' (1998) 26 *Fed LR* 165.

95 As Zines notes, British parliament is a specific body that can exercise its will in the form of enactments and other ways that are different from the will of 'people', which requires representatives to implement its will. Secondly, unlike parliament, the people cannot legally or practically control or direct the institutions it created to carry out its will. Finally, the Commonwealth parliament was not accountable to Imperial parliament the way it is said to be accountable to the people: above n26 at 394–395.

government are followed; it is now an institution which belongs to the people and exercises its powers for the people.[96] This gives greater legitimacy to the judiciary and, as a superintendent of the sovereign will of the people, it elevates its role above other institutions, including parliament.

In addition to an augmentation in judicial authority, the concept of sovereignty of the people introduces a different form of constitutionalism. If the Constitution derives its authority and legitimacy from the will of the people then it represents a radical constitutive formulation of the people's coming together. In this sense the view of the Constitution as a type of social contract draws upon different theoretical traditions with far-reaching consequences for the character of the regime. It may well be that as an expression of Lockean liberal constitutionalism the Constitution secures natural rights, limited government, citizenship and representative government. However, the sovereignty of the people also opens up a world of fundamentally different political visions, from Hobbes' sovereign to Rousseau's general will, from communitarianism to republicanism.[97] In these outer reaches the judicial task of interpreting and applying the law, of choosing the character of the political regime, becomes a task more suited for the skills, abilities and discretion of a political philosopher and statesman.

4. Politics of Interpretation

For a range of reasons, including international influences and gradual changes in Australian constitutionalism, the court has abandoned its previous methods of interpretation and has declared that it now makes the law. Given the crucial importance of legitimacy for the judiciary, this admission has compelled the court to reconcile its new role with the rule of law, to explain what lawmaking means for the judiciary. Hence its recent decisions reveal as great a concern with the proper basis for adjudication – the way it should interpret and develop the law – as the substantive issues at stake in each case.

In attempting to resolve the tension between judicial lawmaking and the rule of law the court has relied on a version of sociological jurisprudence. Though not abandoning the common law way of proceeding, this form of judicial lawmaking is justified as a legitimate way of bringing the law up-to-date with community values. Thus dynamic and progressive judicial review is seen to be consistent with, and supplementary to, democratic governance. In this formulation the court's lawmaking reflects the politics of the community; the judiciary do not have a democratic vision as such.

This apparently neutral and ministerial method of interpretation appears at odds with the inherent presuppositions of sociological jurisprudence itself,

96 Mason A, 'The Role of the Judge at the Turn of the Century' *The Fifth Annual AIJA Oration in Judicial Administration*, Melbourne, 5 November 1993 at 29–30.

97 See generally Williams G, 'A Republican Tradition for Australia?' (1995) 23 *Fed LR* 133; the debate between George Williams and Andrew Fraser in (1995) 23 *Fed LR* 362, 377; Fraser, above n15; Special Issue, ' Australia's Republican Question' (1993) 28 *Australian Journal of Political Science*; Hudson W & Carter D *The Republicanism Debate* (1993); Cristaudo W, 'Republic of Australia? The Political Philosophy of Republicanism' (1993) 69(11) *Current Affairs Bulletin* 4.

namely, its separation of the legal and the political, its egalitarianism, its commitment to social democratic principles and its belief in change and progress. Therefore, contrary to its claims, it would seem that dynamic interpretation itself does assume a vision of a democratic and representative regime. If, on the other hand, such a dynamic interpretation does not favour any specific political settlement, the High Court's recent decisions suggest that the notion of community values may not in fact provide the anticipated check on individual judicial discretion. The minority judgments regarding the common law, implied rights, separation of powers and sovereignty of the people reveal the extent to which these concepts are sufficiently supple and complex to harbour divergent and in some instances irreconcilable positions. Perhaps these difficulties are no more than those faced by Pound and Stone regarding the ascertainment of interests, the establishment of community or societal values and their reconciliation with jural postulates or fundamental values. If indeed they are inherent limitations to the dynamic method of interpretation then they open the possibility of having individual judicial preferences being implemented under the auspices of justice, progress and community demands.

In any case, the inherent pluralism of dynamic interpretation has introduced into the High Court's jurisprudence a greater willingness to appropriate a range of concepts, theories and ideas in trying to reach a just outcome. Such an apparently neutral method of interpretation has therefore led to the adoption of fundamentally different theoretical frameworks and political settlements by the court. For example, the need for a just outcome has meant that fundamental values of the common law have been employed by some justices at the same time that they have resorted to notions of popular sovereignty and the social contract theories of sovereignty. In other words, though the court has proposed as a minimal political vision a representative and progressive democracy, its decisions also prefigure regimes based on common law principles, liberal democratic regimes based on popular sovereignty and potentially republican regimes relying on representative institutions. In short, its method of interpretation has made possible these different political visions without specifying the bases for choosing between them. The inability of dynamic interpretation to rank or negotiate between these different visions may represent its fundamental limitation as a method of interpretation.

The politics of interpretation can be seen in the specifics of judicial method, in the court's understanding of its role within the Australian community, and in its largest signification, in the character of the Australian regime and constitutionalism it favours. The court has acknowledged its increasing role in the shaping of Australian politics. In doing so it has opened itself to a world beyond legal authority and precedent, to an unfamiliar historical, political and philosophical terrain it now has to confront and engage. It has done so, however, without a distinct theoretical basis for negotiating the different visions of democracy it is confronting. How it faces these difficulties, and its success in meeting these challenges, will have far-reaching consequences for Australian constitutionalism.