

The High Court and the Founders: an Unfaithful Servant*

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1 Introduction

As will be apparent from its title, this paper is highly critical of the performance of the High Court. As those familiar with biblical metaphors quickly will realise, the unfaithful servant was invariably the unhappy menial who eventually would be transported to the place where there would be weeping and gnashing of teeth as a just reward for his unsatisfactory service. The application of this unflattering label to the High Court, together with the implication of the appropriate destination in a constitutional afterlife for most of its judges, is entirely intentional.

Perhaps the most crucial point to be made here is a preliminary one, and that is that the performance of the High Court is fundamentally a fit subject for academic and legal scrutiny. The High Court is the highest court of our federation, and its decisions carry profound constitutional implications. Consequently, academics should feel not only free but obligated to discuss these decisions in the frankest terms, and to disagree publicly, forcefully and at length if they believe them to be wrong. In doing so, they would have before them the immensely healthy example of the United States, where all decisions of the Supreme Court are minutely scrutinised from both ends of the constitutional spectrum, thus ensuring that no new direction on the part of the Court can be adopted without full intellectual accountability being exacted through vigorous, and sometimes frenetic debate.

The need for such critical debate in Australia has never been greater than at the present time, when the Court is asserting for itself a far wider role than it previously had claimed. Thus, justices of the High Court are cheerfully asserting that they do and they should make law, and

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that the Court is routinely in the business of making policy decisions. Putting aside for the moment—but only for the moment—the propriety of such claims, it certainly is clear beyond doubt that it would be entirely inappropriate for such a cheerfully policy-orientated court to claim the public deference and immunity from question due to a more conservative, exclusively interpretative judicial body. If the Court does indeed believe that it can maintain both an overtly political role, and the traditional deference due to an apolitical court, it is in for bitter disappointment.

Thus, it is nothing more than common sense that if the High Court wishes to make political decisions, and accompany their making with essentially political statements, it must be expected to be treated like the robust political creature that it claims to be, and not like some judicial maiden aunt. In particular, if the Court chooses, for whatever reason, to adopt a course of constitutional interpretation which to many appears to be a wilful distortion of the Court's constitutional role, and profoundly intellectually dishonest, then the High Court must expect to be called for precisely what these persons believe it to be.

Moreover, it is the duty of both lawyers and academics, but especially of those who are both academics and lawyers, to say so loudly and often where they believe the Court to be wilfully distorting the Constitution. Certainly, there could be nothing more antithetical to the duty of a constitutional lawyer within a society committed to the rule of law, than to acquiesce passively in a process of constitutional interpretation which he or she believed to be a conscious subversion of the democratic constitutional will of their society. On the contrary, such a person would be bound as a matter of intellectual morality to point prominently to the Court's dereliction of duty, to explain in precise terms the nature of that dereliction and to encourage the Court, with such brutality as may prove necessary, to revert to the path of righteousness.

Thus, as the Dean of Australia's only Catholic law school, which has a unique commitment to the teaching of law in an ethical context, I am sometimes asked how I can fail to support an interpretation of the Constitution which fosters the creation of judicially enforceable guarantees of rights, if only on the grounds that the creation of such rights must surely follow along the paths of ethics. To this, my answer is that if legal ethics mean anything, they must mean more than achieving the arguably correct result by unarguably improper means. The fundamental ethic in a constitutional society such as ours, at least from the point of view of lawyers, must be that the judges themselves abide by the rule of law, and do not usurp the democratic powers of constitutional amendment invested in the Australian electorate under the Constitution. Thus, from my own point of view, just as timely trains did not render Mussolini's fascism ethical, neither does the commitment of Sir William Deane to freedom of political speech excuse his rather more subtle and undoubtedly well-meant undermining of Australian constitutional democracy.

Clearly, then, it is out of considerations such as these that the title of this lecture has been born. I firmly believe that the High Court has been the unfaithful servant of that title, and that it has consciously and wilfully failed to fulfil the constitutional role envisaged for it by Australia's founding fathers. Consistently with what has been said before, I further believe that this failure has been entirely illegitimate, in that it has been wholly inconsistent with conventional concepts of constitutional democracy. Just as consistently with the comments made above, I believe that these truths—which I hold to be self-evident—should be loudly and painfully proclaimed whenever the Court and its allies are to be heard publicly

congratulating themselves on their contribution to a guided constitutional democracy in this country.

Thus, the chief object of this paper will be to demonstrate that the High Court, over the course of the years since federation, has laboured not to implement but to frustrate the founders' constitutional vision, and that this effort has been entirely conscious. Indeed, a theme of this paper will be that the High Court has been one of the most, if not *the* most, destructive force in bringing the vision of the men of 1897 to substantial ruin. Within these wider parameters, this paper seeks to do a number of things. First, it will consider the nature of the founders' constitutional vision for Australia. Next, it will outline the part to be played within that vision by the High Court, as foreseen by the founders themselves. By way of contrast, it will isolate certain activities which were definitively not regarded by the authors of the Australian Constitution as falling in any manner within the province of the Court. The paper will go on to assess the extent to which the High Court has discharged the role assigned to it and, correspondingly, the extent to which it has usurped functions for which it had received no constitutional authority. Finally, taking as its starting point that the High Court has utterly failed to implement the intentions of the founding fathers, the paper will consider the basic question of whether the intentions of the founders—the views of those men of 1897 who fashioned the Constitution—really matter within the context of contemporary Australian constitutional interpretation.

2 The Nature of the Founders' Vision

The essence of the vision of the founding fathers did not vary materially between 1891 and 1898. That constitutional essence was one of transcendent federalism, of a nation state where central power was strictly circumscribed by reference to the powers and interests of its component regions.¹ This transcendent federalism pervades the Australian Constitution in a manner that is all but over-powering, and this is a matter we should keep very clearly in mind when one or other of today's constitutional necromancers tells us that the essence of the Constitution is 'Democracy', 'Respect for Individuals', or any other fashionable constitutional anachronism. As with any other commodity, there is only one essence of Australian constitutionalism, and that is federalism.

One reason that we may have difficulty in appreciating this fact is that we tend to be excessively impressed by the Constitution as a vehicle for the achievement of Australia's incipient nationalism. It certainly is true that the Constitution was, and to a very large extent was intended to be, the means of Australia attaining national status, at least in politico-historical, as opposed to legal, terms. However, the nationalist vision of the founders was utterly qualified by an over-riding commitment to federalism and it would not be unfair to say—as they often indicated themselves—that nationalism would only be suffered to exist within the framework of the Australian constitutional settlement to the extent that it was consistent with the attainment of a true federalism. Thus, to say that the Constitution is suffused by nationalism would be a little like saying that Catholicism is suffused by the papacy; this is entirely true, but the centrality of the papacy to Catholicism is itself subsumed

¹ I have considered this matter before—see Gregory Craven, 'The States—Decline, Fall or What' in Gregory Craven (ed.), *Australian Federation: Towards the Second Century*, Melbourne University Press, Carlton, Vic., 1992.

within Catholicism's fundamental commitment to Christianity. The analogy is perhaps more apt than it appears, for the slightest consultation of historical materials will show that federalism was the Messiah of our Constitution and its authors, and nothing else. Indeed, one does not even require any particular historical knowledge to reach such a conclusion, as the conclusion is manifest upon the text of the Constitution itself. All that will be done here, is to briefly examine four of the more obvious illustrations of this point.

The most obvious textual embodiment of federalism, and thus in the present context one of the most interesting, is the Senate. It is, of course, hard to recognise the intention of the founders behind the Senate in its modern, and in many ways depressing, reality. Nevertheless, it can hardly be denied that the prominent existence of the Senate on the very face of the Constitution operates to introduce a basic federal element into the central structures of the Commonwealth legislature itself. Much has been made from time to time of the limits upon the Senate's powers in financial terms, but the reality remains that the envisaged states' house was to be co-equal with the House of Representatives in respect of all other potential exercises of the Commonwealth's legislative capacity. The result was that at the very heart of the Commonwealth legislature, a controlling federal element was implanted by Australia's federalist constitutional engineers.

Far less appreciated is the fact that the so-called 'national house', the House of Representatives, itself has its national character savagely qualified by a commitment to federalism. It is true that under section 24 of the Constitution, representatives are elected in proportion to the populations of the different states, and not on any basis of state equality, as is the case with the Senate. This is where those who wish to dwell upon the character of the House of Representatives as an embodiment of nationalist sentiment tend to stop. But when one examines the constitution of the lower house more closely, the position which emerges is profoundly different. Thus, members of the House of Representatives are chosen on a state by state basis, and not nationally.² The divisions in respect of which they are elected must be entirely contained within the borders of one state.³ Original states, regardless of their paucity of population remain entitled to their minimum representation of five members.⁴ The conclusion must be, therefore, that even the 'national' house of the Commonwealth Parliament is almost as federal in character as it is reflective of purely central concerns.

Bizarrely enough in view of the consistent course of Australian constitutional history, a further revelation of the intrinsically federal character of the Constitution is to be found in the limited nature of the legislative powers of the Commonwealth. Years of amplification of these powers by the High Court have tended to make us believe that the capacities delineated in section 51 are broad and untrammelled. Thus, we tend to talk about 'the corporations power' contained in section 51(20) as if it is a general power to make laws with respect to all corporations, as in many senses it has indeed become. In fact, however, a consultation of the actual text of section 51(20) quickly reveals it to be a minutely delineated power with respect to specific classes of corporations, namely, trading, foreign and financial corporations, and

² Section 24.

³ Section 29.

⁴ Section 24.

even these must have been formed within the limits of the Commonwealth. This is no more a corporations' power than a power with respect to 'budgerigars' is a power over 'birds'.

Other placita of section 51 reveal a similarly niggardly approach on the part of the founding fathers towards the expression of the powers of the Commonwealth: nowhere is to be found the words of generous grant that one might expect having regard to the decisions of Australia's highest court. Thus, the so-called trade and commerce power in section 51(1) is in fact a power over trade and commerce with other countries and among the states. The vital tax power contained in section 51(2) is subject to the internal stipulation that it may not be exercised so as to discriminate between states and parts of states. Section 51(5), the communications power, is most often cited for its concluding words 'and other like services', but its textual character is set by the careful specification of the types of service forming the heart of the power, namely, postal, telegraphic and telephonic communications. The point to be appreciated is that the unbiased reader of section 51 quickly will appreciate that its words are not those of unrestrained trust towards a privileged favourite, but rather those of real and pervading caution. They are, in short, richly redolent of a desire to confine the power of the Commonwealth strictly within its sphere, and in favour of the states.

Finally, and most importantly in a federalist context, one must consider the process of constitutional amendment provided for by section 128. The basic federal message of section 128 could not be more brutally clear: there is to be no constitutional amendment within the Australian federation unless the populations of a majority of the states can be persuaded to agree, regardless of any stupendous national majority which might in any event exist. Indeed, in certain cases (such as the alteration to the limits of a state), the population of the state particularly affected also must agree. Consequently, in its most fundamental aspect—the provisions regarding its own amendment—the Australian Constitution ensures that the federal principle over-rides the national, clearly and beyond all question.

Thus far, the federal character of the Australian Constitution and polity has been demonstrated merely by a reading of the Constitution's text, unaided by history or any understanding of the course of events leading to its creation. Indeed, so much could be gleaned by the average intelligent Martian, new on Earth, but capable of reading the English language. However, this literal impression of pervading federalism is greatly reinforced when the Constitution is placed within the context of the intensely federal impetus which brought it into being.

This is not the time to commence an intensive study of the federal movement of the 1890s, nor the place which federal thought as such held within that movement. Suffice to say, therefore, that it is simply beyond question that to the vast majority of the founders, the achievement of whatever degree of nationhood was embodied within the concept of federation was absolutely subject to a satisfactory safe-guarding of the positions of the states.⁵ To put the matter in terms highly unpalatable to many modern historical revisionists, but nevertheless perfectly accurately, the vast majority of the founding fathers, if asked to choose between federation and sacrificing the positions of the states, would unhesitatingly have consigned federation to the rubbish bin of history. Anyone who doubts this inconvenient conclusion has only to read the debates of the 1891 and 1897 Conventions, almost at random,

⁵ A reading of the classic work by Professor John La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Carlton, Vic., 1972 will leave little doubt on this point.

to appreciate the intensity of the federalist and state-protective feeling of the average founder.⁶ In light of this conclusion, it is hardly surprising that the documentary Constitution is absolutely reflective of this historical genesis. The federalism of its provisions does nothing more than reflect the federalism of its authors.

There is a further crucial point to be made here. The founding fathers did not favour just any federalism. In these post-Whitlam days, it is now fashionable to assert that one believes in federalism, but that the form of federalism to which one is committed happens not to accord any identifiable power to the states. This federalism *manque* is not federalism of the founding fathers, nor the federalism which suffuses the Australian Constitution. That federalism was a very particular type of de-centralised government, strongly disaggregated, and with the balance of power lying decidedly and consistently with the states. This is the potent federalism that is reflected in the amendment provisions of section 128, as it is in the critical position of the Senate, and which for so long has been dismissively labelled as that unworkable contraption ‘co-ordinate federalism’. It is this powerfully federal vision, and not some pale apology for a geographic separation of powers, that was at the heart of the thinking of the founders, as it is at the heart of the Constitution that they devised.

Of course, while federalism overwhelmingly is the dominant theme of the Australian Constitution, none of this goes to deny that the Constitution also embodies other extremely significant concepts. The most obvious of these is parliamentary government, in which it is entirely evident that the founders had the most profound belief.⁷ By parliamentary government is meant a constitutional system which displays, in a broad sense, a number of closely-linked characteristics. Within a system of parliamentary government, the executive government will be responsible to Parliament, in the sense in that it will rely upon the confidence of Parliament to hold office; that Parliament will be elected on a franchise which is, at least according to contemporary standards, wide and inclusive; and elections to the Parliament will be regular and free. One could argue, although the point is not pressed here, that parliamentary government also would involve some element of bicameralism.

As readily will be seen, the notion of parliamentary government is wider than the concept of responsible government, in the sense that it does not merely concern itself with the relationship between Parliament and the executive, but rather has regard also to considerations relating to the electoral system itself. Correspondingly, however, parliamentary government is vastly narrower than any concept of ‘democracy’, let alone some notion of ‘popular democracy’. In particular, parliamentary government posits no over-arching, abstract belief in any theoretical notion of equality, or a philosophical commitment to what might be termed ‘democratic rights’. Parliamentary government is not, in fact, an abstract concept at all. Rather, as embraced by the founding fathers, it is a highly practical, experiential and passionate belief in a loose amalgam of practices, traditions and down-right constitutional superstitions which historically had and have been seen as safeguarding that curious endangered species, ‘British liberty’.

⁶ See for example the comments of Trenwith, Australasian Federal Convention *Debates*, Adelaide, 19 April 1897, p. 940.

⁷ See La Nauze, *op. cit.*, pp. 227–31.

In this sense, the founding fathers' commitment to parliamentary government could probably be best approximated as constituting a belief in some 'British constitutional genius' as the very best means of guaranteeing the liberty of the subject. Consequently, to say that the founders believed simply that the Constitution embodied in any abstract sense the principles of 'democracy' is wildly inaccurate, and to say that they felt that it encapsulated 'representative democracy' is only a little better. What the founders actually believed in, and what they believed to be embedded within Australia's constitutional system, was no vague constitutional nebula along the lines of 'democracy' or its representative variant, but a highly specific British tradition of parliamentary government. To the extent that this could be regarded as a sub-set of some wider concept, well and good, but it was the sub-set and not any broader extrapolation from that sub-set which mattered to the founders.

Of course, this commitment to parliamentary government is not so directly reflected in the Constitution's text as federalism, given that much of its crucial machinery was to operate via convention, rather than through constitutional law. It may nevertheless be discerned textually in the vestigial references of the Constitution to responsible government,⁸ but also very explicitly in those provisions concerning the holding of elections and the duration of Parliament. Quite aside from the Constitution's text, however, any reading of contemporary material, and particularly of the Convention debates, quickly will reveal the attachment of the founders to parliamentary government to have been both profound and unshakeable.

In the present context, it must be understood that this commitment to parliamentary government carries with it profound implications as to the role of the courts within the Australian constitutional system. This is because the notion of parliamentary government gives rise to a whole series of understandings and subsidiary understandings concerning the relative roles of the different arms of government. These understandings are broadly reflective of the well-known doctrine of the separation of powers, but are better understood as constitutional-political realities, rather than rigid legal classifications. Loosely speaking, then, within a British understanding of parliamentary government, it is the role of Parliament to make the laws, but not to interfere with the administration of justice. The courts will administer justice, but typically will not make law, in the sense that they will not consciously develop new legal policy. They might, of course, in the context of the common law cautiously develop that branch of the law, which in any event owes its existence to the endeavours of the judges. Finally, the executive will administer the laws made by Parliament, but is subject in its administration to both the parliamentary, and the common law.

Crucially, within the vision of British parliamentary government to which the founders were so profoundly committed, there was no role for the courts in striking down acts of either the legislature or the executive as being contrary to *a priori* concepts of human rights. On the contrary, the protection of rights was located with the elected Parliament to which the founders and their British contemporaries were so intellectually attached, on the basis that history had proven that it could be relied upon to act as a safe harbour for the legitimate aspirations of both majorities and minorities. Of course, the courts could be expected to hold the executive within the law, and in the application of a written constitution, even to contain the Parliament within that document's limits. But both these limitations were derived from

⁸ For example, sections 61 to 64.

the containing effect of a superior legislative will which merely was enforced by the courts, and not from any application by the courts of their own supervening vision of human rights.

All of this, which as a matter of simple intellectual honesty can be deduced from the merest understanding of the context in which the Constitution was written, can be readily confirmed by the most jaundiced eye from the slightest study of the Convention debates. There, it can be discerned in general terms in the recurrently expressed vision of Parliament as the systemic bastion of liberty and determiner of policy within the constitutional construct created by the founders. Indeed, doting references to the historical role and responsibility of Parliament are almost as frequent in the debates as calls for the protection of federalism and the states.

More specifically, this vision of a polity in which Parliament was to be the ultimate recourse of the oppressed and dissatisfied, rather than the courts, is quite explicit in the rejection by the founders of any need for a constitutional Bill of Rights. This rejection is well detailed by Professor La Nauze in his excellent book *The Making of the Australian Constitution*,⁹ and will not be rehashed here. The fundamental reason that the founders rejected the prominent American precedent was that they trusted Parliament to achieve the appropriate balance between the protection of human rights and the furtherance of other legitimate interests within the Australian polity.

Here, it sometimes is said that the true reason for the exclusion of a Bill of Rights was the desire of the founders not to invalidate certain anti-Asian laws in the fields of immigration, industry and labour. In fact, unlovely though the example may be, it is merely an illustration of the general attitude of the founders to issues of human rights. To them, the balance to be achieved between the interests of Asian immigrants and the aspirations and desires of other Australian subjects was a matter for Parliament, and not for the courts. Right or wrong, the fact that the founders held this view is not a matter of surmise. Rather, we know from the historical record that this was indeed the case, in exactly the same sense as we know that Charles I lost his head to Oliver Cromwell.

It is appropriate that we should pause here to summarise the nature of the constitutional vision of the Australian founders as it emerged from the Conventions of the 1890s. First and foremost, that vision was one of federalism; federalism transcendent throughout the Constitution, and ascendant over any other constitutional construct. Secondly, the founders enjoyed a profound belief in a highly specific, culturally constructed notion of British parliamentary government. Within that vision, questions of human rights were in the final analysis questions for Parliament, and not for the courts. Equally, on the basis of the preceding discussion, we can summarily dismiss certain things as not having been part of the founders' vision, and correspondingly as not having been embodied in the Constitution which they produced. First, the founders had no truck with an absolute nationalism which threatened the existence of federalism. Secondly, they had little if any interest in abstract concepts of 'democracy', let alone any desire substantively to embody so nebulous a concept within the Constitution. Finally, they utterly rejected any notion that generalised guarantees of human rights should be enforceable against the executive and legislature through the process of judicial review, consigning the vindication of such rights instead to Parliament itself.

⁹ op. cit., note 5.

3 The High Court and the Founders' Vision

It is a relatively simple matter to outline the role which the founders envisaged would be played by the High Court under the Constitution: indeed, until recently, the general outlines of that role were widely understood, even if they were not in practice adhered to by the High Court. Essentially, the High Court was to have two functions. First, it was to be the final court of appeal within the federation. Secondly, it was to be the ultimate arbiter of constitutional interpretation. Both of these functions were important, but clearly it was the constitutional function that would be fundamental, not only to the Court's own future, but to the future of the Constitution itself.

The role of the High Court as a supreme court of appeal has been relatively uncontroversial. This function is, in fact, something of an example of national integration in the Australian Constitution, in the sense that a national court is placed at the apex of the judicial hierarchy. Unsurprisingly, it is also an example of the pervading federalism of the Australian constitutional system, in the sense that the High Court is placed at the head of an existing state hierarchy, which is not replaced by a substitute system of federal courts, although Parliament is given the power to create additional federal courts. For present purposes there is nothing more that needs to be said about the High Court as a court of appeal.

As regards the Court as a constitutional arbiter, its general role was to interpret the provisions of the Commonwealth of Australia Constitution Act. The Court's more particular role, however, was to maintain through that process of interpretation the federal balance between the Commonwealth and the states which was struck by the Constitution. In other words, like some politician-proof fence, the High Court was to keep the Commonwealth and the states within their respective constitutional spheres.¹⁰ This was the key function of the High Court, and was one constantly referred to by the founders. It was for this reason that the Court was referred to more than once during the conventions as the 'key-stone of the federal arch'. The remainder of the court's constitutional duties, though important, undoubtedly were considered to be subsidiary when set next to this critical function of maintaining the truly federal character of the Constitution.

It is important to understand that this truly federal role of the High Court was in fact a component of a sophisticated three-part scheme devised by the founders, and clearly evident in the Constitution itself, for the protection of federalism.¹¹ The first part of that scheme was to confer upon the Commonwealth strictly limited powers, so that it enjoyed no capacity to invade state spheres of responsibility. This aspect of the founders' scheme has already been considered. Secondly, the Constitution inserted a monolithic federal element into the

¹⁰ See for example the comments of Symon, Australasian Federal Convention *Debates*, Adelaide, 20 April 1897, p. 950; and Higgins, 20 April 1897, p. 953.

¹¹ See Craven, 'The states', *op. cit.*, pp. 58–60.

Commonwealth Parliament itself in the form of the Senate, so that even if the popularly elected House of Representatives was tempted to act in a manner contrary to the interests of the states, the Senate could be relied upon to frustrate any such attempt. The third step was the creation of an independent constitutional court. The intended effect here was that even if the Commonwealth strained against the limits of its powers, and even in the event that the Senate failed to contain any such attempt, the federal balance of the Constitution would nevertheless be preserved by a process of independent constitutional interpretation. Of this tripartite plan, evident from the earliest incarnation of the Constitution in 1891, perhaps the kindest thing to say in light of subsequent history to the vengeful ghost of Sir Samuel Griffith would be 'three strikes and you're out'.

4 What the Founders did not Envisage for the High Court

What is being considered here is the mirror image of the previous discussion of the intended role of the High Court. From that discussion emerged the straightforward proposition that the High Court was intended to fulfil the dual function of a final, federal court of appeal, and as the chief interpreter of the Australian Constitution. This is, and always has been, the conventional view of the Court's role.

Now, however, a revisionist view has emerged, which assigns new fields of judicial conquest to the High Court. The first, and probably the most important of these, is that it is the duty of the Court consciously to revise the meaning of the Constitution in accordance with the perceived needs and desires of the contemporary Australian populace. This tendency is probably best referred to as 'progressivism', in that its essence is that the Constitution should be progressively altered by the Court in line with what it perceives to be contemporary standards of constitutional acceptability. The second suggested role, which really is merely an illustration of the first, is that the Court should institute wide-ranging constitutional guarantees of abstract human rights by striking down legislative or executive action which it sees as being inconsistent with a minimum respect for certain aspects of human dignity. In other words, the Court should insert into the Constitution at least some elements of a Bill of Rights. Clearly, this posited human rights role is merely one element of a progressivist approach to constitutional interpretation. The object of this section of the paper is to illustrate that both these activities, progressivism and the development of human rights guarantees based upon progressivism, are utterly opposed to the founders' vision for the High Court.

To take the general phenomenon of progressivism first, its essence is that the High Court should operate as a constitutional court, law reform commission and Parliament all rolled into one.¹² First, it should identify alleged constitutional deficiencies by reference to the contemporary aspirations of the Australian people, but perhaps more accurately, by reference to some notion of constitutional 'best practice', as enunciated by the world of fashionable constitutional taste. Then, the Court should so interpret the Constitution as to interpellate these features into the unpromising text of the Australian Constitution. Of course, it may be noted at this point that this process does not truly answer the description of 'interpretation' at

¹² See generally, Gregory Craven, 'The Crisis of Constitutional Literalism in Australia' in George Winterton and H.P. Lee (eds) *Australian Constitutional Perspectives*, Law Book Co., Sydney, 1992.

all, given that—in reality—no interpretation of constitutional language is involved, nor is any attempt at the discernment of constitutional intention being made. Rather, the Constitution is in effect being altered or amended by the Court to achieve the extra-constitutional end in question.

It should be entirely obvious from the outset that this understanding of the Court's role is entirely at variance with the founders' vision. Indeed, the point is so historically obvious that further elaboration should be unnecessary. However, in view of certain at least half-hearted suggestions that the founders did in fact envisage some such role of constitutional renovation for the Court, it is appropriate to set out in some detail the reasons why such a conclusion is rather less plausible than the existence of the Loch Ness monster.

In the first place, such a pro-active role for the High Court would have been utterly inconsistent with a conventional British understanding of the function of a court in 1897. In line with our previous discussion of the notion of British parliamentary government, it was a given in the deliberations of the founding fathers that courts did not engage in the amendment of statutes, let alone constitutions. Such amendments were solely within the province of Parliament in the case of enactments, and in the case of the Constitution, were confined to the amending entity created under section 128. Certainly, the founders were not naive, and would have expected that the Court would be required to interpret the Constitution, and in certain circumstances of ambiguity, to discern meaning from the vantage point of a wing and a prayer. However, they would have been united by the view that in whatever circumstances of uncertainty the Court might find itself, the issue of constitutional interpretation always would be one of discerning the intention behind words, rather than of consciously amending the effect of those words in line with a perceived deficiency of the Constitution.

This view would have been consistent with the understanding of the founding fathers concerning the process by which statutes were interpreted.¹³ Once again, a court might find itself cast very much upon its own resources in the circumstances of ambiguity, but it would always be the quest for parliamentary intent that would be paramount. Within that search, there could be no legitimate place for conscious innovation by a court dissatisfied with the effect of the statute concerned. Doubtless, as men of affairs, the founders realised that this nevertheless occasionally occurred, and might even have applauded on a practical level this or that particular result of dereliction of judicial duty. However, on the fundamental constitutional question of the proper role of a court in interpreting a statute, they would have been without doubt that the relevant obligation was to search for the intent, and that no scope existed for conscious deviation.

All this is made profoundly clear in a constitutional context by the existence of section 128 in the Constitution. It is thereby apparent beyond all doubt that the exclusive means of amending the Constitution is comprised in the body created under that section. Indeed, the founders went to great lengths to ensure that the only means by which the Constitution could be amended was through resort to the undeniably cumbersome, but equally undeniably popular and federal process represented by section 128. Moreover, the most striking feature

¹³ See J. Goldsworthy, 'Implications in Language the Law and the Constitution' in Geoffrey Lindell (ed.), *Future Directions in Australian Constitutional Law*, Federation Press, Sydney, 1994, pp. 150, 162–6.

of that section is precisely its insistence that the amendment of the fundamental document of the Australian federation is to be preserved to the people themselves, acting through intrinsically federal forms. Within this process, those over-mighty servants, the legislature, the executive and the judiciary, are all precluded from the alteration of the document which creates the Australian polity. In this sense, maligned as it may be by those who have found its results uncongenial, the Australian Constitution's mechanism for amendment is profoundly popular, federal, and democratic.

This is hardly surprising, in that section 128 reflects precisely the process by which the Constitution was created and adopted in the first place. Thus, after 1891 (and with the exception of Western Australia), the delegates who debated and drafted the Constitution were popularly elected. Thereafter, the Constitution was accepted in each of the Australian colonies only after the conduct of a successful referendum. Nothing could be more inconsistent with this overwhelmingly democratic and popular constitutional pedigree than the amendment of the Constitution in defiance of section 128 by judicial sleight of hand.

The final evidence that the founders envisaged no role for the High Court in the conscious and wholesale adaptation of the Constitution to the perceived needs of the present is revealed by their utter failure (in contemporary utterances and in the conventions themselves) to discuss any such thing. Had the founders intended the Court to discharge so novel a role, in defiance of everything which they understood to be an essential part of the British system of parliamentary government, dramatic evidence of so fundamental a departure from historical principle would be littered through the contemporary records. In fact, no such evidence appears. The attempts to elevate isolated and Delphic utterances by particular founding fathers into clear indications of a progressive role for the High Court are as pathetic for their inability to convince as they are for their paucity of support.¹⁴ Correspondingly, the reason that the Convention debates do not ring with denunciations of the Court presuming to take a hand in the amendment of the Constitution, is that not one of the founders could have conceived that any argument so bizarre could ever seriously have been put. Were one of the delegates of 1897 to have stood on the floor of the Convention in Adelaide and posited some of the views unblushingly put forward by certain recent justices of the High Court in their extracurial writings, and rather more maniacally advanced by various academics, they would have been regarded less as constitutional traitors than as madmen.

This is why the whole of the Convention debates as they touch upon the question of amendment are concerned with section 128, and not with the High Court. Not one of the delegates would have seen the courts as the means by which the Australian Constitution was to be adapted consciously and cohesively to changing circumstances. Once again, the isolated comments that have been pressed into service to try and support so spurious a conclusion are readily explicable as being no more than references to the accepted role of a court in the resolution of documentary ambiguity, and in the discharge of the normal interpretative process. If the founding fathers, parliamentarians to a man, would not accord to any Australian Parliament the power to amend the Constitution, but rather reserved it to the people of the states, why would they confer such a power on the federal judiciary? In short,

¹⁴ For example, the attempt of Justice Deane to elevate the unfortunate Andrew Inglis Clark into a form of constitutional Mahatma in *Theophanous v. Herald and Weekly Times Limited*, 182 CLR, 1994, pp. 171–4.

this is not a matter for intelligent argument. We all know that the founding fathers had no intention that the High Court should play any role in the progressive amendment of the Constitution to meet future needs, and this fact is as well known to those who advance such a proposition as to those who negate it.

To take the narrower question of whether the High Court was intended to have a role in the formulation and protection of abstract guarantees of human rights, we may respond similarly in the negative. Put simply, the Australian Constitution is not a 'rights' constitution. True, it does contain certain specific guarantees: section 92 guarantees freedom of interstate trade, section 80 safeguards the right to trial by jury; while section 116 confers a certain freedom of religion. But all these guarantees are essentially scattered and internally limited, and do not go to deny the proposition that the Constitution was not centrally concerned with the direct protection of individual rights. This is not surprising. As has been argued throughout this paper, the founders consciously rejected the idea of pervasive, judicially enforceable human rights. They did so, not because they were opposed to human rights as such—for who is—but rather because they placed their faith in the British parliamentary system. Again, this is not a matter of surmise. We know it to be a matter of historical fact.

Indeed, we can go further in this context, to note that there is no 'rights discourse' within the Constitution in the sense that we would understand the phrase today. That is, there is no consciousness within the debates of the founders, or within the parameters of the document which they produced, of a wide range of indefeasible rights which are beyond the reach of elected parliaments, and which the courts constitutionally must protect. The vast majority of the founding fathers would not even have understood such a discourse, because it was not only in the nature of Parliament that its was the role to protect rights, but it was the nature of legitimate rights that they were such objects as the Parliament had chosen to protect. Within the British constitutional genius, therefore, if Parliament chose to infringe what some would call a right, in circumstances which some would regard as disputable, then Parliament must have had a good reason for so doing. Within its unfathomable reasoning, the right decision had always been made, as it would when repealing legislation was at last enacted.

The crucial point to understand about this constitutional settlement, is that regardless of how repugnant it is to modern legal and constitutional fashion, there is nothing intrinsically illogical about it. In days when we rightly contemplate a multiplicity of options in questions of culture and civilisation, it is nothing less than appropriate to understand that in constitutions, as in many other things, there ordinarily will be a variety of ways of achieving similar objects. In the particular case of the protection of human rights, one perfectly legitimate system of protection is to be found in the reliance upon the operations of democratically elected parliaments. One may argue about the efficacy of such a system, and about its merits compared to a regime based upon some notion of the judicial enforceability of rights, but this is not a debate which will ever objectively be won or lost. The truth is, that as a matter of logic, it was as open to the founders to conclude that parliaments were the best protectors of rights as it is for some (though not all) of us to conclude that this title must lie with the courts. What is beyond all question, is that the founders opted for Parliament.

5 The High Court's Fulfilment of its Intended Roles

We may begin with an assessment of the High Court's discharge of its role as a court of appeal. This has been relatively uncontroversial. Under Sir Owen Dixon, the Court undoubtedly rose to world status as an exponent of common law technique. In this connection, it may be noted that the New Zealand judge who recently told a dotting academic conference convened to honour the former Chief Justice, Sir Anthony Mason, that His Honour was a greater legal mind than Sir Owen, probably had an ancestor who did enthusiastic, if ineffective, service to the late King Canute.

Recently, it has been possible to raise an argument as to whether the High Court is now dealing with cases satisfactorily according to the classic methodology of the common law: that is, developing the law slowly, incrementally, cautiously and in deference to precedent. In particular, decisions concerning native title in *Mabo* and *Wik* have led some commentators to believe that the common law is being sharply wrenched by the Court in this direction or that to fulfil perceived policy needs, and is suffering serious strain in the process. Others argue that these decisions have represented the common law's finest hour in Australia. However, these are issues which do not concern the constitutional function of the High Court, and need not be further considered here.

As regards the constitutional role of the Court, it is simplest to say at the outset that the Court has almost entirely failed to discharge the chief aspects of that role. It has failed in the sense that, rather than having protected the federal character of the Constitution, it has in fact been one of Australian federalism's greatest antagonists. This conclusion may be stated with such baldness, simply because it is an almost universally accepted common-place in Australian constitutional law. The only thing remarkable, is that so shameful a verdict upon a nation's constitutional court can be so readily and complacently accepted. By way of a necessarily brief examination of the Court's dereliction of its duty, it is worth posing three questions about its fall from grace. Those questions concern the context in which this fall has occurred; the means by which the Court has approached its self-imposed task of undermining federalism; and the reasons why the Court has felt itself impelled in this direction.

As regards the fields of battle upon which the Court's banner of centralism has been displayed, these classically have concerned the interpretation of the powers of the Commonwealth contained in section 51. In recent times, it is notorious that the Court has adopted particularly anti-federal positions in relation to the interpretation of the corporations power, section 51(20), and the external affairs power, section 51(29). This is not the occasion for a minute dissection of the relevant cases, but in relation to each of these powers alternative, pro-federal interpretations which were entirely acceptable in logic were readily available to the Court. Thus, for example, there would be nothing illogical in holding that the external affairs power was confined to legislation with respect to matters which are intrinsically international in character; nor with determining that a 'trading corporation' within the meaning of section 51(20) is a corporation which has, at the centre of its character, the notion of trade. Yet in both cases, the Court chose to interpret the relevant constitutional provisions in a manner as conducive as possible to the expansion of Commonwealth power. A similar process may be observed in relation to the interpretation of section 90, which confers upon the Commonwealth Parliament an exclusive competence in relation to the levying of duties of excise. For many years, the Court has consistently adopted an extraordinarily wide view of the term 'excise', thus extending the Commonwealth's

monopoly over a wide range of indirect taxation. Such examples could be multiplied almost endlessly.

The interpretive means by which the Court has pursued this expansion of Commonwealth power essentially has two aspects. The first is literalism, which was established by the *Engineers'* case in 1920. Literalism as a methodology of interpretation within an Australian constitutional context is intrinsically anti-federal, in that by relying exclusively upon the written words of the Constitution, it enhances the specific textual powers of the Commonwealth contained in section 51, at the expense of the unexpressed state residue of legislative competence. Moreover, by privileging the textual powers of the Commonwealth Parliament, it ignores the wider federal context within which—as we have seen—those powers were intended to operate.

The second means by which the Court has facilitated the expansion of Commonwealth power has been through a gloss on literalism. This is comprised in the rule that not only are Commonwealth powers to be interpreted literally and without regard to any residue of state competence, but they are to be so construed as to give to the Commonwealth the largest possible field of legislative action which is consistent with the bare words of the text. This rule, which goes well beyond an insistence upon the natural meaning of the text, is best described as 'ultra-literalism', and is so bizarrely inconsistent with the historical intentions of the founders as to the nature of the Australian federation as to constitute a major interpretative fraud on the Constitution.

The crucial thing to understand about both literalism and ultra-literalism is that they are consciously directed towards divorcing the interpretation of the Constitution from the federal context which surrounds and suffuses it. In this sense, the central theme of the High Court's interpretation of the Constitution for the past seventy years has been a determined avoidance of the profoundly federalist intentions of those who wrote the document that the Court purports to be construing.

Once again, this is not the time for an extended theoretical criticism of literalism, but a few brief points may be made. First, it is indeed fundamentally anti-intentional, in that it privileges the text absolutely over the historical intentions of those who wrote it. Thus, if one believes that the interpretation of constitutions is about finding the intent of those who wrote them, literalism is entirely invalid. Second, literalism is profoundly anti-intellectual, since the idea that one can interpret the Constitution purely by reference to its words and divorced from subjective and historical context is quite implausible. Thus, as a constitutional methodology, literalism deals at best uneasily, and more often incompetently with such everyday interpretative issues as implications and ambiguity, which necessarily require extratextual input for their resolution. Third, ultra-literalism is less palatable, intellectually and otherwise, than literalism. It does not possess even the lonely virtue of being based on the words of the Constitution, and constitutes little more than an unprincipled assertion of anti-federalist bias in defiance of the essential character of the Constitution. Fourth, it is worth noting that there is no evidence that the founders intended that the Constitution which they wrote should be interpreted according to a ruthless literalism, let alone a literalism expanded by ultra-literalism. On the contrary, there is a good deal to suggest that they believed that the interpretation of the Constitution would be suffused by the same respect for federalism that the document itself in general terms displays. Finally, it is clear beyond all question that literalism is essentially a device, rather than an intellectually-held position. Its great virtue is

not that it is logically compelling as a methodology of constitutional interpretation, but rather that it produces that praiseworthy result that power within the Australian federation is centralised in the hands of the Commonwealth. This is a conclusion that is rarely disputed, and its every-day acceptance tends to blind us to its cynicism and lack of principle as a matter of constitutional law.

The final issue which may briefly be considered concerns the reasons why the High Court has so determinedly interpreted the Constitution in such a way as to undermine the federal character which its authors intended it to possess. This is a large question, which may only briefly be touched upon here. One point which must be kept in mind, is that there has always been a strong strand of centralism in British constitutional thought. Thus, Imperial constitutional authorities from Dicey down had always stressed the incomparable advantages of untrammelled central power. This is undoubtedly a culturally-generated tendency in Australian constitutional thought which has borne bitter fruit for Australian federalism. The irony is, of course, that rabid centralism is a particular preserve of the left, which presumably would be horrified to realise that it was thus placing itself firmly in the constitutional company of such radical figures as Edward I and every Tory prime minister who ever tore up an agreement for Home Rule.

Nevertheless, the tendency of many Australian constitutional thinkers to incipient centralism undoubtedly was reinforced by the experience of the First World War and the Depression, to which one feasible reaction was a hankering for strong central government, a desire which found expression in forms as various as the *Engineers* case, and the novel *Kangaroo* by D.H. Lawrence. Indeed, generations of Australians have reacted to a whole range of economic, social and other crises with the implausible cry that if only power could be centralised in a small country town not far from the Murrumbidgee, all would be well. Added to such considerations has been the undeniable fact that the central government of the Commonwealth has been the natural beneficiary of the rising tide of national sentiment that has been generated by participation in everything from two World Wars, to international sport.

Correspondingly, the economic and political decline of the states serves as an illustration that just as nothing succeeds like success, nothing fails like failure. The states have looked so seedy and so pathetic for so long, that championing their constitutional cause is very much like being the supporter of a football club which last made the finals in 1906. (Naturally, this says little for the judgement of the author of this paper.) Nor can it be ignored that the High Court is a body appointed by the central government, with the result that not only are appointments to that body made from among lawyers more likely than not to sympathise with a centralist point of view, but that the Court itself as a matter of simple psychology is likely to identify with the centre, rather than the periphery of Australian constitutional arrangements. Finally, it is worth mentioning that there can be little surprise in the highest court of a federation favouring central over state government, when the wider intellectual milieu of which that court forms part does precisely the same thing. Thus, just as it has been fashionable for many years for academics, bureaucrats and business people to denigrate federalism, it would if anything be remarkable were their intellectual compatriots on the Bench to behave in a different manner. Indeed, the standard of debate on issues of federalism in Australia is so abysmally low by international standards, that it might be thought that a High Court desirous of remaining in touch with fashionable intellectual opinion would have little choice.

6 The High Court's Assumption of an Unintended Role

It is, perhaps, no particular insight to observe that it is one of the most fundamental rules of nature that if something does not do what it was supposed to do, it almost certainly will do something which it definitively was not intended to do. This is why a cat purchased for the purpose of catching mice certainly will demonstrate a profound aversion to rodents, but will cheerfully deposit dead lyrebirds on its home hearth. This rule applies equally in a constitutional context, and just as the High Court has failed to fulfil its intended role as protector of federalism, so it is now enthusiastically adopting roles from which it was absolutely precluded.

The most fundamental aspect of this tendency may be observed in the phenomenon of 'progressivism'. This concept, which has been referred to previously in this paper, essentially embodies the idea that it is the function of the High Court to adapt the Constitution to modern needs in line with the popular expectations. As we have seen, this was never part of the intended role of the judiciary, and was in fact antithetical to the founders' conception of the Court. However, the prevalent tendency of the Court to embrace progressivism may be marked in a variety of contexts.

Historically, the High Court's consistent centralising agenda was—in essence—pure progressivism, although it was achieved via the constitutional and interpretative device of literalism. The Court's reasoning was simple, if not simplistic: the needs of modern Australia are such as to necessitate a more centralised government; the Constitution does not accommodate such a government; therefore, the High Court will adjust the Constitution appropriately. This progressivist-centralist agenda was not often explicitly acknowledged by the Court, although the famous dictum of Windeyer in the *Pay Roll Tax* case came close, and even closer were certain of the extra-curial comments of Sir Anthony Mason.

Of course, two intrusive notes of reality should be sounded in relation to the High Court's progressive centralisation of power under the Australian Constitution. The first, is that it is highly dubious whether the centralisation of power reflects an objective imperative for the survival of the Australian federation. It is, at best, merely one view of on-going national needs. Indeed, Australia's economic decline, which to some extent parallels its increasing centralisation, might be said to argue against the wisdom of the High Court's political economy. Secondly, it is highly unlikely that the High Court's vision of an Australian populace clamouring for the greater centralisation of power is matched by the reality of public opinion. This is illustrated by the fact that, throughout the period during which the Court vigorously pursued a program of centralisation, the people themselves tended to vote consistently in the negative at referenda concerning the extension of Commonwealth power.

However, centralism is no longer the leading example of progressivist thinking by the High Court. That place has now been taken by the so-called 'implied rights' cases. The relevant reasoning here, is that the High Court believes that the Constitution should contain judicially enforceable guarantees of certain basic human rights. This belief is in line with much modern legal thinking on bills of rights, and certainly with legal academic opinion, heavily influenced as it is by United States and United Nations precedents. Accordingly, the Court is proceeding to insert such rights into the shrinking flesh of the Australian Constitution in accordance with what it apparently regards as 'world's best constitutional practice'. This is essentially what

occurred when the Court invented the implied right of freedom of political communication in such cases as *Theophanous* and *Stephen*. Some judges, such as Sir William Deane, would have gone further in cases like *Leeth* to create a similarly based right to coequality.

Of course, as we have seen, there was absolutely no intention on the part of the founders that any such generally-enforceable guarantees of human rights should exist within the framework of the Constitution. As was demonstrated, their intention was exactly opposite in character, with the founders firmly committed to a system of parliamentary protection and adjustment of human rights. Thus, as with *Engineers'*-style centralisation, the High Court through its jurisprudence of implied rights is acting in a manner directly contrary to the intentions of the founders. It is worth stressing the point once again that this is not a matter of surmise, but of the most elementary constitutional history.

It is appropriate to pause here and consider the exact nature of the so-called implied rights, if only because their utter lack of logical plausibility should be firmly and regularly exposed whenever matters of Australian constitutional theory are addressed. The starting point must be to note that these rights are, by definition, said to be 'implied'. Ordinarily, something will be implied from a document if it represents a real but unexpressed intention on the part of the authors of that document. Thus, if I say to a gathering 'All women remain seated', it is perfectly proper to say that I have implied that all men in that room should stand. This implication is based on the listeners' understanding of my intent as revealed by a consideration of my words in the context in which they were uttered.

Just such an intentional understanding of implications invariably has been adopted in relevant legal contexts. Thus, in the case of the interpretation of statutes, implications are drawn on the basis of parliamentary intent. Again, as regards our own Constitution, such implications as have historically been drawn relating to federalism and the separation of powers likewise have been based upon a presumed intent on the part of the founding fathers. Yet in relation to the suggested 'implied rights', it already has been demonstrated that there is absolutely no intentional support whatsoever for their existence. Indeed, it has shown that the intentions of the founding fathers were diametrically opposed to the subsistence of such rights. It follows inexorably from this that the so-called implied rights are on their own tenets entirely bogus, and do not answer to the description of 'implications' in any meaningful sense. The fitful attempts of some judges of the Court, notably Sir William Deane, to cobble together a sketchy intentional basis for the new rights only serve by their pitiful thinness to underline the profoundly ahistorical nature of those constitutional excursions.

So if the 'implied' rights are not in fact implications, what are they? It is not uncommon for the High Court to claim that these rights are 'structural' in character, in the sense that the 'implications' upon which they are said to be based arise from the structure of the Constitution considered as an integral whole. But what does this mean? Clearly, the notion of structure can have nothing to do with the question of founders' intent, for as we have seen, the founders definitively did not intend the creation of the posited rights. Apparently, what the Court means by a right based upon structure is that it believes the right in question to emerge from the Constitution when that document is read as a whole, in much the same way as an individual reader may receive a 'message' when reading a novel or a poem.

Consequently, just as Jane Austen's *Pride and Prejudice* may be about 'pride', 'prejudice' or 'forgiveness', depending upon the sensibility (or sense) of the reader, so the Constitution may

be about ‘democracy’, ‘respect for individuals’ or ‘free enterprise’, depending upon the predilections of the particular judge, and corresponding ‘implied’ rights may be based upon those predilections. The problem with what might be termed the ‘literary’ theory of constitutional interpretation is that the Constitution is not, on any intelligent analysis, a book or a poem. The Constitution is not a work of art intended primarily to evoke a subjective response on the part of the reader, but rather a determinate (if often generalised) set of instructions, developed through a democratic process, which are intended to be implemented by executive, legislature and judiciary alike.

The unprincipled character of this form of constitutional interpretation cannot be overstressed. If each individual judge is to interpret the Constitution according to that judge’s own subjective extrapolation of its values, then the Constitution can mean anything, depending upon which judge is interpreting it. Thus, just as to one judge the Constitution will be a charter of representative democracy, to a more conservative judge it may conceivably represent a regime for the protection of private property and the repulsion of socialism. Moreover, as has been said, such an approach utterly misconceives the intrinsic nature of a constitution. A constitution is not, like a book, about the generation of generalised responses, but about the achievement of intended legal results. Not only the founding fathers, but any modern-day parliamentarian certainly would be astonished to learn that the legislative will was nothing more in the hands of the judges than the sort of provocative reading material issued to English students at examinations.

A final but fundamental point must relate to the sheer intellectual dishonesty of the Court’s implied rights reasoning. If the Court really wishes to re-write the Constitution in a manner contrary to the directions laid down by the founders and without further recourse to the Australian people, and if this is an entirely legitimate approach to constitutional interpretation, why does it not simply say so? Why does it feel impelled to clothe its constitutional inventions in the intensely intentional language of implication? The only possible answer is that the Court does so in a spurious attempt to acquire respectability for what is, at heart, a thoroughly disreputable constitutional activity. The general conclusion in relation to implied rights theory must be, therefore, that it is entirely bogus. It is nothing more than a thinly disguised variant of progressivism according to which the Constitution will be furnished with judicially enforceable human rights which it was never intended to contain.

It may be noticed that, even on progressivism’s own terms, it is extremely difficult to justify the particular constitutional end of a judicially created Bill of Rights. The first difficulty here is general in character, and turns upon something of an internal contradiction within the rhetoric of progressivism. Almost invariably, overt or covert progressivism seeks to draw legitimacy from the desire for change on the part of a population trapped in Geoffrey Sawer’s constitutionally frozen continent. Thus, progressivism prefers to present itself as a force essentially popular in nature, drawing upon the needs and desires of the people at large. Yet in practice, progressivism is highly non-popular in character, given that it is directed to subverting the intrinsically popular and democratic referendum process of section 128. This somewhat embarrassing difficulty is strikingly reinforced in the context of human rights by recent Australian constitutional history. The last proposal to entrench a right into the Constitution—an extended freedom of religion—was massively defeated at referendum in 1988. Thus, the claim of progressivism to represent some monolithic national consensus on the constitutional protection of human rights is dubious, to say the least.

Indeed, the embarrassing reality is that progressivism, as represented in the implied rights theory of the High Court, is anti-popular and highly oligarchic in character. It is quite consciously aimed at subverting the inexplicable and obnoxious habit of the people in voting 'No' at referendum. Stripped of its popular rhetoric, the argument essentially is that the High Court will save us from democracy, and that if the people do not have the brains to amend the Constitution in the appropriate manner, then the Court will do it for them. This will all be achieved with the enthusiastic support of the tiny band of judicial and academic supporters which has egged the Court on in its course. The one thing which such a process cannot conceivably claim is any sort of popular basis. However, it should be noted, that what the 'progressivism of rights' lacks in terms of democratic theory, it certainly makes up in terms of benefits for its practitioners and their supporters. The practical effect of the application of such an approach is that lawyers and judges are transformed from the dusty denizens of the law volumes, to something very close to philosopher kings. It is extremely difficult, in reading many of the shrill protestations of the proponents of implied rights theory, not to detect the squeak of triumph of someone who never would have condescended to face popular election, but has nevertheless found themselves in possession of enormous social power.

A final point to be made concerning implied rights discourse relates to its extraordinarily impoverished intellectual character. In general terms, putting aside its spurious claims to a popular pedigree, that discourse tends to turn upon the explicit or implicit assumption that it is perfectly acceptable for the Court to amend the Constitution, at least so long as it is only doing so to create further enforceable human rights. After all, the argument goes, who could object to being the recipient of another human right? There are two basic problems with this point of view.

The first, is that this justifiably might be referred to as the Mr Justice Mussolini theory of constitutional interpretation. Thus, if the particular constitutional result is unobjectionable, it hardly matters whether the process by which it was reached was legitimate or not. Of course, this has all the ethical plausibility of saying that as long as Mussolini made the trains run on time, what was fascism between friends? The truth is that if the enhancement of rights is achieved at the cost of the subversion of that most fundamental of civic rights, the right to participate meaningfully in a constitutional democracy, then all that has been accomplished is a grave diminution of Australian political culture.

Secondly, the constitutional equation usually is nowhere near as simple as saying that an extra right hurts no-one. Ordinarily, the recognition or extended recognition of a particular human right necessarily will be achieved at the expense of the limitation of some other posited right. Thus, in the instant case of freedom of political speech, added protection for this right meant diminished respect for the right to reputation and privacy on the part of so-called public figures. Consequently, the High Court's entrenchment of particular rights hardly constitutes a constitutional win-win situation, with which no sane person could argue. On the contrary, what is involved is the making of highly political decisions as to the relative values to be attached to particular human aspirations and interests. This is precisely the role which the founders never intended that the High Court should discharge.

7 Conclusion: Why the Intentions of the Founders Matter

Obviously, the implicit assumption throughout this paper has been that the intentions of the men of 1897 do indeed matter in interpreting our Constitution, and that they matter profoundly. Equally clearly, it has been the contention of the paper that the High Court ought, so far as possible, act in conformity with those intentions. Quite explicit has been the assertion that the High Court has not exhibited any such degree of constitutional faithfulness. Yet all this begs the fundamental question of whether the High Court should indeed be attempting to discern the intention of the founders, and to give effect to that intention in the interpretation of the Constitution. The answer to this question must be, in general terms, an unequivocal 'yes', and what is detailed here are just a few of the theoretical, constitutional, legal and political reasons supporting that conclusion.

The first reason for what might be termed constitutional fidelity lies in the profoundly democratic pedigree of our Constitution. After 1891, the framers of that Constitution were elected by the colonial populations, while the Constitution which they drew up was submitted to popular referendum before ever it was enacted by the British Parliament. In fact, this is the most democratic process for the creation of a constitution in the history of the great Anglo-Saxon democracies. In light of this profoundly democratic genesis, it would be profoundly incongruous for an unelected court to modify the Constitution according to its whims and perceptions of the Australian constitutional climate. Against this view, it is sometimes urged that those voting at the federal referenda in the 1890's voted merely upon the words of the Constitution, and not upon the intent underlying those words. This seems a curiously formalist, legalistic argument to emanate from those who typically are fully initiated adepts in implied rights mysticism. In any event, as a matter of simple historical reality, the best view of the affirmation comprised in the referenda would be that it involved not only (and perhaps not even primarily) the documentary Constitution, but rather what the founders themselves frequently referred to as the 'federal compact'. That compact comprised not only the written words of the Constitution, but the fundamental character of the polity which the founders understood that document to create, and which had been 'sold' by them to the population at large. At an even more basic level of common sense, it is hard to accept that the populations of the Australian colonies voted in favour of the words of the Constitution divorced from the intent which underlay that Constitution, rather than for the words as embodying the intention.

A second argument in favour of faithfulness to the founders, is that in saying that the search for intention is fundamental to the interpretation of the Constitution, one is saying no more than that the Constitution fails to be understood in the same way as other uses of language, including legal usage of language in such fields as statute and contract. In this sense, intentionalism as a method of constitutional interpretation accords with the basic principle of human relations that, in trying to understand words, we seek to comprehend them as instruments by which the human mind is expressed, not as random groupings of words to be construed according to the personal prejudice of the hearer or reader. Thus, it is worth noting that even the original claim of literalism to a privileged interpretative position was that the natural meaning of the words was the best path to finding the relevant intent. Moreover, it similarly is worth recalling that even implied rights theory, so anti-intentional in its genesis and effect, nevertheless resorts to a spurious claim of intentional validity by the very use of the word 'implication'.

Against this, it sometimes improbably is urged that the relevant intention in relation to the Constitution was that of adopting colonial populations themselves, rather than that of the founders. The essential silliness of this argument is readily appreciated when it is recalled that

no-one has ever yet suggested that the intention to be sought in relation to parliamentary enactments is that of the electorate, rather than the Parliament which passed the statute. The reality of the position of the men of 1897 is that they were 'delegates': that is, their actions and deliberations were carried on behalf of the people, and in a constitutional sense are generally attributable to them. Moreover, as a matter of simple common sense, it is hardly likely that any attempt to ascertain in a meaningful way a collective public mind upon the minutiae of meaning to be ascribed to this or that constitutional provision would prove successful. Indeed, the argument in favour of some 'popular intention' may readily be seen for what it is, a not particularly subtle attempt to avoid any significant recourse to intention in the interpretation of the Constitution.

A third reason for pursuing the intentions of the founders lies in the nature of constitutions as such. As has been stressed throughout this paper, constitutions typically are not evocative documents like books or poetry. They are highly instructional in nature, setting a blueprint for a polity, and seeking to exact obedience from future arms of government in operating within the stipulations of that blueprint. There have been occasional attempts to show that constitutions (and the Australian Constitution in particular) are 'non-communicative', or more accurately non-instructional, and really are merely provocative starting places for the creative labours of the judiciary. Such arguments are, frankly, laughable. Imagine the furore were the judiciary to determine that any other legal instrument, for example, the Income Tax Assessment Act, were not a series of specific statutory stipulations but rather a mere statement of basic principle from which they should extrapolate novel general themes for application to the circumstances of citizens. Historically, of course, the slightest examination of the Convention debates and of the history surrounding the framing of the Constitution makes it pellucidly clear that the document is highly instructional and directive in character, and this is no better exemplified than in the restrictive provisions of section 128 concerning its amendment.

The fourth consideration justifying a search for intention is what could be referred to as the 'comparative democracy factor'. The starting point here is to note that, in a constitutional context, issues revolving around democratic legitimacy are characteristically complex. Almost no institution within a constitutional construct can claim to be perfectly democratic in character. Consequently, when issues of democratic legitimacy arise under a constitution, the real question must be not whether the body or institution in question is perfectly democratic in character, but rather whether it is more democratic than any potential rival. Applying this dictum to the founders, it is quickly apparent that their democratic claims are strong indeed. As has been noted, they owed their position to popular election, and the outcome of their labours was popularly ratified. It is, of course, true that women, Aborigines and Asian immigrants did not enjoy the opportunity to vote for the founders, and these are, by any modern standard, grave electoral deficiencies. But applying the dictum of comparative democracy, the question is not whether the collective founders were absolutely democratic in character, but rather how they compare to their most proximate rival for the determination of Australia's constitutional dispositions, in this case, the High Court.

Here, it may quickly be observed that whatever the democratic deficiencies of the founding fathers, they pale into insignificance when compared with those of the High Court. Thus, whereas women, Aborigines and Asians could not vote for the founders, no one can vote for the High Court. This is a miserable difficulty for the Court in terms of maintaining any democratic claim to modify the Constitution, and one which it is impossible to manoeuvre

around. Within this context of constitutional democracy, it should be remembered that no-one is arguing that the intentions of the founding fathers should endure forever. Rather, the issue is whether those intentions should be respected until such time as the Constitution is modified in a contrary direction according to the undeniably democratic machinery contained in section 128, rather than through the undeniably undemocratic operations of the High Court. It is now appropriate to briefly address some of the main arguments urged against a position of faithfulness to the intentions of the fathers.

The first, and possibly the most ritualistic, is what is often referred to as the 'dead hand of the past'. This is the argument that unless the High Court progressively modifies the Constitution, Australia will be trapped within a constitutional paralysis of the founders' making. Regrettably, this position is self-evidently incorrect. The presence of section 128 within the Constitution has the effect that any outdated concept contained within that document can, as a matter of law, be deleted by recourse to that provision. Thus, the idea that the Constitution is locked within an historical coma is quite misleading, even on the face of the document. Whenever this embarrassing difficulty is raised, progressivists tend to reply that section 128 is useful only in theory, and that in practice, the refusal of voters to respond in the affirmative to questions posed at referendum does indeed render the Constitution immune from change. This, however, is a radically different argument, and is one that has little to do with the dead hand of the past, and a great deal to do with the live hand of the present. If the argument is that progressivism is in reality required to overcome the negative effect of Australian constitutional democracy, then that argument, unpalatable as it is, should be plainly put. The difficulty is that it is the essence of democracy that the demos are allowed to be arguably wrong as well as arguably right, in the context of constitutional referenda, as in any other. To argue that the High Court must amend the Constitution precisely because the people have decided that no such thing should occur is to scale new heights of rhetorical unpalatability.

A third argument is that it is practically impossible to discover the intentions of the founding fathers behind constitutional provisions, at least in a form that will assist in their interpretation. Usually, what is meant by this is not that the intentions themselves are impossible to discern, but rather that the commentator in question does not wish to discern them. Very often, it is perfectly possible to ascertain with considerable accuracy the historical intention behind a particular provision or set of provisions contained within the Constitution. Indeed, the entire process is vastly simpler in Australia than in the United States, owing to the existence of comprehensive printed records of the founding fathers' deliberations. The irony, of course, is that in the case of the most controversial aspects of the Constitution, we do in fact know the relevant intention with a considerable degree of certainty. Thus, in the case of the implied rights recently discerned in the Constitution, there is no need for any particularly sophisticated historical analysis before we can come to the conclusion that the founders intended no such result. Likewise, one does not have to be the reincarnation of Herodotus or Lord Macaulay to know that the founders did intend that the Constitution should be interpreted federally. In any event, difficulty in ascertaining the relevant intention is no excuse for not making the attempt. It may be that, in particular circumstances, it is not possible to discern with certainty the intention behind a particular provision, or where two equally plausible potential intentions appear. In such circumstances, a court will simply have to make the best fist of the constitutional text and the available historical evidence that it can. But this is not really an argument as to whether the court should engage in a search for

intention, but merely as to the difficulties which may have to be encountered or surmounted as part of that search.

A final argument against any method of constitutional interpretation which centres upon the intentions of the founders concerns what are sometimes called ‘levels’ of intent. Thus, the question is posed, at what level of intention on the part of the founders should we interpret a particular constitutional provision? Thus, to take the example of the external affairs power contained in section 51(20), are we to discern in the words ‘external affairs’ a very specific intent that it should comprise those matters falling within the ambit of those words in 1900? Or should we attribute an intent of medium scope, that the provision deals with matters falling within those terms as they are understood at the time when they are interpreted? Or, at the widest level, do the words evince an intent on the part of the founding fathers that the Commonwealth Parliament should have a power to legislate with respect with to all matters which it believes possess some element of internationality?

These are thorny questions, but the general answer is relatively straightforward. The level of intent to be attributed to particular constitutional language will depend upon the historical evidence available as to the framing of that language. Thus, it sometimes will be very clear that the founders ascribed to a provision an extremely narrow and specific meaning. For example, in relation to section 51(20), the founders obviously intended that the particular types of constitutional corporation delineated in that provision should be narrowly confined to the understanding of the relevant terms as they existed at the time of the Constitution’s framing. To take the matter one step further, the rule of constitutional thumb should be that, when in doubt, the most specific or lower level of intent should be regarded as being embodied in specific constitutional language. There are a number of reasons for this. The first, is that the discernment of a very general intention behind a provision will too often represent an attempt to re-state the effect of that provision in such a way to permit a judge to extrapolate out of the relevant constitutional language his or her interpretative preference. Secondly, it obviously will be the case that the more specific the intention discerned behind a provision, the greater the confidence that this intention can in fact be attached to the historic intent of the founders. Thirdly, such an approach is consistent with the interpretation of statutes, where courts do not seek to generalise the effect of sections and apply them to new situations, but rather to isolate the specific parliamentary intent underlying their enactment. Finally, a determined attempt to identify the specific intention behind constitutional provisions will produce, particularly in the case of the Commonwealth heads of power contained in section 51, a result which limits federal power consistently with the generally federalist assumptions of the founders.

It may be noted that the assertion of one form of constitutional ‘intent’ is intellectually unacceptable in this context. The question occasionally is asked ‘what would the founders say about this or that subject had they thought about it?’, with the interlocutor going on to supply the mute answer of Australia’s constitutional progenitors, and to advocate its inclusion in the Constitution accordingly. This is logical nonsense. Such an approach turns not upon any intention of the founders, but mere speculation. It is nothing more than a convenient historical stalking-horse for the subjective constitutional solution preferred by the questioner.

This entire discussion raises the fundamental question of how should the High Court interpret the Constitution on the assumption that it proposes to do so in fidelity to the founders? This is a large question, which merely will be touched upon here. First, any court proposing to accept

the burden of fidelity to the intentions of the framers of the Australian Constitution would do well to recognise at the outset the truly democratic and popular nature of that Constitution, with the consequent obligations of deference and respect which this involves. Thus, the Australian Constitution is popular by origin and ratification, and is democratically novated on an on-going basis by the presence of section 128. Given these considerations, the High Court should recognise that, in the interpretation of the Constitution, it is under a duty of utmost good faith towards those who wrote it and towards those for whom it was written. In short, the Constitution has never belonged to the Court, but rather is both the creature and the encapsulation of the Australian people. As such, it is theirs to do with as they will.

Secondly, the court should accept that the search for constitutional intention is absolutely basic to the process of constitutional construction. In other words, the inarticulate premise of Australian constitutional interpretation is that the Court is searching for the intention of the founders.

Thirdly, it would do no harm for the court to accept that if the words of the Constitution are utterly clear on any given point, then that is the end of the matter: those words should be given their face value. This concession can be made, not on the literalistic basis that constitutional interpretation consists of nothing more than giving words their natural meaning, but on the grounds that unambiguous words ordinarily will be a sound guide to the intention behind them. However, this minimal commitment to literal interpretation would be made within a pervasive acceptance that the words of the Constitution typically cannot be understood in isolation from their context, and that much if not all of the Constitution will need to be understood in documentary and historical context before its ambiguities may be resolved and its implications unravelled.

Consistently with this, the Court should accept that where the words themselves are not abundantly clear in revealing the relevant constitutional intention, it must look to other sources by way of seeking supplementary intentional evidence. Here, the Court would have recourse primarily to the Convention debates and draft constitution bills, but also to other contemporary writings. It should be stressed that in this process, the Court will always be searching for actual intent, and not for a convenient basis upon which to ground extrapolations of supposed intention.

Within this process of interpretation, there will always be room for the making of implications. However, these will be real implications, and not the variety improperly drawn in the implied rights cases. Thus, a real implication will be consistent with the text of the Constitution, at least to the extent that it does not flatly contradict some express provision. More fundamentally, it will be based upon a demonstrable intention on the part of the founders: without this, no true implication can exist. Finally, an implication will be 'necessary', in the sense that strong evidence of supporting constitutional intention will be required. In this context, it will be necessary not only to show an historic intention supporting some generalised implication (for example, representative democracy), but also an inevitable connection between that intention and any suggested specific result (for example, a judicially enforceable freedom of political speech).

Finally, to the extent that interpretation of the Constitution is to be controlled by any considerations as to its general character, these too must be based upon the actual intentions of those who formed it. Thus, where the 'theme of the Constitution' is to be called to aid in

resolving a division of power question, the relevant theme will be one of transcendent federalism. Where the issue is one of rights, it will be notions of British parliamentary government that will come to the fore. There can be no role within Australian constitutional interpretation for what the High Court and its admirers would have liked the founding fathers to have believed.

As the title of this paper makes clear, the High Court has been an unfaithful servant. It has been unfaithful in the sense that it has wilfully betrayed the vision of Australia's constitutional founders: and it is indeed a servant, in the sense that it was bound to give effect to that vision. My recollection is that the unfaithful servant in the Bible invariably also is branded as 'wicked'. This is a term which one would be reluctant to apply to the highest court of our federation, but speaking of the Court as a constitutional creation, rather than of the personal character of any of its particular judges, if the wig fits, wear it.

Perhaps the most troubling thing to emerge from this analysis concerns the future position of the Court in Australian society. Recently, there has been considerable public criticism of the Court's performance of its constitutional role. Some of this criticism has been, if vigorous, informed and accurate. Some has been politically motivated and unhelpful. However, clearly observable in both cases has been a tendency by the Court's supporters to brand virtually all criticism as being in some way disloyal to the principle of judicial independence. For the reasons outlined in the opening section of the paper, this reaction is nonsensical.

However, the question which must be asked is why the Court is now the subject of such exceptionally focused attacks? Putting aside the obvious range of reasons such as the practical difficulties occasioned by the Mabo decision, and the increasing willingness of some judges to embroil themselves in public controversy, it has occurred to me for the first time in writing this paper that at least some of the High Court's public difficulties may stem from what could be called its own 'moral exhaustion'. By this is meant that the Court has, at least since the *Engineers'* case, pursued a constitutional methodology which both the Court and every intelligent observer knows to be motivated primarily by considerations of constitutional politics, rather than those of constitutional law. Since 1992, the Court has compounded this legal realpolitik by developing a divergent constitutional methodology to deal with questions of rights, which is equally bereft of principle. The sad result is that virtually every intelligent contemporary observer of the Court must appreciate that, however much they may approve the outcomes of the Court's jurisprudence, those outcomes have been achieved by ethically and intellectually unsustainable means.

Is it too much to ponder whether seven decades of this type of institutionalized constitutional cynicism has not left its mark upon Australian constitutional culture? Perhaps it is the case that both friend and foe alike have ceased to respect the High Court as the impartial mediator of the intentions of those who wrote the Constitution, and rather assess it on the purely self-interested basis of whether its current pragmatics happen to agree with their own. If we have indeed reached this point, it follows that the Court routinely will be buffeted by the winds of outrageous politics whenever it produces a decision unacceptable to one political interest or other. After all, in the cynical world of politics, this is how one group of politicians treats another hostile group of politicians, whether that group happens to be comprised of judges or not. Of course, in these battles, there is little doubt that the professional party politicians will triumph over their amateur judicial brethren, but the cost of such imbroglios to notions of

judicial independence may be high indeed. Perhaps the High Court would have been better off with the founders, after all.

Questioner — Would you like to comment on the fact that the founding fathers and the Constitution do not recognise Aboriginals as citizens of their own country. Was it a tragic mistake or was it intentional?

Professor Craven — I think it can be both a tragic mistake and it can be intentional. In the contemporary context in which they were writing the Constitution, that was undoubtedly an inevitable historical result. In objective terms it was wrong then, as it is wrong now. In contemporary terms it was contemporary then, as it is not contemporary now. It was changed under the amendment process of section 128 and therefore to that extent represents an illustration of the capacity of the Constitution to change over time.

Questioner — There are fine words in your address; it is impossible to tackle each one of them. Someone said, I think it was a cleric, ‘fine words butter no parsnips’. What changes would you like to see in our Constitution?

Professor Craven — I think there are two changes. What you are talking about here in one sense is a cultural and a psychological change. I mean, how do you psychologically change the High Court—it is complicated. I would do two things; one is change the method of appointment. I have no great confidence that it would work well, but I would require that each judge appointed by His Excellency the Governor-General have the support of three state governments. I think that would just open up the process. It would at least potentially limit the capacity of the Commonwealth to appoint judges who will certainly run straight, as in straight to Canberra. I think that would be a good start.

The second thing, and probably the more important one from my own point of view, would be to change the amendment process. I think that one of the limitations of section 128, which I have certainly praised today but I am not by any means saying is perfect, is that you have a situation where only the Commonwealth Parliament can initiate an amendment. It would be highly desirable to have four state parliaments being able to initiate amendments, the so-called state initiative option, and that would mean that you would have amendments coming from a far wider range of perspectives. This procedure would open up Australian constitutional democracy. On balance, I am not in favour of popular initiative, which is allowing people to take up a petition and if obtaining the required number of signatures, for example, one hundred thousand signatures, initiating an amendment. It seems to me that that might be too unstable. But if you had both state and commonwealth initiative it would probably give you the best of both worlds and stability. So they are probably the two things I would like to do.

Questioner — Professor, the sins of the High Court, as you see them, began, I think you are at least implying, many many years ago. Would you trace the historical developments of those sins, lest we go away with the feeling that this is something purely within the last few years.

Professor Craven — I have talked about two major deficiencies of the Court from my own point of view, one of which was a highly centralist, literalist interpretation, of which the implied rights cases was one. Literalism came into the Australian High Court in 1920 with the *Engineers’* case. You could say that the Court has been anti-federal from the 1920s. Now that

has waxed and waned, so that obviously you have had situations where, for example, Sir Owen Dixon was a great deal more federal than Sir John Latham, different Chief Justices of the Court. It has been a long process and it does go back to that question of why the Court is like that, what are the influences that have operated on the Court. I do not think that has ever really been searched through. But I suppose the great disappointment from my own very private point of view is that watching the Court with *Engineers'* and literalism and watching it grow more bankrupt and more threadbare year by year by year, this idea that we can interpret the Constitution without any real recourse to its history, just by looking at the words, and by Heaven also, interpreting them in the widest possible way. By the late 90s I think that was looking so threadbare, it was embarrassing, and I had some vague, and doubtless utterly stupid hope, that the Court would modify it and go back and say, 'Well, we have made a mistake and we are going to go into a scheme of interpretation that does acknowledge a great deal more historical intent'. It is very disappointing then, to have the Court come up with probably the only constitutional theory that could be more intellectually threadbare than *Engineers'* literalism.

So, it is true, the Court has been on the downward road to constitutional hell for a very long time, with occasional rallies and fitful pauses. I guess over the past seven or eight years it has added a new string to its bow and that was what I was meaning by that reference.

Questioner — My question concerns your contention that the High Court basically rejected the founders' vision of federalism by putting it in two contexts. First, you stated that the new progressivist interpretation with rights are different from the current implications concerning federalism in the Constitution. On that point, is not the federalist basis of those implications just as structuralist as the criticisms you have made of the rights-based interpretations that have come up? Secondly, you seem to be saying that the *Engineers'* case was a landmark which turned the Court away from federalism, and historically that is quite true, but how sustainable were the interpretive procedures that the High Court was using up to *Engineers'*? For example, up to that point the High Court had flirted with the idea of what was called dual characterisation—the idea that if the Commonwealth passed a law with respect to taxation, it could not also be a law with respect to criminalising something or penalising something. It seems to me that that is a very difficult kind of interpretive strategy to sustain. And perhaps that was one of the reasons the High Court departed from federalism rather than a conscious attempt to modify the Constitution in favour of the Commonwealth.

Professor Craven — I love questions with which I can profoundly disagree. The first one is there is a basic difference between the federal implications and the implied rights implications, and that is, at the most simple level, we know that the founders intended a profoundly federal constitution and constitutional construct. We know that to be their intent. We know, with equal certitude, that they had no intention for implied constitutional judicially enforceable rights. There can be no greater distinction in fact, law, or principle than those two things. They are the basic difference.

As regards the *Engineers'* case, and whether the pre-existing interpretation could have been sustained, I suppose the central plank of that was reserved powers. I would not want to commit myself to say that if I suddenly became the god of the Australian High Court I would reinstate Sir Samuel Griffith's reserved powers. I would say this though, reserved powers which for years was denigrated as subjective and anti-textual and uncertain, fits remarkably well with the judgements of Sir Anthony Mason on implied rights, which are more anti-

textual, far vaguer, equally impossible or more impossible to apply and have the only difference, that whereas reserved powers was true, implied rights is false.

THE FIRST SESSION OF THE HIGH COURT;
MR JUSTICE BARTON, MR JUSTICE GRIFFITH AND MR JUSTICE O'CONNOR

