Approaches to Constitutional Interpretation in Australia: an American Perspective

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Constitutional interpretations in the United States ("US") and Australia have been frequently compared and contrasted, and historical parallels have been well documented.[1] While the Constitutions of both countries failed to include explicit authority for judicial invalidation of legislative acts, courts in both have relied upon the same primary authority to establish that role.[2] As a result, in the context of constitutional interpretation, US and Australian judges remain free from normal democratic constraints while they impose limits upon other institutions of government.

Judges and scholars in the US and Australia have consistently identified the significance of this responsibility. In the words of John Marshall CJ: "... we must never forget that it is a Constitution we are expounding".[3] Chief Justice Sir Owen Dixon elaborated on the same theme: "... it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to

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1 See, eg, Inglis Clark, A, *Australian Constitutional Law*, 2nd ed, 1905; LaNauze, JA, *The Making of the Australian Constitution*, 1972; Dixon, Sir Owen, "Two Constitutions Compared", and "Marshall and the Australian Constitution", in *Jesting Pilate and Other Papers and Addresses* (collected by Judge Woinarski), 1965; Sawer, G, "The Supreme Court and the High Court of Australia" (1957) 6 *Journal of Public Law* 482; Mason, Sir Anthony, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 *Federal Law Review* 1.

2 *Marbury v Madison* 1 Cranch 137 (1803); see Dixon, Sir Owen, "Marshall and the Australian Constitution", cited at footnote 1; and LaNauze, work cited at footnote 1, at 233 - 34.

3 *McCulloch v Maryland* 4 Wheat 316, at 407 (1819).

be capable of flexible application to changing circumstances".[4] Despite the parallel language - often repeated and widely accepted - there is no consensus regarding their meaning. The only agreement is that constitutional interpretation is unique and therefore subject to special attention.

Within each nation there have been independent debates regarding theories of constitutional interpretation. In the US, where the Constitution has been regarded in almost reverential terms, theoretical discussion of constitutional interpretation has an elevated status.5 High drama of Supreme Court appointments has focused on such questions as whether the doctrine of "privacy" is entitled to constitutional status,6 or whether constitutional rights of criminal defendants have been enforced too aggressively. In contrast,7 surveys which preceded efforts to amend the Australian Constitution identified limited public awareness.8 For much of this century, literalism prevailed as the appropriate guiding theory for constitutional interpretation;9 neither lawyers nor the public have substantially questioned that approach. In recent years, however, that traditional consensus has died, and Australia is now in the midst of renewed debate regarding competing theories of constitutional interpretation.10

This paper presents an American view of that debate. It begins by discussing the traditional Australian theory of constitutional interpretation and briefly recounts the familiar story of its decline. It then describes different theories closely linked to

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4 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, at 81. Chief Justice Dixon's addition to Marshall CJ's statement is echoed elsewhere in the *McCulloch* opinion. References to "flexibility" and "changing circumstances", if anything, compound the problem of seeking guidance for constitutional interpretation.

5 See Mason, work cited at footnote 1, at 1.

6 See Bork, Robert H, *The Tempting of America*, 1990, at 290-91.

7 Saunders, Cheryl, "Changing the Constitution", in Galligan, Brian and Nethercote, JR (eds), *The Constitutional Commission and the 1988 Referendums*, 1989, at 31.

8 Byers, Sir Maurice, "What the Constitutional Commission Achieved", in Galligan and Nethercote, work cited at footnote 7. A 1987 survey showed that only 53.9 percent of Australians knew that Australia had a written Constitution (at 2).

9 Craven, Greg, "The Crisis of Constitutional Literalism in Australia", in Lee, HP and Winterton, George (eds), *Australian Constitutional Perspectives*, 1992, at 1: "Since its great decision in the *Engineers* case in 1920, literalism has been the Australian High Court's enunciated methodology of constitutional interpretation."

10 Work cited at footnote 9, at 1: "... as we approach the centenary of Federation, literalism undeniably looks more vulnerable than at any other stage in its long history".

Australian traditions, followed by alternative approaches which have received substantial attention in the US. Brief summaries and potential criticisms are developed in order to explore the relationship between constitutional theory and judicial decision-making in both the US and Australia.

The Decline of Legalism

"Legalism" is one of the terms often used to characterise the tradition of Australian constitutional jurisprudence. It belongs in a larger family of approaches including literalism, positivism, formalism, textualism and, in the US, "strict construction".[11] All of these concepts share the ambition of constraining judicial discretion to "legally defensible" choices which are theoretically protected from influences of individual political philosophy.[12] The goal of continuing judicial attention to a literal interpretation of text, however, has been repeatedly challenged by both judges and scholars.[13] In its original terms legalism was linked to the political goals of Sir Isaac A Isaacs.[14] In the words of Sir Owen Dixon, "strict and complete legalism"[15] was referred to in support of a more

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11 While there are obvious differences among these approaches, the line-drawing involved in making such distinctions is beyond the scope of this discussion.

12 American discussions of this purpose may be found in Ely, John Hart, *Democracy and Distrust*, 1980, at 1 - 9; Bork, work cited at footnote 6, at 177-78 (in terms of "original understanding"); Craven discusses "literalism" in terms of British antecedents: see work cited at footnote 9, at 3. See also Hanks, P, *Constitutional Law in Australia* 1991, at 21 - 29.

13 Twenty years ago academic critics, influenced by American realism, were criticising the Australian "legalism". See Sawer, G, *Australian Federalism in the Courts*, 1967, at 196 - 97; Lane, PH, *The Australian Federal System*, 2nd ed, 1979, at 1146. More recently, members of the Court have participated: see, eg, Mason, work cited at footnote 1, at 28: "movement away from formal, legalistic interpretation, if it continues, should reinforce our determination as judges to provide objective and principled elaboration in support of our decisions"; McHugh, Mr Justice Michael, "The Law-making Function of the Judicial Process - Part I" (1988) 62 *Australian Law Journal* 15; Part II, 62 *Australian Law Journal* 116, at 127, concluding: "Law-making by judges is likely to remain controversial, but its existence seems essential."

14 Justice Isaacs was known as a strong "nationalist" and his decision in *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129, broadened the scope of Commonwealth power while also establishing an Australian standard for "legalist" constitutional interpretation. See Galligan, Brian, *Politics of the High Court*, 1987, at 96-102.

15 Dixon used this phrase in his Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia on 21 April, 1952 (*Jesting Pilate*, cited at footnote 1, at 245, 247). Subsequent commentators have often referred to this phrase.

centrist legal position.[16] Sir Garfield Barwick, however, relied upon the "same" guiding philosophy to steer a resolutely conservative course.[17] A comparison of the approaches accepted by these major figures in Australian High Court history has made the pretence that "legalism" can be pursued independently of other philosophical guidance indefensible.[18] The political aspect of "legalism", typified by the confrontation between Barwick and Murphy JJ,[19] has been thoroughly exposed.[20] Criticism of legalism in its "narrow" sense has been accompanied by a series of constitutional decisions - from the *Franklin Dam* case[21] to the *Political Speech* cases[22] - which have captured attention and generated renewed interest in jurisprudential debates.

There appears to be general consensus in support of two observations regarding Australian judicial interpretation: first, that the courts in this country have traditionally identified legalism as a major guide to decision-making; and secondly, that explicit reliance upon legalism is now declining. It would be a mistake to overstate either of these observations. Even the most avid adherents to legalism also recognised the limits of that approach, and even the most articulate of realist critiques still acknowledge the role of legalism in Australian constitutional interpretation. Many factors, however, have contributed to the general belief that the ground has shifted and contemporary judicial decision-making has changed in significant ways.[23]

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16 A description of Sir Owen Dixon's role may be found in Galligan, work cited at footnote 14.

17 Barwick pursued interpretations which would constrain government regulation both as an advocate and as a High Court Justice. See Galligan, work cited at footnote 14.

18 Geoffrey Sawer had discussed this point twenty-five years ago: see Sawer, G, work cited at footnote 13, at 196 - 97.

19 See Marr, David, *Barwick*, 1980, at 245 - 47; Goldring, John, "Murphy and the Australian Constitution", in Scutt, Jocelynne A (ed), *Lionel Murphy: A Radical Judge*, 1986, 60, at 81 - 82.

20 See, eg, Galligan, work cited at footnote 14.

21 *Commonwealth v Tasmania* (1983) 158 CLR 1.

22 *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 108 ALR 577; *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681. I refer to these cases jointly as the *Political Speech* cases. They will also be individually referred to by reference to the respective plaintiffs.

23 Reasons behind this shift are assessed differently by different observers. One may point to the difference in membership in the High Court where Dixon and Barwick CJJ have given way to a Court which is now pursuing a more independent course. Absence of Privy Council review establishes, at least in some psychological sense, new freedom of interpretation for the Justices, and development of international treaty obligations have produced changes in the federal framework. Issues confronting the Court have also changed, and mounting academic

Whatever the reasons for the change, ritual incantations of deference to legalism have been increasingly displaced by a search for underlying values.[24]

Interpretivism

There is a persistent view that, although strict legalism cannot be resurrected without at least some of its conservative political baggage, some variant is still the most obvious source of coherent theoretical guidance for the High Court. Thus, while Brian Galligan and Jeffrey Goldsworthy may disagree in their analysis of motive and effect,[25] they nevertheless both advocate "interpretivism" as an alternative to the realist judicial activism of the US.[26] Galligan defines this alternative as "to draw out principles and values from the Constitution and apply them incrementally to cases as they arise, rather than to read one's own preferred principles and values back into the Constitution using the opportunities provided by particular cases".[27] The distinction between excessive legalism and sensible interpretivism appears to be based on the willingness of the latter to consider underlying purposes in a flexible manner, keeping it "up-to-date" while avoiding the vice of "amendment".[28]

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criticism has undoubtedly taken its toll. For discussion of the "rise and decline of literalism", see Craven, work cited at footnote 9, at 1-15.

24 See, eg, opinions in the *Political Speech* cases, cited at footnote 22, discussed in the text accompanying notes 84 - 89. Those decisions at least raise questions about whether Craven would still conclude that "literalism" remains the cornerstone of constitutional interpretation in Australia.

25 See Goldsworthy, Jeffrey, "Realism about the High Court" (1989) 18 *Federal Law Review* 27; Galligan, Brian, "Realistic 'Realism' and the High Court's Role" (1989) 18 *Federal Law Review* 40; Goldsworthy, J, "Reply to Galligan" (1989) 18 *Federal Law Review* 51.

26 Goldsworthy, "Realism about the High Court", cited at footnote 25, at 38; Galligan, work cited at footnote 25, at 48.

27 Galligan, work cited at footnote 14, at 232. He compares this "interpretivist" approach to traditional Australian legalism which is described in terms of "an austere rationalist steeped in the traditions of nineteenth-century English law who sought always to draw his conclusions from legal technique and principle".

28 Goldsworthy, "Realism about the High Court", cited at footnote 25, at 38. Somewhat different terminology is used by Craven who distinguishes traditional "literalism" with an emerging "intentionalism" or "originalism". While the literalist, in keeping with the *Engineers* case, would treat "bare text" as "both the beginning and the end of the search for intention", the "moderate intentionalist" would be more willing to accept the ambiguous nature of the Constitution and would look to "original intention of the Australian founders" as a primary guide (Craven, work cited at footnote 9, at 21). The discussion

Holding the line between interpretivist and non-interpretivist approaches, however, may be more difficult than either Galligan or Goldsworthy admits. Examples of the inevitable limits of interpretivism may be drawn from cases which Galligan cites to support his approach.[29] In *Attorney-General (Cth) Ex rel McKinlay v Commonwealth*[30] the High Court rejected arguments that Australia should follow the US' lead by mandating equality within parliamentary electoral districts. Chief Justice Barwick repeated the common refrain that:[31]

> the only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole: and to find its meaning by legal reasoning ... "strict and complete legalism".

He compared the history of the franchise in the US with that in Australia and, despite marked similarities between the two,[32] he concluded that the same language should be interpreted differently in Australia. A key distinction made by the Chief Justice would appear to have been that "unlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary government with ministerial responsibility".[33] To an American observer, however, that very distinction would constitute a reason for increased insistence upon electoral equality. American jurisprudence shares an historical emphasis on the importance of "confidence" in the political structure.[34] If confidence is to be the measuring stick,[35] then it seems at least arguable that the prime judicial role should be one of policing the democratic process to ensure that an unrepresentative group will not attain and then preserve its anti-majoritary place in

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above will use the "interpretivist" label to avoid confusion while assuming that the alternative described by Craven is generally analogous.

29 Galligan, work cited at footnote 14, at 232 - 36.

30 (1975) 135 CLR 1.

31 (1975) 135 CLR 1, at 17.

32 Both Australia and the US began their national history with marked departures from universal suffrage; both Constitutions gave their Legislative Assemblies essentially unguided responsibility to provide for elections "by the people".

33 (1975) 135 CLR 1, at 17.

34 In *McCulloch v Maryland* 4 Wheat 316, at 431 (1819), John Marshall CJ cited the "magic of the word CONFIDENCE" as the key to understanding why the Constitution should be interpreted in a deferential manner towards Congress, but nevertheless should preclude the State of Maryland from taxing an entity of the national government.

35 *McCulloch v Maryland* 4 Wheat 316 (1819).

Parliament.[36] Elemental confidence in majority rule was the basis for the US precedent which the Chief Justice and a majority of his colleagues chose to reject.[37]

Galligan, who offers a thoughtful "realist" review of Australian constitutional history, nevertheless finds it fortunate "for the integrity of both the democratic process and judicial review in Australia"[38] that requirements of practical equality in voting strength were not imposed by the Australian High Court. He expresses a preference for "interpretivism" which would have the Court "draw out principles and values from the Constitution and apply them incrementally to cases as they arise ...".[39] One may question, however, the reasons why Galligan did not see both the *McKinlay* decision and the US alternative as arguably within the range of interpretivist choices that judges must make.[40] He does not explain his conclusion that the High Court's failure to insist upon electoral equality helped to preserve the democratic process.[41] Nor does he address the question of why the Court's comparative insistence upon frequent relocation of electoral seats among States[42] should survive "interpretivist" criticism. These issues become especially pertinent now that the High Court has recognized implied constitutional protection of the political process in their

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36 Justice McHugh's comments regarding the importance of High Court efforts to police the political process, in part because of the Australian reliance upon responsible government, appear to support this approach. See *Australian Capital Television*, cited at footnote 22, at 124. Further discussion of this approach as developed in the context of the US is discussed in the text accompanying footnotes 71 - 94.

37 See *Baker v Carr* 369 US 186 (1962).

38 Galligan, work cited at footnote 14, at 232.

39 See footnote 38.

40 The surprise is heightened when Galligan subsequently emphasises the interpretivist theory of John Hart Ely (Galligan, work cited at footnote 14, at 258). Ely is perhaps best known for having demonstrated the interpretive basis for the US Supreme Court decisions which protected equality of voting strength: Ely, John Hart, *Democracy and Distrust*, 1980, at 116-25. (In Galligan's defence it should be noted that even Ely admits questions about whether the view he recommends is properly understood as a form of interpretivism. See Galligan, work cited at footnote 14, at 12.) For discussion of Ely's approach, see the text accompanying footnotes 71 - 94.

41 Similar arguments were made in the US when the Supreme Court embarked on its course of mandating equality of voting strengths. Such sceptics, however, have subsequently admitted that the Court's decisions in fact "enhanced the prestige of the Court": Ely, work cited at footnote 40, at 121.

42 See, eg, the opinion of Barwick CJ in *McKinlay* 135 CLR at 27-32.

Political Speech cases.[43] An outsider's perspective suggests that the Court's distinctions in *McKinlay* were reasonable exercises of discretion from among defensible alternatives.[44] Despite Barwick CJ's analysis, "interpretivism" does not lead in itself to one conclusion or another.

The other case which Galligan refers to as representative of the judicial restraint which helped to preserve democracy and judicial review is the *DOGS* case[45] which interpreted the constitutional bar to "establishment of religion".[46] It may be true that Australia avoided numerous problems[47] and also acted in a manner that was most consistent with its national history by concluding that s 116 of the Constitution did not prohibit government financial support for religious schools. However, such practical realities are not the stuff of interpretivist constraints. Characterisation of the American approach as "radical" and "controversial",[48] does not necessarily mean that it cannot be validated using an interpretivist method.[49] An examination of the debate among Australia's founders supports an interpretation requiring "strict separation" between church and state.[50] The record does not support conclusions that the High Court's interpretation of the religion clauses falls within an acceptable interpretivist tradition while alternative constructions would fail that test.[51] In

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43 See footnote 22. For discussion, see the text accompanying footnotes 84 - 89.

44 There would seem to be little question but that an opposite resolution to the *McKinlay* case could now follow in an incremental fashion from the principles and values which underlie the Constitution as identified in the *Political Speech* cases.

45 *Attorney-General (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559.

46 *The Constitution of the Commonwealth of Australia*, s 116.

47 Chief Justice Mason expressed such views: see work cited at footnote 1, at 10.

48 Galligan, work cited at footnote 14, at 236.

49 An American analysis of the meaning of the constitutional text, which Australia virtually copied, supports the US prohibition of government support for religious schools. See Richards, David AJ, *Toleration and the Constitution*, 1986.

50 Ely, Richard, *Unto God and Caesar*, 1976. Ely notes (at 94 - 102) that the "strict separationist" interpretation prevailed at the time in the US, and the US record was referred to fairly extensively by the Australian founders.

51 Ely, work cited at footnote 50, at 102, notes reasons why Quick and Garren's account, *The Annotated Constitution of the Australian Commonwealth*, 1901, was not reliable on this issue: "Quick and Garren's analysis ... is so often shot through with misstatement and tendentious rhetoric that from the point of view of understanding the original meaning of this section of the Constitution it simply should be

this case, it may be more accurate to conclude that the Australian interpretation was a pragmatic accommodation of the role which religious schools have played within this society, while a different judgment in the *DOGS* case would have led to a politicised quagmire.[52] Realist explanations of the *DOGS* case may therefore be more persuasive than references to the text or to the intent of the framers.

If neither *McKinlay* nor the *DOGS* case can be fully accounted for on the basis of interpretivist theory, then it is also possible to understand why that theory provides such hollow relief from "judge-made" law. In a final analysis, "interpretivism" will not effectively resolve the great majority of cases which reach judicial chambers. Both Goldsworthy and Galligan accept the proposition that "narrow" or "naive" legalism is an ineffective and impractical guide to decision-making. Goldsworthy, for example, notes that "to apply interpretivism properly thus requires striking a balance between the actual text and its purpose or spirit".[53] Galligan advocates an interpretivism which allows for examination of "purposes behind" the constitutional text as well as "normative inferences ... drawn from silences and omissions".[54] Based on these perspectives, both also deride the "non-interpretivist" judicial activism of US' Chief Justice Earl Warren.[55] Few, if any, of Warren CJ's opinions, however, could not have been written to meet the guidelines which Goldsworthy and Galligan promote.[56]

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disregarded." Nevertheless, the High Court in the *DOGS* case relied on Quick and Garren, and ignored evidence which conflicted with their opinions: see, eg, *Attorney-General (Vic) (Ex rel Black)* 146 CLR at 612, per Mason J.

52 It would appear that the High Court Justices are quite pleased to have avoided such problems: see Mason, work cited at footnote 1, at 9 - 10. It may be noted that their limited definition of an "Establishment of Religion" will not necessarily protect them from becoming enmeshed in philosophical judgments regarding the appropriate relationship between the government and religion. The Court was still forced to decide whether "freedom of religion" protected individuals from participation in the military (*Krygger v Williams* (1912) 15 CLR 366), or permitted individuals to speak out against a war (*Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116). Changes in religions and in contexts will spark renewed debates. In a changing and pluralist society the Court must inevitably resolve such disputes, and interpretivism is unlikely to guide them to their conclusions.

53 Goldsworthy, "Realism about the High Court", cited at footnote 25, at 28.

54 Galligan, work cited at footnote 14, at 258.

55 Goldsworthy, "Realism about the High Court", cited at footnote 25, at 37; Galligan, work cited at footnote 14, at 259.

56 Galligan refers to Warrens CJ's opinions relating to racial segregation as an example of his non-interpretivist approach (Galligan, work cited

The "interpretivist" alternative may be better understood as a preference for moderation. The unstated premise of Galligan's book is that, with occasional deviations, the Australian High Court has generally steered a course consistent with "Australia's political culture that favours moderation and the rule of law".[57] Galligan obviously approves of that course, and just as obviously believes that such moderation would result from the brand of interpretivism that he advocates. The label, however, is not a substantial substitute for the political preference of its proponent.

Ethical Positivism

From a more theoretical perspective, Tom Campbell advocates "ethical positivism"[58] as the appropriate substitute for the more sterile positivism of the past. He aims to resuscitate positivism by acknowledging the strength of contemporary criticism and responding with an idealised or "aspirational" model. He associates "ethical positivism" with the progressive elements which have often accompanied that approach: from Austin[59] to Hart, adherence to positivism has been tied to implementation of progressive legislative reform. As an idealist, Campbell welcomes the "evidence" of critical legal studies and feminist jurisprudence[60] and uses their insights to develop a theory of legal positivism

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at footnote 14, at 259). In those cases, however, Warren CJ was simply rejecting the legalist constraints that had been imposed by a nineteenth century Supreme Court. See *Brown v Board of Education* 347 US 483 (1954) in which the Supreme Court rejected the "separate but equal" doctrine that had been adopted by the Court in *Plessy v Ferguson* 163 US 537 (1896). Surely Galligan does not mean to suggest that an "interpretivist" Justice would have clung to the racist conceptions of the Fourteenth Amendment that were present in the nineteenth century. Even Robert Bork, the conservative judicial nominee who was rejected by the US Senate for a seat on the US Supreme Court, acknowledges that an interpretivist could support the Warren Court's conclusion in *Brown*. See Bork, work cited at footnote 6, at 82.

Goldsworthy insists that critics of interpretivism miss the "important distinction" that, at some point, "flexible and purposive interpretation becomes amendment" (Goldsworthy, "Realism about the High Court", cited at footnote 25, at 38). That point, however, is irrelevant to most serious questions of constitutional decision-making.

57 Galligan, work cited at footnote 14, at 249.

58 Campbell, Tom D, "Legal Change and Legal Theory: The Context for a New Legal Positivism", Plenary Paper, Australian Law Teachers Association Conference, Brisbane, 9 - 12 July, 1992.

59 Campbell describes Austinian Positivism, "properly understood", as "an ideal not a stipulation or deduction from arbitrary definitions and certainly not as a description of legal reality" (work cited at footnote 58, at 16).

60 Work cited at footnote 58, at 35.

which will restore "confidence in legal change as a source of social progress".[61]

Questions about these aspirations, however, still need answers. For example, what is the judge's role after taking account of "the reality of a far wider range of morally suspect biases which operate in extant legal systems"[62] before "corrective" legislation has been adopted? What is meant by "a commitment to discovering ways of combating such damaging distortions"[63] within a positivist framework? Does the "ethical" positivist simply expose and then impose such law on its victims despite the fact that they were not protected or represented by the "democratic" process which gave rise to the legislation? And what if a traditional interpretation of legislation can no longer be squared with contemporary moral values? Does the "ethical" judge nevertheless impose the old morality until corrective action is taken? This dilemma was squarely faced by the High Court in its decision in the case of *Mabo v Queensland*.[64] As stated by Brennan J:[65]

> the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilised standard, such a law is unjust ...

Presumably the "ethical positivist" would approve of the High Court's rejection of such a standard, but Campbell does not clarify reasons why judges should substitute their values for those of the common law rather than simply appealing for legislative action.

While it is possible that Campbell would endorse the *Mabo* judgment as part of a judge's responsibility within the context of the common law, even more difficult questions arise when the focus is on constitutional interpretation. Campbell's ethical positivism appears to be intended as part of a dialogue with a representative legislature; its weakness becomes apparent when the issue involves constitutional provisions which impinge upon a discrete minority, but which cannot be changed even though a contemporary majority has recognised the sexist, racist, and anti-democratic conceptions which prevailed a century ago. Exposure of such values will not result in corrective action because of limits on amending the

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61 Work cited at footnote 58, at 41.

62 Work cited at footnote 58, at 18.

63 See footnote 62.

64 (1992) 107 ALR 1.

65 (1992) 107 ALR 1, at 18.

Constitution. In this context, the ethical positivist would not appear to have better answers than the traditional legalist or the realist. None are able to supply the guiding principles which Marshall and Dixon CJJ appealed for when they called us to "remember that it is a Constitution" we are interpreting.[66]

The limits of Campbell's approach are illustrated by an attempt to apply it to the "interpretivist" cases discussed above. The decision to reject interpretation of s 24 of the Australian Constitution to mandate practical equality in electoral districts could be reconstructed as an affirmation of the biased, anti-democratic values which were prevalent at the end of the nineteenth century and which gave rise to the limited constitutional language. Chief Justice Barwick's acceptance of traditional limits on the right to vote[67] could be seen as entrenching those values despite society's clear rejection of gender or racial barriers to voting. The decision to accept government funding of religious education could be just as easily seen as an affirmation of biases which favour the established European/Judeo-Christian religions which have been the traditional recipients of government funds. Once recast in such terms, the ethical positivist would seem to be left without guides to interpretation.

A problem which the positivist must confront, and which seems to be at the heart of Professor Campbell's appeal, is that the theory can be either progressive or conservative. It is forward-looking when focused upon legislative correction. It is also, however, inevitably focused on the past when old legislation has been exposed and discredited because of the biased institutions from which it emerged. The ideal of "procedures which seek to minimise bias", the rejection of "value presuppositions", and support for the "rationale for adopting a rule-based approach in the first place",[68] will clash with the ethical judge's obligation to act when such ideal conditions have not been met. While it may be helpful to avoid "the impression that law can remedy the defects of bad political decisions",[69] this advice does not adequately address questions about judges' choices from among potential alternatives.

Alternative Approaches

The general thesis developed above is that legalist, interpretivist or positivist guides to constitutional interpretation are inadequate. It is therefore appropriate to review potential alternative

66 See the text accompanying footnotes 3 - 4.

67 See the text accompanying footnotes 30 - 33.

68 Campbell, work cited at footnote 58, at 15.

69 Work cited at footnote 58, at 42.

approaches. Alternatives that have been advocated in the US include document-bound interpretivism or "representation reinforcement",[70] economic analysis, pragmatic instrumentalism, coherent "principled" theory, and republican theory. The question is whether any of these theories will succeed where legalism has failed.

"Document-bound" Interpretivism

Despite doubts regarding the "interpretivist" label,[71] John Hart Ely advocated what he labelled as "document-bound interpretivism".[72] For essentially the same reasons embraced by Galligan and Campbell, Ely promotes the merit of interpretivism. It is the only approach which answers the fundamental questions he raised regarding democratic constraints on the judiciary.[73] Ely sees the need to respect those constraints as especially compelling in the context of constitutional review where meaningful legislative response is often not possible. He concludes, however, that interpretivism which does no more than amplify the meaning of the specific text is unworkable in the context of the US Constitution: thus, the "impossibility of a clause-bound interpretivism".[74]

Ely reaches this conclusion after looking at both historical and contemporary materials. He notes the familiar problems with seeking an interpretive view when the historical documents on which it is based suggest a multitude of viewpoints and a lack of clear consensus.[75] He emphasises the problem in the context of the US Constitution which was framed in terms of broad standards rather than specific guides. These broad standards may be seen as embracing the concept of intentional ambiguity which leaves room for future changes in interpretation.[76] If the framers intended

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70 For understanding the origin of the doctrine of representation reinforcement, see John Marshall CJ's opinion in *McCulloch v Maryland*, cited at footnote 3, in which he concluded that the State of Maryland could not tax the President of the US because of a lack of voter confidence in such a structure.

71 See footnote 40.

72 Ely, work cited at footnote 12.

73 "The Allure of Interpretivism", in Ely, work cited at footnote 12, at 1 - 9.

74 "The Impossibility of a Clause-Bound Interpretivism", in Ely, work cited at footnote 12, at 11 - 41.

75 Work cited at footnote 74, at 22 - 30 (discussion of "privileges and immunities").

76 In Ely's words, "there was at the same time 'an awareness on the part of these framers that it was a constitution they were writing, which led to a choice of language capable of growth'" (work cited at footnote 74, at 30, citing Bickel, Alexander, M, "The Original Understanding and the Segregation Decision" 69 *Harvard Law Review* 1 (1955)).

ambiguity and change, then interpretivist constraints cannot be derived from such clauses.

Nevertheless, Ely persists in finding a basis for limiting judicial review derived from a commitment to procedural and specifically democratic values which underlie the US Constitution.[77] Judicial discretion is narrowed to an enforcement of those underlying values, and outside of that context courts are instructed to defer to legislative judgments.

There are substantial reasons for accepting at least a modified version of Ely's analysis as applicable to the Australian context. Despite the fact that the Australian Constitution is more detailed than that of the US, there are nevertheless many provisions which appear to be deliberately ambiguous.[78] Despite the outcome of the *McKinlay* decision discussed above,[79] there are obvious grounds for arguing that the Australian Constitution, like its US counterpart, is built upon democratic principles; that the High Court's task is therefore one of "representation reinforcement".

Arguments in favour of an approach similar to Ely's may be derived from Craven's concept of "contextualism".[80] Although Craven does not discuss the range of problems associated with "framers' intent",[81] he nevertheless recognises constitutional ambiguity and appeals to some combination of "fundamental constitutional values"[82] and "the general needs and aspirations of the Australian people".[83] It is not clear, however, whether Craven's emphasis on specific nineteenth century values would be compatible with the modern conceptions identified by Ely.

The High Court's decision in the *Political Speech* cases arguably embraced elements of "document-bound interpretivism" and "representation reinforcement" which Ely proposed. Where Ely relied in part on the First Amendment to the American Constitution

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77 Ely, work cited at footnote 12, at 88 - 101.

78 The Australian framers surely understood the lessons of *McCulloch v Maryland*, cited at footnote 3, as they crafted the ambiguous language of s 51. Chief Justice Dixon helped to make that recognition a part of the Australian constitutional tradition with his adoption of the *McCulloch* language. See footnote 4.

79 See text to footnote 30.

80 Craven, work cited at footnote 9, at 28 - 32.

81 Thus, he does not discuss the problems of a divided body with multiple, conflicting "intents" and with at least some participants who "intend" to leave room for changing interpretations, all as discussed by Ely, see work cited at footnote 74.

82 Craven, work cited at footnote 9, at 30.

83 Craven, work cited at footnote 9, at 31.

to develop his theory, the High Court relied on the constitutional assumption of representative government to imply a freedom of speech. The opinion by Deane and Toohey JJ in *Nationwide News*[84] was the most explicit and comprehensive in defining "doctrines of government which underlie the Constitution" in terms of first, federalism; secondly, separation of powers; and thirdly, the "doctrine of representative government".[85] Several other members of the Court, however, referred to their role in policing representation as the basis for their opinions. As it was stated by Mason CJ, "in a representative democracy, public participation in political discussion is a central element of the political process".[86] Justice Brennan said: "To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential."[87] Justice Gaudron noted: "... [P]rinciples of representative Parliamentary democracy ... necessarily entail ... freedom of political discourse."[88] Finally, McHugh J observed: "... [F]reedom of communication ... is a paramount right given for the limited purpose of enabling the people of the Commonwealth to choose their representatives..."[89]

For a variety of reasons, however, it will be difficult for the Australian High Court to extend its political speech decisions to encompass the full representation reinforcement approach that was developed by Ely. In the first place, the Australian Constitution lacks several aspects of the ambiguous protective standards upon which Ely relied. In particular, there is no obvious counterpart to the Fourteenth Amendment which provides for due process and equal protection of the laws. Ely builds upon that Amendment to demonstrate a relationship between democratic principles, on the one hand, and judicial protection of "discrete and insular minorities" on the other.[90] Thus, while Ely's theory embraces the full range of values including freedom from invidious discrimination as well as freedom of speech and protection of the electoral process, the same breadth is not as obvious in the Australian context.

By linking representation reinforcement to federalism and the separation of powers doctrines, Deane and Toohey JJ lay the groundwork for a more general, coherent approach to the Australian

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84 (1992) 108 ALR 681.

85 (1992) 108 ALR 681, at 721-22.

86 *Australian Capital Television*, cited at footnote 22, at 595.

87 *Nationwide News*, cited at footnote 84, at 704, citing the European Court of Human Rights, *The Observer and the Guardian v United Kingdom* (1991) 14 EHRR 153, at 178.

88 *Australian Capital Television*, cited at footnote 22, at 652.

89 *Australian Capital Television*, cited at footnote 22, at 674.

90 Ely, work cited at footnote 12, at 135 - 179.

Constitution as a whole. While identifying a network of underlying principles, however, the Justices do not indicate how those general guides are to be interpreted and applied. Instead, the cases become a further illustration of the premise that judges need to make value judgments when deciding whether individual clauses of the Constitution should be interpreted in a manner which defers to, or confines, legislative judgments. While the cases help to put to rest approaches based on "narrow legalism", they do not "fill the gap"[91] which has resulted from the demise of literalism.

In the context of the US, flaws in Ely's approach have also caused it to fall short as a general guide to decision-making. Ely's emphasis on policing political processes, especially in the context of obvious bias or discrimination, moves his approach towards the "ethical positivism" of Campbell.[92] It is, however, beset by the same underlying difficulties. No "neutral" answers which appeal to the interpretivist instinct that judges should avoid value judgments adequately explain decisions to accept some procedural protections and to reject others.[93] Ely also fails to convince his critics that judges should abandon the search for alternative fundamental values.[94] The contribution of "document-bound interpretivism" can thus be best understood as widening the field of prospective judicial discretion without offering specific guidance to those who attempt to follow its direction.

Economic Analysis

An alternative often debated in the United States is "economic analysis". In its traditional form, an economic approach rests on the principle that government decision-makers generally, and judicial officers in particular, should decide cases in a manner which will maximise efficiency.[95] Efficiency is defined in terms of maximising wealth by assuring that markets permit free transfers to those who place the highest relative value on objects of exchange. The model for this theory is that of a market-place in which goods are traded to those willing to pay the highest price. Such transfers are "efficient" if the buyer gets the product and the seller is paid so that both perceive benefits from the exchange. Advocates claim

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91 Craven, work cited at footnote 9, at 32.

92 See footnote 58.

93 See, eg, Brest, Paul, "The Substance of Process" 42 *Ohio State Law Journal* 131 (1981).

94 See Richards, David AJ, "Moral Philosophy and the Search for Fundamental Values in Constitutional Law" 42 *Ohio State Law Journal* 319 (1981).

95 See Posner, Richard A, *Economic Analysis of Law*, 2nd ed, 1977. The "Efficiency Criterion" is discussed at 10 - 12.

that such theories may be applied beyond the market-place - attempting "to reconstruct the likely terms of a market transaction"[96] - potentially to the point of offering a guide to interpreting the Constitution.[97]

While such assertions of an economic analysis have encountered fairly constant criticism, they are not without support in the context of constitutional analysis in the US. Thus, the view of Marshall and Dixon CJJ that constitutional principles are to be interpreted more flexibly than statutory provisions[98] is tied to an economic analysis of the greater costs of changing Constitutions compared with changing statutes.[99] Federalism and the separation of powers doctrine prevent undue centralisation or monopolisation of government power.[100] In the context of limiting state regulation of inter-State commerce, the Court in essence asks whether the state regulation at issue reflects a "neutral" evaluation of costs and benefits, or whether States are in fact discriminating against out-of-State interests because of invalid protectionist motives.[101]

Development of the federalism doctrine in Australia may be analysed in similar economic terms. Section 92 of the Australian Constitution[102] reflects a "free market" attitude towards government regulation of commercial transactions even more clearly than its US counterparts, and the High Court's interpretation which prohibits any "discriminatory protectionist purpose"[103] accords with economic theory. So does the Court's interpretation of s 117 protecting "rights of residents in States".[104]

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96 Posner, work cited at footnote 95, at 11.

97 Posner, work cited at footnote 95, at 266.

98 See the text accompanying footnotes 3 and 4.

99 Posner, work cited at footnote 95, at 491.

100 Posner, work cited at footnote 95, at 492 - 93.

101 A case which illustrates this approach is *Hunt v Washington State Apple Advertising Commission* 432 US 333 (1977). In that case, labelling requirements for apples sold in the State of North Carolina were seen to have minimal benefits, other than protection of the local apple industry, while imposing very large costs on out-of-State apple growers. No neutral evaluation of costs and benefits would have resulted in such an "inefficient" regulation. As a result, the regulation violated the Interstate Commerce Clause.

102 Section 92: Trade within the Commonwealth to be free. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

103 *Cole v Whitfield* (1988) 165 CLR 360, at 409.

104 See *Street v Queensland Bar Association* (1989) 168 CLR 461; 88 ALR 321.

While economic analysis may be readily understood in the context of commercial regulation, it becomes more controversial when applied in such contexts as the interpretation of freedom of speech. At one level, the free speech clause of the US Constitution can be simply understood as endorsement of a free "market-place of ideas".[105] Use of cost-benefit analysis to constrain that market, however, faces formidable problems. An historical attempt at such analysis is found in the formula initially developed by Learned Hand J and adopted by the US Supreme Court when asked to assess government efforts to limit Communist speech activities.[106] The Court asked "whether the gravity of the 'evil', discounted by its improbability, justifies [the challenged] invasion of free speech".[107] Critics have pointed out, however, that the Hand approach unduly restricted measures of the value of free speech. Thus, if the specific speech was only weighed against the long term threat of Communist world domination, the outcome became a foregone conclusion. On the other hand, if living in a "free society" was the interest weighed on the pro-speech side of the balance, then the outcome became unpredictable. Unfortunately, at such high levels of generality it becomes difficult to assert that the test was more than a vehicle for expressing one's political preference. Alternative uses of economic analysis to explain free speech analysis have proven equally unsatisfactory.[108]

Illustrations of the difficulty which American courts have in imposing market criteria on non-economic questions may be projected to the Australian context. Thus the decision to protect pre-election political advertising[109] may be justified in terms of a constitutional preference for the market-place of ideas. A cost-benefit analysis weighing the value of television advertising which

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105 Justice Holmes expressed this classic view in his dissent in *Abrams v United States* 250 US 616, at 630 (1919).

106 *Dennis v United States* 341 US 494, at 510 (1951).

107 See footnote 106.

108 Another case which illustrates limits in the use of the market-place to measure non-economic values such as free speech is *Snepp v United States* 444 US 507 (1980). Elements of private contract law were used to conclude that employees of the Central Intelligence Agency had waived financial benefits from publications relating to their experiences unless their publications were cleared in advance. The Court's decision has been justified by arguments that restrictive contracts which required pre-clearance were valid market transactions, with an assumption that the market-place (the point at which employees weighed the terms of their prospective employment contracts) adequately protected the speech interests involved. The problem, however, is that once again the general public interest in assuring that its government would not unduly limit speech activities was not represented in that market.

109 *Australian Capital Television*, cited at footnote 22.

"at best lacks substance and at worst obscures and distorts crucial issues"[110] against government interests in reducing costs led to one conclusion.[111] The outcome was different when the plaintiff's interest was described in terms of "freedom of expression in relation to political and public affairs".[112] The basic issue was removed from such simple balancing, however, by the majority of Justices who established the need for a "compelling" interest to warrant interference with political speech activities.[113]

Economic analysis also offers little guidance to political judgments regarding validity of environmental regulations or recognition of Aboriginal land rights. Such assessments involve the kind of multi-generational, societal values which, when expressed in terms of costs and benefits, do little more than enshrine the political views of the party which defined the terms of the balance. In this sense, economic analysis inevitably suffers from the same defect that limits claims to objectivity of the legalist or interpretivist analysis. Like the others, it reflects a set of values which have no inherently superior status of legitimacy.

Pragmatic Instrumentalism

Another approach theoretically enshrined in the constitutional jurisprudence of the US has been labelled "pragmatic instrumentalism".[114] This pragmatism is generally defined in contrast to the legalism of English jurisprudence. The tradition of pragmatism may be traced back to John Marshall, and incorporates the approaches of Supreme Court Justices ranging from Holmes to Warren.[115] The pragmatist is focused on "law as a means to goals"[116] and both realism and positivism can be recast in these terms. Reinterpretation of the law was seen to "arise from the dynamism of society".[117]

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110 *Australian Capital Television*, cited at footnote 22, per Brennan J at 611, quoting from Moran, "Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech" 67 *Indiana Law Journal* 663 (1992).

111 Justice Brennan concluded that the government ban was valid: *Australian Capital Television*, cited at footnote 22, at 617.

112 *Australian Capital Television*, cited at footnote 22, per Mason CJ at 592.

113 In *Australian Capital Television* McHugh J (at 670) was most explicit in defining a "compelling interest" test.

114 See Summers, Robert S, *Instrumentalism and American Legal Theory*, 1982.

115 Summers, work cited at footnote 114, at 26.

116 Summers, work cited at footnote 114, at 78.

117 Summers, work cited at footnote 114, at 84.

Elements of a pragmatic approach can also be traced in Australian constitutional history. The decision of Isaacs J in the *Engineers* case has been understood in terms of "using" legalism in order to achieve ends of expanding federal power.[118] In those terms, the approach is consistent with the "ideal" of positivism discussed by Campbell.[119] Even Dixon J could be described as a pragmatist when he embraced a broad definition of the federal defence power[120] while more narrowly construing the government's right to pursue ends which were not so palatable. Justice Dixon (as he then was) defended his approach by noting that "[the Constitution's] meaning of the terms does not change, yet ... its application depends upon facts, and as those facts change, so may its operation".[121] As noted by Galligan, this "is a convenient legal fiction for disguising the broad discretion and progressive role of judges in developing the law".[122]

The pragmatic instrumentalism described in the American context is comparable to the "emerging progressivism" identified by Craven.[123] A series of recent judicial opinions, demonstrating progressive interpretation of ambiguous constitutional language, are cited as evidence of this alternative.[124] The advantages of progressivism may be compared to "intentionalism" which Craven cites as an alternative "emerging" theory.[125] Democratic theory offers a basic support for staying "in tune with the changing needs of society" rather than regressing to the nineteenth century world view

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118 See Galligan, work cited at footnote 14, at 96 - 102.

119 See work cited at footnote 58, at 17. Campbell advocates positivism as an ideal "to further certain moral and political objectives": citing MacCormick, Neil, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, 1982, Chapter 2.

120 *Andrews v Howell* (1941) 65 CLR 255, at 278.

121 See footnote 120.

122 Galligan, work cited at footnote 14, at 130. Dixon would, however, insist upon a more temperate picture of the judicial role: see "Concerning Judicial Method", in *Jesting Pilate*, cited at footnote 1, at 152 - 165.

123 See work cited at footnote 9, at 16 - 20. One might also relate the "pragmatic" or "progressive" labels to the emphasis on "sensible" or "statesman-like" interpretivism described by Goldsworthy and others. See Goldsworthy, "Realism about the High Court", cited at footnote 25, at 38.

124 For example, Craven cites Windeyer J's opinion in *Victoria v Commonwealth* (1971) 122 CLR 353, at 396; and Mason J's opinion in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, at 224-25.

125 Goldsworthy, "Realism about the High Court", cited at footnote 25, at 20 - 23. The "intentionalism" described by Craven is an aspect of "interpretivism" discussed above at the text accompanying footnotes 25 - 57. See, in particular, footnote 28.

of the "framers".[126] It is difficult to reconcile the progressive and intentionalist perspectives which Craven finds running through Australian constitutional law. Both may be understood, however, as "tools" rather than as guides to specific decisions; thus, the "instrumental" aspect of the approach. References to what was intended and to what will have a favourable impact on society become elements of the decision-making process.

"Pragmatism", while seeking to combine the best elements of realism and positivism, fails when put to the test of guiding judges. Where economic analysis (or utilitarianism) asserts a substantive, albeit controversial, value which may guide judge-made law, pragmatism does not necessarily even embrace that constraint. It is close to the pure legal realism defined in the earlier parts of this century which simply recognised the judge's role in asserting value preferences. Even among those who would define both American and Australian experiences in terms of their pragmatic search for "good" results, the theory remains virtually devoid of substance as a guide to future decision-making.[127] It is not so much a matter of pragmatism (or progressivism) imposing "new burdens upon ... a judicial body adrift on the sea of policy",[128] rather, as understood by both Isaacs and Dixon CJJ, able judges have always been aware of the relationship between judicial decisions and society. A "progressive" identification of individual rights, however, may conflict with an equally "progressive" view of the democratic process.[129] Able lawyers cast their arguments in terms of positive,

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126 The latter becomes impossible if it turns out that at least some of the framers themselves would have understood that ambiguous language is appropriate for a Constitution precisely because it allows changes in interpretation to meet the needs of society. See work cited at footnote 76 and the accompanying text. See also the views of Dworkin, Ronald M, in *Taking Rights Seriously*, 1977; *A Matter of Principle*, 1985; and *Law's Empire*, 1986.

127 The realists themselves recognised that their theory was "incomplete" in this sense and accepted a range of principled approaches as necessary supplements to realist theory. See Purcell, Edward A Jr, "American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory", 75 *American History Review* 424 (1969). Galligan also recognised the artificial nature of the legalism/realism dichotomy: see work cited at footnote 14, at 41 - 44.

128 Galligan, work cited at footnote 14, at 19.

129 For example, one may characterise the *McKinlay* case, cited at footnote 30, as "progressive" because of the extent to which it protected democratic control of the electoral process. In contrast, one might characterise the *Australian Capital Television* case, cited at footnote 22, as "progressive" because of the extent to which it protected freedom of political speech activities. Neither of these labels will advance the underlying debate.

rather than negative, effects on society. The progressive label does little to sort out the choices involved.

Coherent Rights and Principles

An alternative to the emphasis on procedure is an approach based on the thesis that the common law and the Constitution together establish a coherent guide to decision-making. This approach is represented by Ronald Dworkin who challenges positivism with claims that a conscientious judge should assess the complex of existing rights and principles to determine the single "right" answer for a given dispute.[130] Unlike legal rules, principles have "weight", and if defined at their appropriate level of generality, they fit into a coherent body of law from which answers to legal questions should be derived. Those answers guide the judge to "correct" interpretations of common law, statutes, and the Constitution.[131] By Dworkin's account, the judge strives in each context to establish a rule of law which is consistent with values of fairness and integrity. This return to first principles, evaluated in light of contemporary conditions, offers a basis for rejecting the "silly" and "perverse" tendency of intentionalists to base decisions on the "public morality" of those who voted for the Constitution a century ago.[132]

A full critique of Dworkin's approach is beyond the scope of this article. The limited goal of the discussion which follows is to note possible relationships between Dworkin's approach and traditions of Australian constitutional interpretation, and to raise questions about whether this approach is likely to meet the demands of a contemporary High Court.

Chief Justice Owen Dixon is recognized for his insistence upon "strict and complete legalism". A review of his opinions, however, will concede that Dixon CJ was committed to identification of legal principles which were implied independently of the positive law, and which determined the outcome of his legal reasoning.[133] Independent of possible realist

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130 See Dworkin, works cited at footnote 126.

131 See works cited at footnote 126; in particular, *Law's Empire*, Chapters 8, 9 and 10.

132 Dworkin, *Law's Empire*, at 365.

133 In *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 681 Dixon J rejected the "notion that in interpreting the Constitution no implication can be made", and he declared that "such a method of construction would defeat the intention of any instrument, but of all instruments a written Constitution seems the last to which it could be applied".

accounts of Dixon CJ's motives,[134] his approach, based upon principles and logic, has more in common with Dworkin than with the legalists, literalists, or positivists who have characterised his opinions to fit their theories.[135] Chief Justice Dixon and Dworkin may both be seen as steering a course that should be distinguished from either legalist or pragmatic extremes.[136]

When Dixon CJ reminded readers that "it is a Constitution"[137] he was interpreting, he was keeping the door open to broad principles which change their shape depending upon historical context and concerns. When he found implied principles which limited the scope of the *Engineers* case[138] he was developing a coherent theory of federalism which guided his interpretation of text.[139] Like Dworkin, he was inclined to be faithful to broad concepts rather than to specific conceptions of the framers. His reference to strict legalism is best understood in its context of an appeal to recognise the "total body of the law", "close adherence to legal reasoning", and a demanding search for "coherence".[140] These references can be more closely tied to Dworkin than to the literalism or interpretivism traditionally referred to as characteristic of Dixon CJ's High Court.[141]

The principles which Dixon CJ embraced are different from those which Dworkin would advocate. Dworkin advocates a philosophy built upon fundamental human rights; in contrast, Dixon CJ's constitutional interpretation focused upon questions of structure

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134 See, eg, Galligan, work cited at footnote 14, at 112 - 13, describing Dixon's "free enterprise interpretation of section 92".

135 Galligan, work cited at footnote 14, at 39, characterises Dixon as the "arch-legalist", and also notes that the label does not entirely fit.

136 This observation is consistent with Galligan's view that the "legalist" and "realist" caricatures are not meaningful alternatives. See Galligan, work cited at footnote 25, at 41.

137 Case cited at footnote 4. This observation would also apply to John Marshall CJ's use of the same language: see case cited at footnote 3.

138 See footnote 133. See also *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, at 390; *Melbourne Corporation v Commonwealth* (State Banking Case) (1947) 74 CLR 31, at 78 - 79.

139 See Zines, Leslie, "Sir Owen Dixon's Theory of Federalism" (1964-65) 1 *Federal Law Review* 221.

140 Dixon, "Upon Taking the Oath of Office as Chief Justice" in work cited at footnote 1, at 247 - 48.

141 Note that this relationship between Dixon and Dworkin is identified through reference to Dixon's constitutional decisions, especially those dealing with the doctrine of federalism. No effort has been made to review the complete body of his opinions to determine whether they fit within this pattern.

and power.[142] While much of Dworkin's substantive theory is derived from the Bill of Rights and the Fourteenth Amendment to the US Constitution, Dixon CJ's opinions reflect a framework built upon the Supremacy of the Parliament of the United Kingdom and the common law as an "Ultimate Constitutional Foundation".[143] This substitution of "constitutional texts" limits the extent to which Dworkin's work can be relied upon to chart a course for the contemporary Australian High Court. Thus, Dworkin's approach only becomes coherent in the context of a judicial role which allows elaboration of first principles of "justice, fairness and integrity".[144] Absence of a constitutional commitment to those principles results in an approach that is built upon an incomplete or incoherent foundation.

In contrast to the theoretical power of the Parliament at Westminster, Australian law derives its power from an entrenched Constitution.[145] As a result, all High Court Justices would recognise that there are limits to the principle of parliamentary supremacy. In recent opinions the High Court Justices have referred to a doctrine of "proportionality" which they rely upon to check the power of Parliament.[146] There is a large gap, however, between a general reference to proportionality and the moral principles of fairness and integrity which guide Dworkin's Judge Hercules. Attempts to use Dworkin's approach in the context of this relatively weak principle would lead judges to points at which they conclude that a particular law is "immoral", that is, it conflicts with the first principles as defined by Dworkin. The judge must then also ask whether it is "so immoral" that it triggers the proportionality doctrine which would lead to overturning the legislation. There is no apparent "principled" basis for resolving this question, and as a result the judge is once again left with little guidance for exercising discretion. In other words, the Australian Constitution as traditionally understood does not include a concept of "rights in the strong sense".[147] While there remain possibilities of an "implied bill of

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142 For example, Dixon J's opinion in the case of *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, focuses on limits to the defence power of parliament, rather than on individual political rights.

143 See Dixon, "The Common Law as an Ultimate Constitutional Foundation" in work cited at footnote 1, at 203 - 13.

144 Dworkin, *Law's Empire*, at 263.

145 See the opinion of Brennan J in the *Nationwide News* case, cited at footnote 22, at 694.

146 See, eg, Mason CJ's opinion in the *Nationwide News* case, cited at footnote 22, at 690, citing *South Australia v Tanner* (1989) 166 CLR 161, at 165.

147 See Dworkin, *Taking Rights Seriously*, at 188-90.

rights"[148] or of an incorporation of international norms[149] which might result in establishment of such principles, at present Australian constitutional law lacks the building blocks needed to construct "Law's Empire".[150]

A series of developments lead to further questions about whether building upon a "coherent body of law" from the past is now appropriate in Australia. The *Privy Council Acts* of 1968[151] and 1975[152] and the 1986 *Australia Acts*[153] at least symbolised independence from the full British traditions which Dixon CJ had relied upon. The *Tasmanian Dams* case[154] opened the door to a range of new issues which had not been developed within the existing body of common law. The *Mabo* case[155] explicitly noted the racial bias of existing Australian common law and the High Court's determination to move away from that tradition. The *Political Speech* cases leave substantial room for development of constitutional principles which had not been previously recognised by the Australian High Court.[156] Although these recent decisions can be supported from within the philosophic tradition which Dworkin describes, contemporary critics challenge his adoption of a universal perspective as the best guide for the Court.

Dworkin's emphasis on the value of "coherence" has been criticised for giving too much weight to that value. Feminist and critical race theories challenge the view that a universal and

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148 See Toohey J, speech to a Darwin Constitutional Conference, as reported in Barker, Geoffrey, "The Court's Key Role in Rights", *The Age*, 10 October, 1992, at 11.

149 See Kirby, the Hon Justice MD, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514.

150 Sandra Berns has demonstrated that, even accepting the first principles defined by Dworkin, judges may still be led to the basically incoherent conclusion that they have "a moral obligation to engage in an immoral exercise of power" (Berns, Sandra S, "Integrity and Justice or When is Injustice Mandated by Integrity?", (1991) 18 *Melbourne University Law Review* 258, at 276). Dworkin's claim to a "single right answer" may as a result be challenged even in the context of the first principles which he defines.

151 *Privy Council (Limitation of Appeals) Act* 1968 (Cth).

152 *Privy Council (Appeals from the High Court) Act* 1975 (Cth).

153 *Australia Acts* 1986 (Cth & UK).

154 *Commonwealth v Tasmania* (1983) 158 CLR 1.

155 *Mabo*, cited at footnote 64.

156 See the text above accompanying footnotes 84 - 89.

coherent perspective is either possible or desirable.[157] A perspective built upon an existing legal framework would inevitably be slanted towards the biased world view of a European male.[158]

The search for coherence may also force judges to play a more aggressive role in articulating and promoting broad principles than is acceptable in the light of democratic theory. In the current Australian context, which includes efforts to protect individual rights and to eliminate sources of historical bias, it may be more appropriate for judges to limit the scope of their analysis in order to extend the process of developing new approaches. We may accept as given that the legislative process produces a body of law which embodies elements of inconsistency. Judges responsive to democratic theory will avoid addressing all perceived inconsistencies and confine decisions to the specific elements of a dispute.[159] For example, when the High Court decided that the political advertising ban was invalid in the *Australian Capital Television* case, the Justices generally chose to avoid detailing the scope of the principle on which their decisions were based,[160] thus encouraging further discussions of that issue in both academic and political forums.[161]

Republican Theory

A view which is more consistent with the criticism of those traditionally excluded from the legal community suggests that it is appropriate to see the judge as a participant in a dialogue, perhaps willing to state potential issues of broader significance, but reluctant to declare binding principles at high levels of generality which lead both current and future judges to their "one right answer". The "republican" label stems from what has been described as the "civic

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157 See West, Robin, "Jurisprudence and Gender" 55 *University of Chicago Law Review* 1 (1988); Harris, Angela, "Race and Essentialism in Feminist Legal Theory" 42 *Stanford Law Review* 581 (1990).

158 See MacKinnon, Catherine A, *Toward a Feminist Theory of the State*, 1989; West, Robin, "Taking Freedom Seriously", 104 *Harvard Law Review* 43 (1990).

159 See Campbell, work cited at footnote 58, at 7.

160 See, eg, Gaudron J's opinion that the "notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally" (*Australian Capital Television*, cited at footnote 22, at 652). Neither Gaudron J nor her colleagues chose to resolve such issues at this stage.

161 See also the discussion of the relative merits of case by case amplification of judicial theory in McHugh, work cited at footnote 13, at 117 - 27. This approach is addressed in more detail in the present article at the text accompanying footnotes 176 - 186.

republican" strain of American political and legal theory.[162] It is defined in contrast to dominant "liberal" theory which is described in terms of the belief that "a neutral state with neutral law could provide the framework for a neutral market society".[163] In contrast, law is recognized by republican theory as an expression of "public values".[164] Ronald Dworkin and his mythical Judge Hercules would probably not be satisfied with such a role, but it is an approach which may be more consistent with the role of the High Court as it adjusts its views to accord with the contemporary multi-cultural society.

Republican theorists describe an "alternative to liberal legalism's court-centred and right-centred strategy".[165] Their primary focus is upon a "civic minded legislature and virtuous citizenry that engage in open dialogue".[166] The judge in this context is expected to participate in, and not preclude, effective community dialogue. Participation would include willingness to recognise new perspectives,[167] to depart from precedent which failed to protect adequately those who were traditionally excluded from the dialogue,[168] and to limit identification of "rights" to a level of generality which is no greater than that needed to resolve the immediate dispute before them.[169] Judicial decisions should acknowledge the values which they embrace: "Only when constitutional debate becomes normative will it be a form of debate, or dialogue, in which the legal community can take pride, and which might be worth sharing."[170]

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162 See, eg, Horwitz, Morton J, "Republicanism and Liberalism in American Constitutional Thought" 29 *William & Mary Law Review* 57 (1987); Sherry, Suzanna, "Civic Virtue and the Feminine Voice in Constitutional Adjudication" 72 *Virginia Law Review* 543 (1986); Michelman, Frank, "Law's Republic" 97 *Yale Law Journal* 1493 (1988); and Sunstein, Cass R, "Beyond the Republican Revival" 97 *Yale Law Journal* 1539 (1988).

163 Horwitz, work cited at footnote 162, at 69.

164 Michelman, Frank, "Bringing the Law to Life: A Plea for Disenchantment" 74 *Cornell Law Review* 256 (1989).

165 West, work cited at footnote 158, at 60, citing Michelman, "Law's Republic" 97 *Yale Law Journal* 1493 (1988).

166 West, work cited at footnote 158, at 61, citing Sunstein, work cited at footnote 162, at 1566 - 71.

167 See Harris, work cited at footnote 157.

168 See, eg, the *Mabo* case, discussed at footnote 64.

169 See Sherry, work cited at footnote 162, at 546.

170 West, Robin L, "The Authoritarian Impulse in Constitutional Law" 42 *University of Miami Law Review* 531, at 552 (1988).

A US Supreme Court case which illustrates the significance of this alternative is *RAV v St Paul, Minnesota.*[171] The case challenged government regulation of "hate speech" targeted on the basis of race, religion or gender. Justice Scalia delivered the opinion of the majority which was based upon a general principle that speech, even when it involved "fighting words",[172] could not be regulated on the basis of its content. The overarching principle of content neutrality was thus used by Scalia J to preclude evaluation of context or conflicting values. The minority view of concurring Justices did not dispute the conclusion that the vague St Paul ordinance was unconstitutional, but they sought to leave room for more focused government efforts to deal with the issue. As noted by Blackmun J: "The meaning of any expression and the legitimacy of its regulation can only be determined in context."[173] On that basis he rejects the "quest for absolute categories of 'protected' and 'unprotected' speech"[174] while also rejecting the majority's broad refusal to allow regulation based on content. This preference for narrow principles developed through case by case adjudication reflects a traditional role of the common law judge; "republican theorists" have noted the extent to which the common law tradition accepted the normative element of judicial decision-making.[175]

Recent comments and developments illustrate potential application of republican theory to the Australian context. Justice McHugh presented an expanded description of the disciplined and incremental role of judicial development of constitutional theory in his articles on the "Law-making Function of the Judicial Process".[176] In discussing that role he identified several of the themes which may be followed throughout the preceding discussion. He recognised the "reality" that occasionally judges "have to make law".[177] He also recognised the significance of "cohesive principles of justice" within "any community" as well as the "necessity of examining

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171 112 S Ct 2538 (1992).

172 Historically the Supreme Court had taken the position that speech which met a narrow definition of "fighting words" was not protected by the First Amendment: *Chaplinsky v New Hampshire* 315 US 568 (1942).

173 *RAV v St Paul* 112 S Ct 2538, at 2566 (1992).

174 *RAV v St Paul* 112 S Ct 2538, at 2567 (1992).

175 Horwitz notes that Justice Oliver Wendell Holmes J in his book *The Common Law*, 1881, recognised the common law as "an expression of custom which itself had a normative and evolutionary character" (work cited at footnote 162, at 173).

176 McHugh, work cited at footnote 13.

177 McHugh, work cited at footnote 13, at 117. Compare to views expressed by Michelman, work cited at footnote 163.

societal interests".[178] He describes those elements, however, in the context of "incremental law-making" as implied by the case method, and in this way he envisions a judicial role which "has a contribution to make to democracy".[179]

Republican theory breaks from the purported "neutrality" of legalism and the interpretivist or positivist alternatives. An historical example of republican theory in action would be Dixon CJ's use of "implied constitutional principles".[180] Resurrection of such doctrines, distinguishing strict or narrow adherence to the doctrine of the *Engineer's* case, illustrate the ongoing normative component of constitutional interpretation.

A contemporary example of this approach, which recognises emerging and alternative community perspectives, is the High Court decision in *Mabo*.[181] The traditional doctrine of *terra nullius* was rejected because it was based upon a nineteenth century European perspective which failed to respect the perspective of the Meriam Island people. The decision of the Court, however, was limited to the *Mabo* case, and thus allowed room for government and citizen response which may precede judicial development of the issue.

The High Court's *Political Speech* cases[182] also reflect elements of republican theory. The doctrine of "proportionality"[183] developed in those cases is another example of the open and inherently normative tests developed by the Court. The Court stopped short of asserting a broad principle of freedom of speech which would demand repackaging of contemporary legislation and common law to fit into a new coherent package. The spirited debate which followed the Court's decisions is an example of the "republican" activity which such theorists advocate.

Recognition of the role of community and the importance of dialogue is not unique. Craven refers to such an approach in the

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178 McHugh, work cited at footnote 13, at 117. Compare to the discussion of the "normative" elements of the law as discussed by Horwitz, work cited at footnote 161.

179 McHugh, work cited at footnote 13, at 124. Republican theory also promotes the value of making law more open and understandable to the public, rather than keeping it hidden behind the professional culture of the legal community. See also footnote 163.

180 See Dixon, work cited at footnote 1. Horwitz makes this point with specific reference to doctrines of "implied limitations" (work cited at footnote 162, at 74).

181 Cited at footnote 64.

182 See footnote 22.

183 See *Nationwide News*, cited at footnote 22, per Mason CJ at 691.

context of his discussion of "progressivism".[184] He cites McHugh J's position that "courts, as much as the legislatures, are in continuous contact with the needs of the community".[185] Also cited is Mason CJ's emphasis on prospects for "far more open debate of constitutional decisions".[186]

There is a risk that emphasis on debate and dialogue will clash with the role which society has placed in the hands of judges. Courts have the power to "fine, imprison, or execute",[187] or in even stronger terms, "judges deal pain and death".[188] When handling such power, it is appropriate to seek "right answers", not debate. While acknowledging that judges are tied to limited perspectives and cannot hope to achieve perfect insight, recognition of ambiguity and uncertainty may also be viewed in a more positive light. Judges who recognise their limits may be more inclined to listen to the "victim's story"[189] than those who emulate Hercules.

This account of judicial decision-making as dialogue, embracing a range of views and approaches, may appear out of step with legal tradition. By another view, however, the best of judges

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184 Craven, work cited at footnote 9, at 25.

185 McHugh, work cited at footnote 13, at 124.

186 Craven, work cited at footnote 9, at 24, citing Mason, work cited at footnote 9, at 158-59. In his comparison of US and Australian judicial interpretation, Mason CJ also noted Australia's "isolation" from other nations which have at least some form of entrenched Bill of Rights. He concluded: "If we do not enact a Bill of Rights we will stand outside the mainstream of legal development taking place in other common law countries ..." (see work cited at footnote 1, at 13). As norms developed from international law replace traditional common law sources, however, one must also recognise the limitations of that source. See also, Kirby, the Hon Justice MD, work cited at footnote 149. Both the *Mabo* case and the *Political Speech* cases appear to recognise this international dimension. References to international law and to the constitutional decisions of courts in other nations help to underscore the public and political nature of the issues involved. The tension between efforts to "create structures that enable individuals and communities to fulfill their deepest aspirations" (see Horwitz, work cited at footnote 161, at 73) and to establish "a broader conception of human rights that is more than just 'men's rights' in disguise" (see Wright, Shelley, "Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions" (1992) 12 *Australian Yearbook of International Law* 241, at 242) illustrates the difficulty of the task.

187 West, Robin, L, "Adjudication is not Interpretation: Some Reservations about the Law-as-Literature Movement" 54 *Tennessee Law Review* 203, at 257 (1987).

188 Cover, Robert M "Violence and the Word" 95 *Yale Law Journal* 1601, at 1609 (1986).

189 See Matsuda, Mari J, "Public Response to Racist Speech: Considering the Victim's Story" 87 *Michigan Law Review* 2320 (1989).

have always recognised the value of alternative perspectives. Chief Justice John Marshall derived his strength and established a lasting framework for interpretation of the US Constitution by using a multitude of approaches to support his conclusion. Virtually all of the approaches described in this discussion can be identified in the single case of *McCulloch v Maryland*.[190] Chief Justice Owen Dixon derived similar strength from a concept of legalism which acknowledged ambiguity and respected both historical influences and the significance of context and social change.[191] Both Marshall and Dixon CJJ may be favourably compared to members of their Courts whose approaches were more single-minded.

Conclusion

A final comment on the issue of judicial "disarray". A simple statement of the thesis described above is that legalism has declined and no single, alternative approach has emerged to take its place. Expectations of a single, coherent approach would at this stage be incompatible with the process of constitutional development that is taking place. The unsettling conclusion is that there is a large element of uncertainty in current understanding of Australian constitutional law which shakes the confidence of those who expect the law to protect values of consistency, stability, and predictability.

Instability, however, may not be all that bad. Americans who experienced the 1950s and 1960s learned to accept increased environmental regulation by local planning agencies, and decreased authority in the hands of local police and local school authorities. Settled expectations were changed in part because of new approaches to constitutional decision-making which were inspired by commitments to a more inclusive view of principles of fairness and integrity. Throughout this process, the courts maintained their position as the most respected branch of the US government.

There are also reasons to believe that the openness of the current High Court to new approaches to constitutional decision-making will not significantly reduce predictability. Different outcomes were expected from Isaacs, Dixon and Barwick CJJ not because they either did or did not espouse "legalism", but rather because of their individual differences and the changes in the cases and conditions which they confronted. This is not the first generation to sense shifts in constitutional interpretation. Fifty

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190 See footnotes 3, 34, 70, 78, 98, 115 and accompanying text.

191 Chief Justice Dixon also used at least some aspects of the different approaches reviewed above. See footnotes 4, 78, 98, 121, 133 - 143 and accompanying text.

years ago Dixon CJ concluded his account of Australian federalism by noting that: "The only lessons to be gained ... perhaps are that all is flux and that you never can tell."[192]

By now we should have learned that judges cannot resolve significant constitutional problems by simple reference to a literal translation of the text. We should expect them to interpret text in a broad manner, and also recognise that interpretation which includes discovery and elaboration of underlying principles is virtually unbounded. We should expect judges to weigh costs and benefits, but should not expect them to be bound to follow the outcome of any one application of such a formula. We should also expect them to appreciate social impact, but impact alone should not be accepted as an adequate basis for their decisions. We demand reasoned elaboration, which includes an effort to fit their decisions within the fabric of the law, but we should not expect agreement that there is a single right answer which will emerge from that process regardless of the context or the experience and perspective of the decision-maker. Finally, we should be willing to treat judges as members of a political community who, like all of us, participate in an ongoing dialogue to determine the future course of our society.

192 See "Aspects of Australian Federalism" in *Jesting Pilate*, cited at footnote 1, at 122.