CONVERSATION

A PUBLIC CONVERSATION ON CONSTITUTIONALISM AND THE JUDICIARY BETWEEN PROFESSOR JAMES ALLAN AND THE HON MICHAEL KIRBY AC CMG*

JAMES ALLAN† AND THE HON MICHAEL KIRBY AC CMG‡

[Professor James Allan and the Hon Michael Kirby AC CMG engaged in a public conversation on constitutionalism and the judiciary at a meeting of the Australian Society of Legal Philosophy on 5 June 2009. Amongst the issues discussed in this public conversation between Professor Allan and Mr Kirby are the role of judicial philosophy in the work of judges, especially in final courts; the ideal judicial characteristics, particularly in constitutional adjudication; the limits and legitimacy of law-making (or 'activism') in judicial reasoning; the necessity of restraints upon judges and the role of textualism in providing such restraints; the 'originalist' approach to constitutional interpretation and whether it is the 'least defective' way to construe a constitutional text or is instead functionally incompatible with the nature of such an instrument; the role (if any) of international and foreign law in constitutional elaboration and whether its use merely invites 'cherrypicking' from the opinions of those whose views are similar to one's own; and the 'living tree' approach to constitutional meaning and whether it is appropriate in the Australian context. There are some differences and some common ground between the discussants in this lively and mutually respectful conversation on issues of great importance for the content of constitutional law. The edited transcript of the conversation appears below.]

Professor Adrienne Stone: It is my pleasure to introduce the participants in our public conversation, although I suspect that this gathering of colleagues and friends needs no introductions. On my left I have Professor James Allan of the School of Law at the University of Queensland. He has made it today having battled the Brisbane fog. He will be known to all of us because, since his immigration to Australia, he has played a very robust role in our public debates on the role of judges in constitutional law, judicial activism and other topics.

Professor James Allan: I have become an Australian citizen. I even knew who Don Bradman was for the test I had to pass.

* Held at the Melbourne Law School, The University of Melbourne, on 5 June 2009 under the auspices of the Australian Society of Legal Philosophy, chaired by Professor Adrienne Stone. The transcript has been edited for clarity and brevity, and footnotes have been added to illustrate the points made.

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Stone: Congratulations. I also am pleased to welcome today the Hon Michael Kirby, formerly Justice Kirby of the High Court of Australia. He will be well known to all of you. But let me just tell you one thing that you may not know. In addition to his Honour's very long service as a judge, I understand that he was also present at some of the earliest meetings of this Society, the Australian Society of Legal Philosophy ('ASLP'). So it is especially nice to be able to welcome him back today to this meeting of the Society.

We will have a public conversation today. I have asked our two participants to speak for about five minutes, outlining their philosophy concerning judicial reasoning and the judicial role. I will then invite each of them to speak to each other on some of their many points of disagreement and perhaps some discovered points of agreement. After we have done that, I will open the conversation up to questions and comments from all of you. And that should take us through the session.

Perhaps if I could ask the Hon Michael Kirby to begin?

The Hon Michael Kirby AC CMG: Thank you very much for having me. I pay my respects to Jim Allan for getting here despite the problems of airline schedules and fog in Brisbane. I was sorry to see him looking a bit distressed as he came rushing in. I expect that he will be even more distressed by the end of this session!

I also pay my respects to everyone in the audience. I know many of you. I am glad to be in your company because it's very congenial company to me: philosophers and lawyers.

It's true, as Adrienne Stone has said, that at the very beginning of my career, when I was a student at the Sydney Law School, I was invited by Professor Ilmar Tammelo, a very fine scholar and the supervisor of my LLM thesis on the communist doctrine of the withering away of the state and its relevance in the Soviet Union of that time, to join the *Internationale Vereinigung für Rechts- und Sozialphilosophie* ('IVR'), which I did. The ASLP was the local chapter of the IVR. I don't know whether the ASLP has kept its links with the IVR. I see nods of agreement that you have. I am glad of that because legal philosophy certainly doesn't belong to any one country. Self-satisfaction about our philosophy, and the law in our society, has been an endemic problem in Australia, partly for geographical and historical reasons. In this sense, I am very glad to be back.

Everything that has happened in my life can, in a way, be blamed on the IVR and the ASLP. If you don't like what you are going to hear, well, you only have yourselves (or at least your predecessors) to blame.

I was warned that I should say something at the outset about my judicial philosophy. That seems a rather high-flown expression to describe what you actually have to do in day-to-day work as a judge. One is so busy answering the questions, getting the detail of the record in one's mind and solving the dilemmas and puzzles that are presented for judicial determination that you don't usually have a lot of time to ponder upon your 'philosophy'. In a sense, if there is a philosophy, it is something which is discovered in retrospect — meanings and approaches that you reveal through a series of your decisions. Naturally, at the

end of my judicial career, as I am now, I have looked back and asked myself about the consistent major themes in my judicial approach. I would say that they were these.

First, a strong belief in the democratic, egalitarian and accountable nature of the basic ideas of the *Australian Constitution*. I did not go along with Lord Cooke's view that law is only that which the judges say;[1] that parliamentary law is only obeyed because the judges say it will be obeyed; that the judges have the ultimate right to substitute their opinions for Parliament if Parliament strays into fundamental injustice. That was his theory of 'deep-lying rights' that were 'so deep that even Parliament could not override them.'[2] His opinion, in this respect, had a distinguished lineage in the common law tradition, back to *Dr Bonham's Case*,[3] and earlier and later cases.[4] However, in my opinion, this is not a view that sits comfortably with the textual basis of the *Australian Constitution*,[5] with the democratic nature of that *Constitution*,[6] and with the democratic foundation of the *Constitution* in the votes of the people, the electors of Australia, as then constituted in the 1890s, who adopted the *Constitution*.[7] Accordingly, it is not a view that has ever been attractive to me. For example, it's one that I disagreed with in *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* ('*BLF*') in the New South Wales Court of Appeal.[8]

On the other hand, I don't have the romantic attitude to democracy that James Allan has. I don't believe that the fact that people go, every three years, to a local church hall and vote in an election clothes everything that is done thereafter by the elected government and Parliament with a legitimacy and democratic character.[9] My experience in life and in the judiciary, but above all in the Australian Law Reform Commission, taught me that on many occasions — indeed, on very many occasions — Parliament simply isn't interested in most areas of the law.[10] Often the problem is getting the democratic polity to face up to problems and to deal with them, even when very thorough law reform reports have been provided.

1 See Justice Michael Kirby, 'Robin Cooke, Human Rights and the Pacific Dimension' (2008) 39 *Victoria University of Wellington Law Review* 119, 127.

2 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (Cooke J). See also *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 (Cooke J).

3 (1610) 8 Co Rep 113b, 118a; 77 ER 646, 652 (Coke CJ, Warburton and Daniel JJ).

4 See, eg, *Case of Proclamations* (1611) 12 Co Rep 74, 76; 77 ER 1352, 1354; *Rowles v Mason* (1612) 2 Brownl 192, 198; 123 ER 892, 895 (Coke CJ).

5 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 427 (Kirby J).

6 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 387 (Kirby P); *Eastgate v Rozzoli* (1990) 20 NSWLR 188, 201–2 (Kirby P).

7 *Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Deane and Toohey JJ); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J).

8 (1986) 7 NSWLR 372.

9 Sir Anthony Mason, 'Democracy and the Law: The State of the Australian Political System' (2005) 43(10) *Law Society Journal* 68, 69.

10 Justice Michael Kirby, 'Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman' (2006) 80 *Australian Law Journal* 299, 312–13.

There may be some truth in a point that Professor Allan has made, on a number of occasions, that the American polity developed in a slightly different way in comparison with the polities of the countries of the Commonwealth of Nations. It's important to acknowledge that the Australian political system is, in a sense, a product of the American Revolution. When the British lost the American settlements, the Australian penal colony had to be established. Therefore, our polity had the benefit of the later evolution of the British constitutional system. The Americans didn't. We see that in the semi-monarchical way in which the President of the United States of America enjoys his many powers under the *United States Constitution*. We don't have that sort of system in Australia.

There are certain elite features of our polity. Examples are the Crown — the most elite of all, in the sense of a hereditary monarchy. The judiciary, appointed without prior consultation with Parliament and with responsibilities including the *Marbury v Madison* responsibility of judicial review.[11] The executive, which has been described by Lord Hailsham as a kind of 'elective dictatorship' for the period of their elected service.[12] And the bureaucracy. All of those are elite organs of government. They are not directly elected, any of them, and in that sense they are not democratic. It's very important for us to approach Professor Allan's theories about democracy understanding that democracy has a place in our *Constitution*. But it isn't the only theory that has to be found a place within it.

Secondly, within the judiciary, I have been a strong supporter of textualism. I have tried to be a consistent supporter of textualism. Going back to the text is normally the foundation of judicial legitimacy in declaring the governing law. The text of the *Constitution* or of a statute is overwhelmingly what judges have to grapple with nowadays. That's why Harvard Law School is dropping its case law method of teaching law as common law and introducing obligatory attention to statutory interpretation and the theories of that activity in first-year law courses. Many other law schools around the world are now doing this. That's a correct move because legislation is now, overwhelmingly, how our law is made.

Yet legislation as expressed in our rather peculiar language — the English language, with its dual Anglo-Saxon and francophone traditions — can only be understood by examining the context and the purpose of the legal text. And this can often take one into examining the international context and any ideas derived from international law and the international context in which the law of Australia is now made. Consistency and manifest consistency in judicial interpretative techniques are important to me. Transparency is important. And non-discrimination is important.

So this brings me to the third element in my judicial philosophy. Non-discrimination came out at the end of my judicial service in two important cases.

[11] 5 US (1 Cranch) 137 (1803), cited with approval on this point in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262–3 (Fullagar J).

[12] Lord Hailsham, *Hamlyn Revisited: The British Legal System Today* (1983) ch 4 ('Third Shock: Elective Dictatorship').

One of them was *Al-Kateb v Godwin* ('*Al-Kateb*'),[13] a case about refugees. The other was *Roach v Electoral Commissioner* ('*Roach*'),[14] concerning electoral rights for prisoners. Use of international law, especially the international law of human rights, is something which Professor Allan hasn't found particularly congenial in his writing.[15] But I regard it as very important.[16] And, indeed, I regard it as possibly inherent in the constitutional text. Another case involving non-discrimination involved Aboriginal Australians: *Wurridjal v Commonwealth*.[17] That case involved the constitutional challenge to the Northern Territory Intervention.[18] I hope that there will be time to talk about that decision and the views that I expressed there.

My attitude to the international dimension of constitutionalism may have been affected by my experience in the United Nations and elsewhere in many activities. One of these is going to take me to New York tomorrow for a consideration of the future of the United Nations strategy against HIV/AIDS. These experiences have sensitised my views about international law. They have made me more understanding of the growing importance and influence of international law and its beneficial influence on all, or at least most, aspects of law. However that may be, the fact is that we have to adapt our law to an understanding of the international context in which law happens to operate today. And that includes constitutional law. In today's world, no country, even Australia, is, constitutionally speaking, an island, entire unto itself. All of us are now part of the main.

So these are some of the features that have affected my approach to the judicial function. The last, especially, is totally antithetical to Professor Allan's approach. He doesn't like the intrusion of international law. My view is that his attitude, in this respect, is old hat. It won't survive. International law is going to permeate all areas of our law, including constitutional law.

Now, Professor Allan and I do agree about some things. Quite possibly the role of the Crown in our *Constitution*. Maybe the role of federalism. But we don't agree about the role of international law. Nor do we agree about the living *Constitution*. In this conversation, I think it's important that we should be concentrating on exploring our areas of disagreement rather than the subjects of agreement, because it is the disagreements that are going to be much more interesting.

[13] (2004) 219 CLR 562, 629 (Kirby J).

[14] (2007) 233 CLR 162, 200–1 (Gummow, Kirby and Crennan JJ).

[15] See, eg, James Allan and Grant Huscroft, 'Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts' (2006) 43 *San Diego Law Review* 1, 9. See also James Allan, 'Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century' (2006) 17 *King's College Law Journal* 1; James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245.

[16] See generally *Al-Kateb* (2004) 219 CLR 562, 617–30 (Kirby J).

[17] (2009) 237 CLR 309, 395 (Kirby J).

[18] See generally *Northern Territory National Emergency Response Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

Allan: Thank you for that. And I would also like to thank Adrienne and Justice Kirby for inviting me here this morning.

I interpreted Adrienne's questions slightly differently. Of course, this theme is indeterminate. When someone asks you to talk on 'judicial philosophy', and to do so for five minutes, you can go in so many different ways. I took it to be five minutes on possibly what I would want a judge to be like. I wanted to start by saying that, if I provided my ideal judge's characteristics, that would be a different answer from the one I would give if I were asked to design an institution. Because, from an institutional point of view, I wouldn't want all seven top judges in Australia or all nine top judges in Canada or the United States to display the exact same approach to interpretation. I think the institution benefits from how all the top judges interact. I think that the institution needs difference. It needs an occasional Lord Denning. So my preferred approach to interpretation comes with the caveat that we wouldn't want all the judges to be alike.

The second proposed caveat that I would make is that there are different vantages from which to look at the question of judicial philosophy. One point of view is to look at it from your perspective on the top court — that's a bad approach; I think the better approach would be to ask: what would a well-informed citizen want from his or her judges? At any rate I am going to approach the problem that way. Inevitably, you get different answers depending on your perspective.

With those caveats, if I am talking about my ideal judge, I'd start by saying that one of the first things is this: I favour a judicial philosophy that leaves us all in a position to be able to criticise the judges. Now I know that might be understood as being able to criticise the *Constitution* itself. But there can also be criticism of the judiciary and the way it goes about interpreting the *Constitution*. As I hope to make clear, I want to limit judicial moral input at the point of application. Related to that, and as a second point, I would want to emphasise most strongly judicial constraint. I want judges who feel constrained by something other than their own sense of shifting moral values or shifting societal values. I want law's written text to be constraining on judges. I want that and I want the limitations that flow from judicial restraint for two reasons. Mostly for reasons of legitimacy: confining the judges to their proper functions. But I also want judicial constraint for reasons related to certainty. So those are two reasons for the modest view I take of the judicial role.

Let's start, then, by talking about wanting constraints. Of course, the whole issue of a 'judicial philosophy' can be collapsed down into one of how judges ought to go about interpreting the *Constitution* and other rules of law. For the purposes of this morning, I agree with Justice Kirby that we really should go straight to constitutional interpretation, because I would probably not have as much to differ with him on the approach to statutory interpretation, not least as regards textualism. We might have minor disagreements about what happens when there is competing evidence of the texts being different to what the people who passed them intended. But those are minor points of disagreement. And even when it comes to common law, the best way to deal with common law is by

evolution. With the common law I would be much more relaxed about some degree of evolution.

So the real problem for us to discuss today as regards constitutionalism and the judiciary in a country like Australia is going to be constitutional interpretation. My view, unlike Justice Kirby's, is that the least bad way of approaching a constitutional text is, in fact, to do so with some element of originalism. This is the least bad system of constitutional interpretation (and I stress *constitutional* interpretation). I see a constitution as locking in certain outcomes: locking them in by reference to the meaning that was expressed, intended, understood and agreed at the time the constitution was made. By all means, if you want to keep pace with society and you don't want to lock yourself into anything, then don't have a written constitution. I really enjoyed living in New Zealand. I could just as easily move over there and enjoy the benefits of parliamentary sovereignty. In such a society, there's no need for talk of a 'living constitution' and the judicial updates that carries with it. In New Zealand, the updating is done all the time by the elected Parliament. I might even prefer that system to a constitutional system expressed in a written text of higher authority than ordinary statutes and cases. But if you are going to have a constitution, it seems to me that the whole point of a written constitution is to lock in certain outcomes. I don't think too many people in New Zealand, if they were asked whether they wanted to move to an entrenched constitutional system and were explicitly told, 'Well, you'll be locked in and that means certain decisions will be taken off the democratic table', would necessarily agree with that idea. But whether that is the case or not, I am confident they'd say 'no' immediately if they were told that the judiciary will not be locked in, just everyone else. That, though, is the implication of 'living tree' interpretation. The judiciary would not be locked in because they will be adapting the agreed text whenever they, the judges, happen to think that it is proper to do so — whenever they feel that it's in keeping with the wider changes in the international world, say. I don't think any Kiwis would want to give so much power to the unelected judges. Few of them would find that system an overly attractive constitutional option.

So I see a constitution as definitely locking things in. Accordingly, it seems to me that anyone's objection to this notion of originalism has to be grounded in, or have something to do with, the elected Parliament not moving fast enough in some areas. But if that is so, you should be complaining to the parliamentarians. You should be working through the parliamentary process. It's almost never the case that a constitutional rights regime is putting in place a ceiling rather than a floor and hence stopping Parliament from advancing whatever set of progressive or innovative requirements the elected representatives decide upon. Provisions interpreted according to whatever version of originalism you prefer are floors on government actions, not ceilings. They don't prevent legislation for wider access to abortions or for same-sex marriages or for euthanasia.

So, yes, I think we have a really big disagreement on how one ought to interpret a written constitution. Yes, I am an originalist — and we can talk about what that means — though for me it's simply the least bad option on offer, not a flawless approach. But as far as I am concerned, there is a real problem with

adopting an approach to constitutional interpretation that looks at international law or treaties or judges' own sense of changing social values.

Everyone knows that judges make law. Reasonable people disagree over particular decisions. Likewise, I don't think anyone believes that there are no constraints on the judge. We differ on the extent of constraints and their desirability. Resorting to international law in interpreting a written constitution presents a big problem because it adds to uncertainty. It undermines the certainty of the text and removes many of the constraints that should operate on judges due to the very nature of a written constitution.

So, then, to the extent that we are going to move on, I would also like to talk about international law. I probably want to be a little more specific about what 'international law' means or is taken to encompass. There are a number of distinctions I would want to make. Of course, nobody minds the legislature looking at foreign law or transnational law. Likewise, we should distinguish between judges giving meaning to the substance of a statute and a constitution. As regards the former, an elected Parliament can always come back and override the interpretation that's been given to a statute by a court. However, giving substantive meaning to a constitutional provision is something quite different. Once that is done, we are all locked in. That's it. And it's that step that is really problematic.

I would also want to make a few other distinctions. The real objection to using foreign law when it comes to giving substantive meaning to a domestic legal provision is not just that most people do not know foreign law. Nor is it usually related to giving substantive relief, directly or indirectly, to a party based on a foreign legal provision. As objectionable as those may be, I don't think they are nearly as contentious as invoking foreign law to interpret one's own national written constitution.

If, focusing on the core issue of giving meaning to one of our constitutional provisions, an interpreter calls in aid some aspect of transnational law, some rights-related decision, let us suppose — well, the blunt truth is that the decision of 18 members of the United Nations Human Rights Committee or Human Rights Council is a highly dubious source of wisdom or insight when it comes to unravelling the meaning of the *Australian Constitution*. Resort to this is even more suspect when it is made plain that many of the countries that staff the Human Rights Council are countries not always noted for their respect for fundamental human rights.

Stone: Do you want to respond?

Kirby: I do indeed because I hope that the audience will have seen the basic flaw that lies at the heart of Professor Allan's statements. The contradiction lies in his statement that we all know judges make law. Yet, on the other hand, he adheres to a 'fairy tale'[19] view that there can be no moral input by the judge at the point of the decision. Well now, how then do the judges make the law? They

[19] Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22.

make it by reference to values. Values are themselves affected by the judge's education, experience and reading. That includes, in my case, reading of the decisions of the United Nations Human Rights Committee. Imperfect though these may be, they have made a number of very important and useful decisions on basic questions that I myself have found helpful.[20]

So you just can't have it both ways. And I didn't think I would come to a meeting of the ASLP which would be confronted with a view which was abandoned in the law when I first went to the meeting of the ASLP 40 years ago under the influence of my great teacher Professor Julius Stone.[21] In the 1960s, we were taught as undergraduates that judges had choices. You can pretend that their decisions are value-free. But you won't fool anyone nowadays. Professor Allan effectively concedes that by saying that judges make law.

Can I give a concrete example? Professor Allan has to bite on the actual reality of sitting there in your chambers on a weekend preparing reasons for judgment. This isn't theory. This is a practical case.

What does 'jury' mean in s 80 of the *Constitution*? Trial by 'jury' of federal indictable crimes is one of the few guarantees in the *Australian Constitution*. Professor Allan, according to his originalist view, has got to go raiding the jury rooms of this nation, throwing women out and also throwing out the people who don't have much property. This is because, back in 1900 (or the 1890s, when the *Constitution* was being drafted), that was what a 'jury' meant. So if you take a strict originalist view (which I don't believe that any serving judge really does), you are bound to go back to dictionaries of 1890, just as Scalia J does to dictionaries of 1776 and 1791 in order to give meaning to the American constitutional text.[22]

That is just an absurd notion, given the *purpose* of the *Constitution*, which is to work and live and operate from age to age in circumstances undreamt of by the founders. If that's the constitutional purpose, this notion of originalism is completely antithetical to the purpose and object of the governing document, which has to survive from decade to decade and century to century.[23]

[20] See, eg, *A-G (WA) v Marquet* (2003) 217 CLR 545, 603–5 (Kirby J), citing Human Rights Committee, *General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the* International Covenant on Civil and Political Rights*: Addendum — General Comment No 25*, 57th sess, 1510th mtg, [1], [7], [21], [25]–[26], UN Doc CCPR/C/21/Rev.1/Add.7 (1996); Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant — Concluding Observations of the Human Rights Committee: Chile*, [8], UN Doc CCPR/C/79/Add.104 (1999); Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant — Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, [19], UN Doc CCPR/C/79/Add.57 (1995); Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant — Concluding Observations of the Human Rights Committee: Paraguay*, [23], UN Doc CCPR/C/79/Add.48 (1995); Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant — Concluding Observations of the Human Rights Committee: Zimbabwe*, [23], UN Doc CCPR/C/79/Add.89 (1998).

[21] Cf Julius Stone, *Social Dimensions of Law and Justice* (1966) 649, citing Karl Llewellyn's writing on 'leeways' for judicial choice.

[22] See, eg, *Morrison v Olson*, 487 US 654, 719 (1988).

[23] Cf Justice Michael Kirby, 'International Law — The Impact on National Constitutions' (2006) 21 *American University International Law Review* 327, 354.

Stone: Alright. Professor Allan?

Allan: One thing. I was very careful to say no more than that the originalist approach limits moral input. I don't think it's ridiculous at all to do so. I think that this is essential if we want constraints on the judiciary — if we want external restraints, so that the judge, when deciding a case, limits himself or herself to the law. At least the constraints on the judge would then go beyond their own conscience and involve some questions of historical fact. To be frank, I don't want the judiciary to feel that whether they must respect the constraints of the *Constitution* is sometimes to be decided by what each judge's own conscience tells the judge is right. That is very problematic to me. I don't think anything that has happened in the last 40 years has made that judicial approach legitimate or attractive. It might have become more acceptable because of the total lack of democratic foundation for much of what is happening in Europe. But that's beside the point. Judges make law. But they make law in the sense that sometimes they find themselves in a situation where the established statutes and constitutional provisions dictate no clear answers, certainly no established answers. But this is different from invention not supported by the text.

If you want an example, I could give an example of the implied rights cases.[24] I think those are a clear example of unacceptable judicial activism. We can talk about the *Australian Constitution* and its possible lack of effective representativeness. But what the *Australian Constitution* doesn't do is allow the judges to do what they did in the implied rights cases. There, on the flimsiest of grounds, they decided that they could strike down statutes made by the Australian Parliament.[25] Even in Canada, with an incredibly strong bill of rights, the judges did not strike down the same sort of statute.[26] The Australian outcomes were by no means dictated by the text or the implications from the text.[27] All that was offered was hard-to-believe reasoning and *ex post facto* rationalisation. Then later on, years later, the High Court of Australia decided that it could read in a reasonableness element to the judicially made-up protected constitutional speech test.[28] Now, I don't see what restraints were accepted by the judges in those

[24] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 44–51 (Brennan J), 76 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 133, 140, 142–4 (Mason CJ), 227 (McHugh J); cf at 180 (Dawson J); *Kruger v Commonwealth* (1997) 190 CLR 1, 115 (Gaudron J) ('*Stolen Generations Case*'); cf at 142 (McHugh J).

[25] The reference in this paragraph is to *Political Broadcasts and Political Disclosures Act 1991* (Cth) s 7, introducing pt IIID ('Political Broadcasts') into the *Broadcasting Act 1942* (Cth), which provided for a blanket prohibition on political advertisements during specified federal election periods: s 95B. See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. The Court, by majority, concluded that the provisions were not valid: at 146–7 (Mason CJ), 176 (Deane and Toohey JJ), 224 (Gaudron J).

[26] In Canada, where there is a very potent constitutional bill of rights, a majority of judges ruled that a similar sort of enactment was constitutional: *Harper v A-G (Canada)* [2004] 1 SCR 827, 900 (Bastarache J for Iacobucci, Bastarache, Arbour, LeBel, Deschamps and Fish JJ); see also at 853 (McLachlin CJ and Major J for McLachlin CJ, Major and Binnie JJ).

[27] See James Allan, 'Implied Rights and Federalism: Inventing Intentions while Ignoring Them' (2009) 34 *University of Western Australia Law Review* 228.

[28] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

implied rights cases as being externally imposed on what they themselves could and couldn't do. I know that the *Australian Constitution* was drafted so as deliberately to exclude a bill of rights.[29] It didn't have a bill of rights. There is no free speech personal right expressed in it. Everyone at the time was well aware of the US First Amendment. But the drafters trusted all this to the elected Parliament.

Yet when I read those implied rights cases, I am left thinking: 'this is judicial activism'. And let me just say, let me emphasise, that if there were ever to be a bill of rights — and let's hope there won't be — the one provision I would myself include would be the right to free speech the way the Americans do it in their *Constitution*, where it is more strongly protected than anywhere else I know of. So I actually like the outcome in the implied rights cases in a substantive sense. I like as few limits on free speech as possible. I just find the reasoning in the cases to be such that I can see no external or effective constraints at all on those judges and what they can do under the cover of 'finding implications' or 'updating'.

Kirby: 'There you go again', as President Reagan said to President Carter.[30] There you go again, back to originalism. Saying that because those founders didn't conceive of having an express bill of rights, therefore you can exclude the implied rights from being read into the *Constitution*.

Now the implied rights cases being criticised were decided before my appointment to the High Court of Australia in 1996. However, it is elementary lawyering that documents have implications as well as express textual statements. It doesn't seem to me, looking as objectively as I can to what was done in the implied rights cases, to be a very large statement to say what the Court said. This was that, in a *Constitution* which is otherwise very sparse in its text (but has quite detailed provisions for how we elect the Parliament), it is necessary, in order that such elections should not be a charade, that there be an entitlement to have a proper and effective national debate of the issues relevant to an election. One can agree or disagree with the outcome in a particular case. I happen to agree with Professor Allan on one point. Even accepting an implied constitutional right to free speech, I don't think I would have struck down the statutory limits on electoral advertising for a Parliament chosen by the people. But that's not the question. The question is whether you can draw implications.

One draws implications in a will, in a contract, in a statute. Why can't we draw implications in a constitution, which has to live for centuries? It's a ridiculous notion, with respect, to say that you can't draw constitutional implications from the constitutional text. The implication that the High Court drew, just like the implication in *Dietrich v The Queen* ('*Dietrich*')[31] (which actually wasn't

[29] See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 688–90 (Edmund Barton, Sir Edward Braddon, John Cockburn, Sir John Forrest, John Gordon, Isaac Isaacs, Charles Kingston and Richard O'Connor).

[30] Public Broadcasting Service, *Debating Our Destiny: The Second 1980 Presidential Debate* (2000) <http://www.pbs.org/newshour/debatingourdestiny/80debates/cart4.html>.

[31] (1992) 177 CLR 292.

founded in constitutional law), was a similar thing. Trials are not charades. Especially criminal trials of major offences. They are a very serious legal business where people's liberty and reputation are at risk. To say, 'well you go on and defend yourself in a rape trial because your barrister hasn't turned up', is unacceptable to a just legal order. Without the postulated implication, this would reduce the legal process to a charade of a trial. Judges shouldn't be party to it. They should say, 'if it's a serious trial and you're indigent, you can't afford a lawyer, then the state has to provide you with a lawyer. If it does not do so, the court may stay the prosecution until the state does.' Implications can sometimes do the work of justice. I am for them. And although *Dietrich* was decided upon common law principles,[32] there was an underpinning of the constitutional character of trials as they are properly conducted in Australian courts of law as provided by the *Constitution*.

Stone: Professor Allan, can I get you to come back in here?

Allan: I think we see where our differences lie.

Stone: Before you go on, could you also address Mr Kirby's point about the meaning of 'juries' in s 80 of the *Constitution*?

Allan: What I would first like to say is that part of what supports some of my ideas is that I recognise that smart, reasonable people can disagree about a lot of things — moral issues and political ones. Not just the proper decision-making role for judges. So I would be very, very hesitant to say, as Justice Kirby has, that it's 'absurd' that anyone could be in favour of originalism — or indeed most other approaches — in constitutional interpretation. Some unbelievably top American scholars of constitutional law seem totally committed to originalism, and they seem every bit as smart as anyone else.

Kirby: You should mix in different circles.

Allan: These scholars may be many things. But to call their views 'ridiculous' seems to me to be strong language, or perhaps even ridiculous itself. Moreover, 'charade' is a very hard word. It indicates that you've got a sublime confidence in your own correctness. But as regards these reasonable people who tend to disagree on so many things, it's hard not to think that the best decision-making system for them is one that lets them all participate in how they are governed. Yet there is no denying that the main implication of Justice Kirby's approach is something different from that. It is that, if you are on the High Court of Australia, then you have a lot more say in how Australia is run on all the big ticket issues than you would have under my way of structuring things, where the judges were constrained by some version of originalism.

What I would like to know is: where do the constraints come from in Justice Kirby's approach to interpreting the *Constitution*? Because when I read him describing his preferred approach I don't really see where those constraints are

[32] See ibid 297–8, 300, 311, 315 (Mason CJ and McHugh J), 326–7, 337–8 (Deane J), 353, 361–2 (Toohey J), 371–2, 374–5 (Gaudron J).

coming from. Let me clarify. Although there are certain flaws with originalism, it is a search for an historical, empirical fact that might be there or might not be. We might have the resources to look; we might not. But you are looking for something external to the human decision-maker and his or her own set of moral and political values. So, in the American context, we are looking for an example of what the notion of cruel and unusual punishment involved 200 years ago when it comes to capital punishment in today's America. I might personally be against capital punishment. However, it seems very clear to me that that's a really hard argument to make out of the language of the *United States Constitution*.[33] The more you have constraints on you, other than your own sense of what's right, the healthier it is for running a constitutional and democratic regime, because it means the other 99 per cent of citizens get a say too.

It may well be that, if everyone sees constitutions as these fluid things that the judges can adapt and the rest of us are stuck with, if that is the case, then we all might want to move to New Zealand and have parliamentary sovereignty where all of the updating is done by an elected Parliament. After all, it's quite an attractive way of running things in New Zealand. But I think if you are going to have a constitutional regime, an entrenched written text, you want the constitution to be locking in some outcomes subject only to constitutional amendment, not subject to the sentiments of seven top judges. Now, we might disagree about the point at which we have moved out of certainty and into uncertainty or ambiguity. Almost everyone agrees that when the *American Constitution* says that you can't be President until you are 35 — that's very clear. That provision is plainly locked in. We are not going to change that because Europeans have, say, presidents at age 32. Or because the ongoing sense of international law is now moving to 33. We are stuck, if we are Americans, with 35. You might think it's ridiculous. You might think your moral antennae know better. But it is clear. Of course, relatedly, you can ask why we should be stuck with a rule in the US that says that a citizen of the United States can't be President if he or she was not a natural born citizen.[34] But that's the price you pay for written constitutionalism. For a while, Arnold Schwarzenegger was looking like he might have a plausible chance to run for President. But barring amendment that would be out because he is not a 'natural born' citizen. The reason you are stuck with that is because you are buying into a constitutional system that locks in outcomes.

[33] *United States Constitution* amend VIII. In *Wilkerson v Utah*, 99 US 130, 135–6 (Clifford J for Waite CJ, Clifford, Swayne, Miller, Field, Strong, Bradley, Hunt and Harlan JJ) (1878), the Supreme Court conceded that torture and punitive 'atrocities', such as burning at the stake, crucifixion or breaking on the wheel, would be 'cruel and unusual' but held that other forms of punishment authorised by statute (for example, hanging, shooting and electrocution) were not. Regarding electrocution, see *Re Kemmler*, 136 US 436, 444, 449 (Fuller CJ for Fuller CJ, Miller, Field, Bradley, Harlan, Gray, Blatchford, Lamar and Brewer JJ) (1890).

[34] *United States Constitution* art II § 1 cl 5 provides:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this *Constitution*, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years …

If you want to change the outcomes, you've got to amend the *Constitution*. No doubt there are real difficulties and hurdles in the way of doing that. On that point, I agree with Justice Kirby. We are in a sense talking about a form of ancestor worship.[35] That's because there are problems with constitutionalism, just as there are with parliamentary sovereignty. Entrenched written texts import a system that locks in things you might not like later, and it might be very hard to change them. But that's what constitutionalism is to my mind. I don't see constitutionalism as being a system that says:

> I'm locked in, and so are all of you. But the seven judges on the High Court aren't locked in. And they're going to make sure this document keeps going through time because, as outcomes arise over time that they happen not to like, then rather than using s 128 these High Court judges will just do the adaptation as they see fit.

What is remotely attractive about that? Besides, s 128 doesn't even look that hard to use to me, speaking now as a Canadian. When it comes to amending a constitution, s 128 is procedurally pretty easy. The fact that people have overwhelmingly voted against change when asked under s 128 just tells me that they like their *Constitution* as it is here in Australia. And I think they've been right. Australia has a pretty darn good one actually. Sure, there have been 38 failed referenda. All but six, I think, have failed. Of those that failed, the vast preponderance couldn't even pass the 50 per cent test amongst the electors of Australia. But if you think that's been a problem, then my answer to you is 'too bad'. If you can't get half your fellow citizens to agree to change, then there shouldn't be change. I don't see a problem with that answer at all. It is what the *Australian Constitution* itself says, after all.

Kirby: Canada likes the *Constitution*[36] it now has. Repeated surveys show that Canada likes the *Constitution* including the *Charter*[37] and the judges' interpretation of the *Constitution*. What a wonderful enlightened court the Canadian Supreme Court is. If only I had served my time on the Canadian Supreme Court or the South African Constitutional Court, or, dare I say, the House of Lords. My life would have been so much easier. So I do agree with Professor Allan in his praise of rights of dissent: the right to express a different point of view. It sharpens judicial reasoning. Indeed, I think he plays an important part in our country in that respect.

As to New Zealand, the people of that country nearly became a part of the Commonwealth of Australia. And there is still a portion of the New Zealand population that would dearly love to join the Commonwealth. But probably there is a majority against it. New Zealand is a different sort of society. They have not

[35] Justice Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1. The description is attributed to Justice Ian Binnie, 'Session Two: The Future of Equality' (Session conducted at Liberty, Equality, Community: Constitutional Rights in Conflict?, Auckland, 20 August 1999).

[36] The *Canadian Constitution* comprises *Canada Act 1982* (UK) c 11, sch B and the *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3.

[37] *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

been so disrespectful of their indigenous people in the same way as Australians have been over a long time. So New Zealand is a different place. But as to the so-called 'sovereignty of Parliament' — I do wish people would drop that expression. It's a real 19th century expression, attributed to A V Dicey.[38] It's not even true of New Zealand, where they now have the constraints of the mixed member proportional form of election[39] and the *New Zealand Bill of Rights Act 1990* (NZ) and so on. You may ask: where do these constraints come from? And I note you haven't answered my question about throwing women off the juries in Australia and excluding citizens without property from juries. And there are so many other such problems for your approach.

Constraints upon the judges there certainly are. Always have been. Always will be. The constraints come first of all from the constitutional text. If you have 'native born' in the text (as the Americans do), if you've got a requirement that to be elected President of the United States of America you have to be 35 years of age, well, there's not much room to have a difference of opinion about that. But if you got the word 'jury', does it include women? Does it include people without property? Does it include prisoners? Does it envisage that the 'jury' may separate whilst participating in a trial? Does it allow reserve jurors to be appointed because trials last much longer nowadays?[40] The notion that you are locked into the concept of what a 'jury' was in 1890 or 1901 is just inconsistent with the character of a written national constitution. With all respect to all those people of the Federalist Society that Professor Allan mixes with when he's in the United States, originalism is truly an absurd notion. It is one inimical to the very purpose of a constitution, which is to work from age to age.

So you start with the text. You have then the history. And the history will include the original purposes. You have then any judicial authority on the point. Generally, on every word of our *Constitution* — I can tell having laboured for 13 years over it — there are judicial and scholarly and historical opinions on everything. So you've always got authority. It may not be right on the point because novel problems continue to arise, presenting new dilemmas. But commonly there will be wisdom that can be adapted by analogy to place bounds on excessive creativity in interpretation.

Then you have reasoned analysis. The fact that the judges have to explain their decisions imports a constraint. And you have your colleagues putting their different points of view. You have to be able to sustain a legitimate opinion in the context of people who may have, and express, a different point of view. So the judges are not unconstrained. The notion that I was sitting there in the High Court for 13 years, labouring over my reasons, thinking that I could just do whatever I liked is, to be frank, rather insulting. That was never the way I

[38] A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) chs 1–3. The heading to pt I, containing these chapters, is 'The Sovereignty of the Parliament'.

[39] See generally *Electoral Act 1993* (NZ); see especially pt 3. See also *Electoral Referendum Act 1993* (NZ).

[40] See generally *Katsuno v The Queen* (1999) 199 CLR 40; *Re Colina; Ex parte Torney* (1999) 200 CLR 386; *Cheng v The Queen* (2000) 203 CLR 248; *Cheung v The Queen* (2001) 209 CLR 1. Cf *Cheatle v The Queen* (1993) 177 CLR 541.

conceived of my role. I hope it's not the way any judges of the High Court have conceived their role.

Then there is the consideration that, as a judge, you don't choose the cases. The cases are chosen by people who bring their problem to court. If the pro bono lawyers hadn't got behind Ms Roach and brought her challenge to prisoners being excluded from voting in the 2007 general election by the amendment to the *Commonwealth Electoral Act 1918* (Cth) in 2006[41] (in time for the 2007 federal general election), that case would never have been decided. Many prisoners would then have been invalidly excluded. There would have been nothing the judges could have done about it.

The core and purpose of our *Constitution* in Australia is to have civic engagement and the involvement of all citizens in elections. If you are an ordinary white, male, Anglo-Saxon, Protestant, heterosexual person, then maybe you don't see why judges should be there, looking to see if the text or implications from the text of the *Constitution* protect the right of prisoners to enjoy the vote for the government of the country along with other citizens. Well I can tell you, sitting for 34 years as a judge, one sees a lot of injustices. Your oath as a judge is to do justice according to law. In a free and democratic society, justice is part of the business of judging. Notions of what justice requires and when it can be given effect are, of course, disputable. But in our society, when a case is brought, the dispute is resolved by the judges.

Stone: I am going to open this discussion up for questions in a just a moment. But before I do, there is one major point of disagreement that I don't think was addressed sufficiently. So I wanted you both to address further the question of the use of comparative and international material when judging. And I'll put the question to James Allan first. In particular, I would be interested in knowing whether you object to all uses of transnational materials in constitutional adjudication and whether you distinguish between foreign precedent, on the one hand, and international law, on the other? Or is it just some kinds of use of non-Australian materials that you object to?

Allan: I will start with complimenting Justice Kirby. There is no doubt that he is correct on one matter, and I don't say this regularly. He certainly would have been the most conservative judge of the present Supreme Court of Canada in the matter of interpreting constitutional text had he been somehow transferred to that Court. Of course, I think that tells you more about the Canadian Supreme Court for some of the things it has done than it tells you about Justice Kirby.

The Americans amended their *Constitution* to allow women to vote in 1918 or thereabouts. I am certain that Australians would have amended our *Constitution*, if need had been, to deal with 'jury' problems. The fact that you achieve an effective amendment a couple of years early by judicial decision is not an advantage. It just causes problems, most obviously ones related to legitimacy. The abortion debate in the US would be a lot better, and more civilised, if they

[41] *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth).

had left it to the legislature. We may be in favour of abortion, or opposed to it. But it's a big problem when judges decide these sorts of things and the rest of us have no say. They should be left to democratically accountable legislatures, not courts.

As to international law, here's what I would say: I know a fair bit about New Zealand law. I know a fair bit about Canadian law. On American law I know bits and pieces. I know a bit of UK law. I even get by with a little bit of Hong Kong law. I assume that judges are somewhere around the same level of knowledge on those subjects as I am. They probably know a bit more law than I do. But they certainly don't have at their fingertips all of the sources of foreign law. That's one of the big problems with reliance on foreign law. Again, let's just focus on how foreign law can possibly affect the substantive meaning to be given to a constitutional provision. We can put aside interpreting statutes because such interpretations can be overridden by the legislature. So we are talking about giving meaning to a constitution, something you cannot change in Australia without a s 128 referendum. We are talking about the judges changing the substantive meaning of constitutional provisions. That is where I draw the line.

There are problems with using transnational law and we can start with them. There are no rules about how you are going to use the materials. There is indeterminacy and ambiguity about what the rules are — about their scope — and this is especially true with rights-based transnational laws. It seems to me that there are no obvious constraints on how the judges are going to deploy them. Personally, I don't think the test of whether you are constrained is whether you personally feel you are constrained. I think there is a different test for whether you are constrained. It's not one of looking inside yourself and confirming to others that you are, or think you are. Rather, it has to be judged from an observer's vantage. From that vantage can you say: 'Look, the theory you have articulated doesn't seem to me very often to lock judges in to answers that they don't like. It looks more like one where the test is them saying they feel personally constrained.' That's the test of whether someone is constrained, then: if disinterested observers think they are.

There are other problems with international law or transnational law. There's the quality of some of the reasoning coming out of it. There's the 'cherrypicking' problem. Hardly ever do you see any sort of a comprehensive survey of the quality of various elements of international law. Leave aside instances like *Roper v Simmons* ('*Roper*'),[42] where you are talking about the juvenile death penalty, which is why the case is so attractive for people who like international law as a source. But normally, on any topic, you can find some jurisdictions going one way and some going the other. You hardly ever see that analysed. The judges don't say: 'Well, look, there are 14 jurisdictions that went this way and 7 that went that way, and I'm inclined to pick the ones that went that way.'[43] They just cite the ones buttressing their own view. So there is a real 'cherrypicking' problem with using this to interpret a constitution.

[42] 543 US 551 (2005).
[43] See ibid 627 (Scalia J for Rehnquist CJ, Scalia and Thomas JJ).

Again, I don't think any human being on the planet has at his or her fingertips the amount of transnational law that exists out there. So you're really talking about letting a couple of law students rummage through materials and produce, maybe, a half-comprehensive survey. There are obvious rule of law problems that open up down that route. What are litigants supposed to do? Are they supposed to come to court every time with a complete survey of all the international law (leave aside the increased litigation expense that would cause)? So even if you think that in some particular instance a judge has a complete survey of what's going on everywhere, you have to admit that it almost always involves different answers in different jurisdictions. So if, say, you look at any of the free speech material as it relates to rights-based issues — say, to defamation provisions — you just get different answers. All of the judges in different jurisdictions are giving different answers. So if we are going to play that international law game, I think that it has to be played properly. You have to look at everything.

In addition to that, we need to ask if we are just talking about the common law jurisdictions or are we going to bring in the United Nations Human Rights Commission or Human Rights Council, which I think has horrible reasoning. Are we going to look at civilian countries? You can't just slough these questions off by saying that transnational law is always problematic. I like the practical outcome in *Roper*. But I think the decision was a pretty appalling one by judicial standards. The test that was laid down earlier by the Warren Court was the evolving standards of human decency as exhibited by an overwhelming national consensus of state law in the United States. In 2005, there were I think only 20 US states that did *not* have capital punishment, 18 or so of the 30 remaining states actually enforced capital punishment.[44] Many of them had the juvenile death penalty on the books. In this situation, there is no overwhelming national consensus against the juvenile death penalty, full stop. You may not like that outcome as a judge. However, the point of being constrained at the point of application is that you know you have locked yourself into a test other than your own moral druthers. That should have been that, in my view. But some of the majority judges in *Roper* cited treaties that hadn't even been ratified by the US Senate.[45] You've got real problems in terms of the legitimacy of reasoning. When you read *Roper*, it reads like: 'Here's an outcome that I think is desirable, so what international or foreign law can I cite to get to that conclusion?'

In some extreme circumstances, I concede, it is warranted for judges just to make things up — to lie. But *Roper* certainly wasn't such a case. And it certainly can't be the case that you lie, as a judge, before you have come right out and said: 'We think this is bad. But we think nevertheless that this is what the outcome has to be if our job is to interpret, not to make things up.' A theory of interpretation is different from a theory of when judicial lying is warranted, after all. The judges have to remember they're working in a democracy and they have

[44] See ibid 564, 579 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ).

[45] Ibid 576, citing *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37 (entered into force 2 September 1990).

to give people a chance to respond. That's why I also think that *Al-Kateb* was rightly decided. In the result, I think that the political system actually dealt with *Al-Kateb* not too badly.[46]

Stone: I'm going to ask for a brief response from Mr Kirby before opening the floor up for questions.

Kirby: First of all, transnationalism doesn't come naturally to the Americans. This is because, after their Revolution in 1776, they cut themselves off from the legal communications that we have always had in the Commonwealth. If you take the *Law Reports of the Commonwealth*, which publish reports from all over the Commonwealth of Nations, they are full of citations from other countries,[47] and references and commentary. A Society of Legal Philosophy, above all, should not want to restrain judges from looking to a whole series of sources. This is what judges and lawyers do in Commonwealth countries. And we do this because the problems you get in an appellate court, especially a final national court, are usually at the cusp. You are often looking at a really difficult question of law, principle and policy. In such cases, there are commonly arguments of authority, principle and policy going both ways. If you can look at a case and a problem, and look at another jurisdiction to see how they've solved it, it will sometimes help your mind in coming to the concrete answer in a particular case.

Take, for example, the prisoners' voting case. I keep coming back to cases. It's the way a concrete mind focuses on a problem which a litigant, a human being or a corporation, brings to your court. When in *Roach* we looked at the decisions in the *Sauvé* cases in Canada,[48] and when we looked at *Hirst v United Kingdom [No 2]* ('*Hirst*') in the European Court of Human Rights,[49] they both grappled with similar issues — the issues of, if you like, philosophy or principle that we were trying to deal with in *Roach*. So it's a kind of check for your mind to help to get you to focus on all of the relevant considerations. Of course, you look, as Justice Breyer said in his public conversation with Justice Scalia, at professors and what they write.[50] They are not elected. They are not necessarily part of the judge's national legal system. Still less of its courts. But their minds, as well as the text that you have to deal with, can often help you on the path of your consideration of the issues of legal principle or policy presented by a case.

[46] After the High Court's decision in *Al-Kateb*, Ahmed Ali Al-Kateb's case was reviewed personally by the then Minister for Immigration, Amanda Vanstone, and he was granted a bridging visa: Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (5th ed, 2010) 665. He was sworn as an Australian citizen in 2009: at 665–6.

[47] Michael Kirby, 'Foreword for the Hundredth Volume of the *Law Reports of the Commonwealth*' [2009] 2 LRC iii, iv.

[48] *Sauvé v A-G (Canada)* [1993] 2 SCR 438, cited in *Roach* (2007) 233 CLR 162, 178 (Gleeson CJ); *Sauvé v Electoral Commissioner (Canada)* [2002] 3 SCR 519, cited in *Roach* (2007) 233 CLR 162, 177–9 (Gleeson CJ), 203 (Gummow, Kirby and Crennan JJ).

[49] [2005] IX Eur Court HR 187, cited in *Roach* (2007) 233 CLR 162, 178 (Gleeson CJ), 203 (Gummow, Kirby and Crennan JJ).

[50] Justice Antonin Scalia and Justice Stephen Breyer, 'The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 *International Journal of Constitutional Law* 519, 534.

Take the expression 'cruel and unusual punishment' in the *United States Constitution*.[51] It doesn't say 'cruel and unusual punishment according to the laws and usages of the states of the United States'. It talks of 'cruel and unusual punishment' in the context of a constitution for the United States. At least on one view, it's therefore cruel and unusual punishment objectively. What is 'cruel and unusual punishment'? In the modern age, it doesn't seem to me so unreasonable to have regard to what the world says on this. So the majority in the Supreme Court of the United States looked at treaty law because, I think, apart from China, and Iran (countries that don't have a great deal in common with the American legal system), all other countries had banned the execution of minors. At the very least, that fact puts the judge to the test in his or her own jurisdiction as to whether or not 'cruel and unusual punishment' in today's age can mean that the judge's own country can still execute young people.

I accept that 'cherrypicking' could be a problem. However, Justice Breyer explained that concept too. This notion is also sometimes explained in the terms used by one judge in the United States: 'looking over a crowd and picking out your friends',[52] and then copying what they do. Well, Justice Breyer's answer to that potential problem is the one I too would give. Of course, if you are illegitimate and if you are dishonest, then you only look for your friends and their opinions. But legitimate and honest judges will look to a range of opinions before they come to their conclusions.[53]

Some of what Professor Allan has been saying today looks rather similar to the dissenting views of Hayne and Heydon JJ in *Roach*, the prisoners' voting case.[54] However, the majority in that case came to the different view.[55] I think the tipping point in *Roach*, as we call it now, was when I asked a question of the Solicitor-General for the Commonwealth: 'Does your view of the *Australian Constitution* mean that Parliament could go back to the laws against voting by Roman Catholics? Could Parliament in Australia take away the vote from Roman Catholics?'[56] Gleeson CJ immediately pricked up his ears at that question about his co-religionists. Indeed, in his reasons, he refers to the fact that it surely couldn't be intended in our *Constitution* that Parliament could enjoy the power to enact laws that restore the laws that existed before the *Roman Catholic Relief Act 1829*, 10 Geo 4, c 7.[57]

It follows that you must have a concept of the *Constitution*. I appreciate that everyone would like to have everything clearer and simpler. But Professor Allan

51 *United States Constitution* amend VIII.

52 This quote is attributed to Judge Harold Leventhal in Patricia M Wald, 'Some Observations on the Use of Legislative History in the 1981 Supreme Court Term' (1983) 68 *Iowa Law Review* 195, 214, quoted in *Exxon Mobil Corporation v Allapattah Services Inc*, 545 US 546, 568 (Kennedy J for Rehnquist CJ, Scalia, Kennedy, Souter and Thomas JJ) (2005). See also Scalia and Breyer, above n 50, 530.

53 Cf Scalia and Breyer, above n 50, 530–1.

54 (2007) 233 CLR 162, 220–1 (Hayne J), 224–5 (Heydon J).

55 Ibid 177–9 (Gleeson CJ), 203–4 (Gummow, Kirby and Crennan JJ).

56 See *Roach v Electoral Commissioner* [2007] HCATrans 276 (13 June 2007) 6960–82 (Gleeson CJ, Kirby J, D M J Bennett QC).

57 *Roach* (2007) 233 CLR 162, 174.

still hasn't answered the question about the 'jury' in s 80 of the *Constitution*. The fact is that it isn't all clear and simple. It requires values and judgement to give a word a precise meaning. There are constraints. The judges are not sitting under a palm tree just deciding things as they think they should be. The decision-maker is a judge. That itself implies membership of a very conservative and cautious profession, let me tell you. But giving meaning to words and expressions is just an inescapable aspect of the job.

Stone: Let me open this up now for questions. I am sure this interesting discussion has got you all fired up.

Question: Can I respond perhaps to Michael Kirby's questions about juries and then ask him a question. It seems to me that it is misleading to suggest that the Australian people in 1900 regarded the meaning of the word 'jury' as excluding women or people without property. At the time they were basically giving women the right to vote. So I very much doubt they even considered the meaning of the word.

Kirby: Can I comment on that? I am old enough to have participated in many trials where it was 'gentlemen of the jury'. Right up to the 1970s in Australia, it was 'gentlemen of the jury'. So the word was deeply entrenched in our concept of what a 'jury' was. I would suspect that most people in the 1890s would have thought a jury was constituted of 12 men. If the judge went to a dictionary or encyclopaedia of that time, that is what it would have told the judge. So this is the essential flaw of originalism.

Questioner: But whether with the word 'jury' or anything else, do not constitutional concepts import what might be described as the essential meanings of the words used? Is that not a concept you yourself have employed to describe the function that the judges are fulfilling?

Kirby: Well, first of all, the word 'jury' is just one illustration of the problem. There are many others that demonstrate that it's really dangerous to accept an originalist approach. And in fact it's not what the High Court of Australia does. Take *Sue v Hill*.[58] That case concerned the meaning of the expression describing a British subject, namely, 'subject of the Queen'.[59] That expression was interpreted to mean a 'subject of the Queen' in right of the United Kingdom.[60] Now that's certainly *not* what those words would have been thought to mean in 1901.

But what about the 'essential meaning'? What do I mean when I refer to the 'essential meaning' of words? It is astonishing how that little blob of grey matter in our heads finds words that express our thoughts that we communicate from one human brain to another, from one consciousness to another. The phrase used may amount to an imperfect expression. But it has to be assigned a legal

[58] (1999) 199 CLR 462.
[59] *Australian Constitution* s 34; see also s 117.
[60] See *Sue v Hill* (1999) 199 CLR 462, 525 (Gaudron J).

meaning in the constitutional context. The decision in *Marbury v Madison* ultimately acknowledges that the relevant meaning is only that which the judges finally decide the word means.[61] There is no getting away from that fact. Particularly in a federal constitution, you have to have neutral umpires who will decide what a disputed word or phrase or provision means.

So if I used the expression 'essential meaning', all I meant was the 'essential meaning' that the judges ultimately give to the words, whether it is 'jury' or 'subject of the Queen' or any other expression in the *Constitution*. The main point is that the applicable meaning is not to be found, as Scalia J thinks, by going to the dictionary of the age when the *Constitution* was drafted and adopted. That cannot be the correct approach because, in a practical world, new experience will give new content to the meaning. As, for example, it does in the notion of a 'jury' or the notion 'subject of the Queen' in today's world.

Stone: I want to bring Jim Allan in on this.

Allan: Well, I just think that it is highly contestable to give judges the power that is being claimed. There is a fundamental difference between a scoring rule and giving someone the authoritative power to record what the score is. From the point of view of a citizen, the *Constitution* may be what the judge says it is. But I don't know how you can sit on the High Court as a judge and say the law is whatever I think it is. There has to be something else to it, something external and objective. Otherwise you run into really big problems. So yes, there are many reasons why for citizens the *Constitution* now amounts to what the judges say it is. But for interpreters there must be something external to themselves. If there is not, that makes an awful lot of the moral claims, moral assertions and moral philosophy cited by interpreters highly debatable — just matters of opinion that from the non-judicial vantage lack legitimacy.

Question: I found the reasoning of the majority in *Roach* convincing both in the analysis of the text of the *Constitution* and in the reasoning by reference to history and foreign analogies.

Allan: Would it matter to you that when the *Australian Constitution* was framed, prisoners weren't allowed to vote?

Questioner: Not necessarily.

Allan: I think that would matter. That said, I think that could be understood as a question along the lines of: 'Do you have to compromise sometimes as an originalist?' And that raises the issue of when can one be certain that a decision has been wrongly decided. Reasonable, informed people can and will disagree at what point that kicks in. Even Ronald Dworkin said that at some point the old, wrongly decided case gets locked in and you have to give way to it and maybe even defer to it.[62] So I would say 'yes' to whether any interpretive theory needs to compromise with perceived past mistakes. But I don't think there is any clear

[61] See 5 US (1 Cranch) 137, 166–7 (Marshall CJ for the Court) (1803).
[62] Ronald Dworkin, *Taking Rights Seriously* (1977) 118–23.

point at which people are going to agree when that is. So I think that in a common law system you couldn't really ever say: 'Well, this case never has any potential constraining effect as long as I think it was wrongly decided.' Any system of interpretation, even a 'living tree' type one, is going to have to compromise with past decisions that are felt to have been wrongly decided. But what I will say — stress, in fact — is that there is a certain asymmetry here. The sort of people who think that the *Constitution* locks outcomes in are going to be, I think, noticeably more inclined to give more weight to past decisions that they think were wrongly decided. By contrast, those who see the *Constitution* as expressing society's most cherished values, with judges there to update things or to keep pace with civilisation, are going to be much freer when it comes to overriding disliked past cases here in the present. So in a sense it's a one-way ratchet-up effect where people who give greater weight to decisions they think were wrongly decided are, over time, losing out to people who give disliked cases less constraining effect. It's going to be a one-way ratchet-up effect. Now I think that sort of asymmetry is a problem, at least for originalists. I think interpretatively conservative approaches to interpreting a constitution will be eroded over time by the 'living tree' crowd. And that's a problem.

Kirby: As a member of the 'living tree' crowd, I should say that there's a lot of law on this. There's a very strong stream, probably comprising the majority in the High Court — and I was one — that has taken the view that, because the *Constitution* is a higher law, the ultimate duty of the judge who is sworn to uphold the *Constitution* is to give effect to the *Constitution*. It is not simply to follow precedent blindly.[63] On some matters, precedent has led us into a whole series of errors.

On the meaning of the constitutional expression 'peace, order and good government', when I said what I said in the Court of Appeal of New South Wales in *BLF*,[64] I was of course bound by a series of High Court and other decisions which said 'peace, order and good government' in constitutional texts are words of grant and not words of limitation. However, it was interesting to me to read a comment in *The Globe and Mail* newspaper in Canada after the same-sex marriage decisions.[65] It contrasted the developments in the United States of America with those in Canada. The United States, with its avowed commitment to 'life, liberty and the pursuit of happiness', could not deliver this. Boring old Canada, with 'peace, order and good government', could, because those notions were ones that extend to good government for everybody. So Canada could deliver this. It's very interesting to compare that development with the votes of people in the United States about miscegenation. They began with 72 per cent of the people in America, at the time of the decision of the Supreme Court in

63 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australia* (1913) 17 CLR 261, 274–5 (Isaacs J) ('*Engine-Drivers' Case*'); *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311, 316 (Deane J).

64 See above nn 6–8 and accompanying text.

65 Heather Gold, 'Gay Rights: Canada, You Surprised Me', *The Globe and Mail* (Toronto), 17 July 2002, A13.

Loving v Virginia ('*Loving*'),[66] saying that the interracial marriage was a very wrong thing. Blacks shouldn't be allowed to marry whites and vice versa. Seventy-two per cent of Americans said that.[67] And yet, within a few years that opinion had been abandoned and people accepted that *Loving* had been correctly decided.

Stone: I am trying to see how many other questions there are, because we have only got time for a few. I will allow two. What I would like to do is get both of you to ask your questions and then each of the two participants can answer each of those questions. So, Dale, do you want to put your question, and before you answer, we'll get the other question.

Question: Could the solution be to embrace some form of 'moderate originalism' and, if so, what would it involve?

Stone: And the other question, as quickly as you can?

Question: Our *Constitution* has lasted a very long time. But its central feature lies in the detailed provisions for the creation of a national Parliament. Is it not inherent in that feature that, generally speaking, we should leave it to the elected parliamentarians to correct suggested injustices in our society?

Stone: Now I would like to invite both of you to respond as quickly as you can. Perhaps Jim Allan and then Michael Kirby?

Allan: I just disagree with the idea that you can sit down with a constitutional system and, if you happen to think something is immoral, then as a judge you can take a remedial course of action and call that 'interpretation'. Even if you don't think that's illegitimate, you are still locked in in another way. As I said at the start, in most of the instances that anyone can articulate, the *Constitution* is setting a floor level of entitlements or rights or guarantees or protections or structures above which you just leave it to the elected Parliament. You have to convince your fellow citizens above those floor level constraints. I actually have real doubts that the Australian High Court would go back and look at, say, federalism issues back in 1920 and decide that the *Constitution* had been wrongly interpreted. They are not likely to go back and reopen cases from 1920. Unfortunately, because I speak as a federalist, we are stuck with the decision in the *Engineers' Case*[68] and many other terrible federalist decisions. So I don't think that they will actually change that. But that's just an empirical claim. I suppose, then, that I think you're right in the sense that there are different versions of originalism. I haven't articulated or outlined the various versions the US scholars advance. And true, it gets so complicated with semantic meanings and all those refinements that I think one can reach a level of sophistication at

[66] 388 US 1, 12 (Warren CJ for Warren CJ, Black, Douglas, Clark, Harlan, Brennan, White and Fortas JJ) (1967), holding that Virginian miscegenation statutes violated equal protection and due process clauses in the fourteenth amendment.

[67] George H Gallop, *The Gallop Poll — Public Opinion 1935–1971* (1st ed, 1972) vol 3, 2168.

[68] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').

which any real life judge is actually unable or unwilling to use it. So you have to strike a bargain between usability and sophistication — remember, I see this as the least bad interpretive option going, because it's the one that puts the most constraints on the interpreting judge. But as to specifying a trigger for looking overseas, as I don't think this is legitimate for constitutions as opposed to statutes, I suppose you and I just have to part company on the underlying assumption here.

Kirby: There are two questions. The first was whether I could embrace so-called 'moderate originalism'. Well, the answer is 'no'. I can't do so because I believe, and have said many times, that a search for what was said in the Constitutional Conventions of the 1890s and what was said around the time the *Constitution* was adopted is fine as background. But it's a fact that originalism connotes that you are really searching for what the founders had in their minds.

My view of the *Constitution* is that the founders neither intended, nor did they have the power as the founders, to bind us to what was in their minds.[69] Just imagine all those gentlemen with their top hats in the 1890s in an absolutely different age binding us to what they had in their minds for the governance of a contemporary Australia which is so very different. Different not least in its attitude to Aboriginal Australians. Different in its attitude to White Australia, to Asian and to other people of colour. Different not least in its attitudes to gays, for that matter. And to women. I mean, it's an inflexible, unchanging, non-constitutional notion to bind us to the past in that way. But to say you will look to the context of what they said and that can give you some ideas for what the *Constitution* is getting at in the modern age, well, that's fine. Assistance, yes. Handcuffs, no.

As to being suspicious of other jurisdictions, well, of course you don't just pick them up and apply them. That would be ridiculous. And that is not what any judge does. Thus, the majority in *Roach* looked at what other judges had done in Canada. They also looked at what judges had done in *Hirst* in the United Kingdom. And they looked to the European Court of Human Rights, a very distinguished and persuasive court. The majority in *Roach* did this over the protests of Hayne and Heydon JJ.[70] They did so for the purpose of being sure that they were taking into account all the relevant considerations that have occurred to other very clever people looking at a similar problem. But, of course, they recognised that this had occurred in very different constitutional contexts. So it's a matter of adjusting your own answer by reference to any differences that exist between your text and theirs.

Now, as to the second question which concerns the fact that our *Constitution* lasts for a long time — that is absolutely true. In fact, the *Australian Constitution* is the sixth oldest continually serving constitution in the whole world. That's an amazing thing for what we think of as a young country. But it is the truth. So when you posit your question by saying what did the founders intend — well, I

[69] *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 522–3 (Kirby J).
[70] (2007) 233 CLR 162, 220 (Hayne J), 225 (Heydon J).

just don't accept that that is the correct way to look at it. It may be different in the *Treaty of Waitangi*[71] because that is a treaty and it has been made a constitutional basis in New Zealand.[72] But our *Constitution* was reified once it was made as a *Constitution*. We accepted the principle of judicial review in *Marbury v Madison* from the start. Our judges simply say what, in their conscientious and reasoned judgement, is the meaning that the text and the purpose and principle lead to.

Whenever I hear these 'romantic notion[s]' about democracy (and that phrase is not mine, it's the phrase of former Chief Justice Mason),[73] I just remind myself that we weren't all that good about Aboriginal Australians. We had elected Parliaments from the 1850s. Yet we did not fix up the position of title to land of Aboriginal Australians. We oppressed the Aboriginal people. We took their land and later we took their people because they were pale and thought suitable for our adoption. It was a wickedness. And it is a good thing that the judges took the first step as they did in the *Mabo* case.[74] We didn't change White Australia in Parliament for three quarters of a century, although we were under enormous pressure from the Imperial authorities. When I sat in *Wik*,[75] I looked at the records concerning battles between the settlers and the Imperial authorities. The British were really rather proper in trying to get the settlers in Australia and elsewhere to conform in their multiracial Empire to principles of non-discrimination. Yet they failed. And our Parliaments kept those racial laws until 1966. At school we celebrated Empire Day. I even made a school speech about Empire Day in 1954.[76] The Empire wasn't all bad. But we in Australia, with all of our democratic polities, didn't fix things up. We didn't fix things up about women. We still haven't. And we certainly haven't fixed things up about refugees, prisoners and gays and other stigmatised minorities. So don't tell me that Parliaments always fix things up in Australia. They don't. Judges have a role. Justice exists in this country. Judges and courts in a modern democracy have an important function to perform in protecting it. And in stimulating Parliaments into correcting injustices that, left to their own devices, they might leave unrepaired.

Stone: I need now to bring this public conversation to a conclusion. Before I do so, I would like those present to join with me in thanking the participants for their willingness to share their opinions and experience.

71 See *Treaty of Waitangi Act 1975* (NZ) sch 1.

72 See *New Zealand Maori Council v A-G (NZ)* [1987] 1 NZLR 651, 664–7 (Cooke P); *Tainui Maori Trust Board v A-G (NZ)* [1989] 2 NZLR 513, 517–20, 527–30 (Cooke P). Cf Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government* (4th ed, 2004) 336–8, 346–8.

73 Mason, above n 9, 69.

74 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

75 *Wik Peoples v Queensland* (1996) 187 CLR 1.

76 See W Lawson, 'Empire Day, 1954' (December 1954) *The Fortian: The Magazine of the Boys' High School Fort Street* 27.