Lionel Murphy and the Jurisprudence of the High Court Ten Years On

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Commentators on current developments in the jurisprudence of the High Court often express some surprise at the novel methods of interpretation adopted by the more 'activist' members of the Court in recent years. Comparisons are drawn with the pioneering approach of Justice Lionel Murphy, a member of the Court from 1975 to 1986, but it is noted that his methodology was spurned by other members of the Court at the time and that his opinions are rarely cited in current judgments.[1]

This paper examines the legal method used by Murphy J and compares his style, approach and substantive argument to those featuring in some of the recent cases that are said to mark a radical departure in judicial method, particularly with respect to implied constitutional rights. The principal objective is to analyse the similarities and differences between the contribution of Murphy J and some current High Court reasoning so as to clarify the nature of both.

The general conclusion is that current trends in High Court jurisprudence adopt a number of themes and methods similar to those favoured by Murphy J but do so in ways which are more detailed and orderly and in many instances more legalistic in presentation. In general, the attitudes prevalent in the later Mason Court are less deferential to the legislative branch of government and, on balance, and despite *Mabo*, less concerned with individual and social justice than is the case with Murphy J. With the possible exception of Dawson J, the current and recent justices of the Court echo and develop one or other, or some mix, of the multiple strands of reasoning evident in the kaleidoscope of the Murphy corpus. The plurality of types of implied-rights doctrines which, in the 1970s and 1980s were almost entirely confined to the often cryptic Murphy judgments, are now to

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1 M Kirby, 'Lionel Murphy and the Power of Ideas' (1993) 18 *Alternative LJ* 253.

be found dispersed, distinguished and expanded in the disparate judgments of several justices.

If there is a Murphy legacy it is a complex and elusive one with many and varied strands.

Objectives of the Article

There are several impediments to coming to a clear view of the relationship between Murphy J and the later Mason Court.

In the first place, most of the published analysis of Murphy J's work was carried out in the immediate aftermath of the dramatic attempts to discredit him which surfaced in 1984 and continued until his sudden death in 1986. This contemporary work inevitably lacks perspective and balance, and is often little more than a brief commentary by way of introduction to excerpts from Murphy J's most striking opinions.[2] There have been few recent studies and these do not provide full and considered assessments of Murphy J's judicial work.[3]

Second, there is little to be gleaned from a scrutiny of judicial comment on, and use of, Murphy J's opinions since there is so little of it. Murphy J's judgments were treated with disdain by most lawyers and his colleagues during his lifetime and for some time thereafter. With a few notable exceptions, there is still a general reluctance in legal circles to cite or even distinguish his opinions, as Kirby J documents.[4] Thus, there is no consideration of Murphy J's opinions to be found in the judgments in *Cole v Whitfield*[5] even though the justices in that case came close to adopting Murphy J's dissenting opinion in *Buck v Bavone*.[6] Kirby J suggests that the 'lack of candid acknowledgment'[7] in the recent free-speech cases[8] is remarkable, as indeed it is, given the apparent similarity between the majority's judgments and the dissenting opinions of Murphy J in *Ansett Transport Industries (Operations)*

2 For instance, JA Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987).

3 However, in addition to Kirby, 'Lionel Murphy and the Power of Ideas', note 1 above, see G Williams, '*Engineers* is Dead, Long Live *Engineers!*' (1995) 17 *Sydney Law Rev* 62.

4 Kirby, 'Lionel Murphy and the Power of Ideas', at 254.

5 (1988) 165 CLR 360.

6 (1976) 135 CLR 110.

7 Kirby, 'Lionel Murphy and the Power of Ideas'.

8 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd* (1992) 177 CLR 1.

Pty Ltd v Commonwealth,[9] *McGraw-Hinds (Aust) Pty Ltd v Smith*[10] and *Miller v TCN Channel Nine Pty Ltd.*[11]

Similarly, there is little positive acknowledgment of Murphy's judgments in recent landmark cases such as *Theophanous v The Herald and Weekly Times Ltd*[12] and *Stephens v West Australian Newspapers Ltd.*[13]

The principal direct reference to Murphy J in the later Mason Court occurs in the opinion of Dawson J in *Australian Capital Television Pty Ltd v Commonwealth*[14] (repeated in *Theophanous*), who is strongly critical of the new implied-rights approach. Here Dawson J's intention is to discredit the opinions of the majority of the Court by likening them to those of Murphy J rather than to use Murphy J's judicial authority.[15] However, there is a favourable citation by Gaudron J in *Australian Capital Television*[16] and oblique, albeit critical, references in the opinions of Deane and Toohey JJ in *Australian Capital Television*[17] and *Nationwide News.*[18]

Explanations for the judicial neglect of Murphy J are many and varied. No doubt many of his judicial contemporaries, particularly Chief Justice Barwick, found the political substance of his opinions unpalatable. Murphy J's frequent and open disregard for precedent must have seemed threatening and unprofessional to judges, even those not imbued with the spirit of literalism. Judicial conservatism is always evident where an individual judge regularly disagrees with the majority and often everyone else on the bench, as was the case with Murphy J.[19]

While Barwick CJ can be as dismissive as Murphy J with respect to precedent, it is for him a devastating criticism of a position to say that it has not been argued before, whereas such novelty is a feature of

9 (1977) 139 CLR 54.

10 (1979) 144 CLR 633.

11 (1986) 161 CLR 556.

12 (1994) 68 ALJR 713.

13 (1994) 68 ALJR 765.

14 (1992) 177 CLR 106.

15 *Australian Capital Television* (1992) 108 ALR 577 at 630-2. Implied constitutional rights are alleged to lack sound constitutional foundation because they depend on constitutionally extrinsic sources such as 'the nature of our society' - a clear reference to Murphy J in *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670.

16 *Australian Capital Television* (1992) 108 ALR 577 at 651-2.

17 Id at 618.

18 (1992) 108 ALR 681 at 727.

19 See 'Overview' below.

Murphy J's output. The flavour of Barwick CJ's attitude to Murphy J's contribution is captured in the opening paragraph of Barwick CJ's opinion in *Uebergang v Australian Wheat Board*[20] explaining why the issues apparently determined by the High Court in *Clark King & Co Pty Ltd v Australian Wheat Board* had to be reviewed by the Full Court:[21]

> Of the majority, one Justice, Murphy J, took a ground which has never been accepted by any Justice of the Court in any case and which, as I pointed out in my own reasons for the judgment in *Clark King*, is, in my opinion, insupportable on a reading of the Constitution itself. It is inconsistent with every decision of the Privy Council and of this Court upon the meaning and operation of s 92 of the Constitution: see in particular, *The Commonwealth v Bank of New South Wales*... Further, it is noticeable that no party to the argument of the present case has attempted to support these reasons of my brother Murphy. The views of Murphy J were not shared by the other Justices forming the majority: nor did Murphy J support the reasons of those Justices.

The Chief Justice is not opposed in this by other justices, including Mason J, who was himself openly critical of Murphy J's positions.[22] This may explain why, more recently, some of the justices may have found it difficult to go back on an established pattern of neglect and use at least those opinions of Murphy J which are now widely shared by members of the Court.

A more benign explanation for why Murphy J's judgments continue to suffer judicial neglect rests on the thesis that Murphy simply asserts his views rather than argues from past decisions in a legally orthodox manner. Murphy J's judgments lack judicial authority because they are not embedded in a web of precedent.

Many of Murphy J's judgments, such as in *Clunies-Ross v The Commonwealth*[23] are put rather bluntly. Brendan Edgeworth points out that in cases such as *Calverley v Green*, Murphy J's insightful points are not developed or applied in detail to the cases analysed in the majority judgment:[24]

> With some justification it could be said that his judgment was so short these critical insights were not more rigorously applied to the body of case law discussed more amply by the majority. It is this tendency which

20 (1980) 145 CLR 266.

21 Id at 276.

22 In *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556.

23 (1984) 155 CLR 193.

24 B Edgeworth, 'Murphy on Property' in Scutt, *Lionel Murphy: A Radical Judge*, p 184.

> has made it all the easier for Murphy's critics to see some of his judgments as more in the nature of social commentary than legal reasoning.

Even Kirby J, an ardent Murphy supporter, concentrates on the impact of Murphy J's ideas rather than his legal method.[25]

That the neglect of Murphy J's judgments is due to his unprofessional methods of argument is a thesis which needs exploration at least to the extent that it bears on the analysis of Murphy J's approach to judicial decision-making, which is a principal focus of this paper. The suggestion is that Murphy J relies on extra-legal factors, bypasses established precedent and appeals directly to considerations of policy and current social values. He thereby detaches himself from the judicial mainstream and renders his opinions of little value for the purposes of a precedent-respecting discourse.

While all this is not entirely accurate there is no doubt that some of Murphy J's judgments are unhelpfully brief. Murphy J is certainly more impatient with arguments from precedent than other senior Australian judges, before or since, particularly in relation to statutory and constitutional interpretation, where he tends to go straight to the evident meaning of the text when read in the light of its purpose. Murphy J is prepared to mount arguments which are not tied in with the texts of statutes or the Constitution when it suits him to do so.

In combination with the radical content of some of his decisions, such open and unashamed activism grates not only in the Anglo-Australian judicial mind but also with the covert manner in which judges have traditionally presented their role to the public as declaring rather than making the law. In contrast, in *Gazzo v Comptroller of Stamps*,[26] for instance, Murphy J appears to endorse the view that judges hide their real powers and suggests that a time will come when 'the other branches of government and the public understand the real, as distinct from the apparent, role of the judiciary', including its law-making function, a theme which former Chief Justice Mason has since made commonplace but which was not openly admitted by the Australian judiciary until recently. Such open adoption of a radical American-Realist approach may be cited as just one more aspect of Murphy J's anticipation of current trends according to which it is acceptable to acknowledge that judges do make law; this admission did not however endear him to his colleagues in the 1970s and early '80s.

25 Kirby, 'Lionel Murphy and the Power of Ideas'.

26 (1981) 149 CLR 227.

Whatever explanations for the neglect of Murphy J's judicial opinions we adopt, it is possible to argue that he has been far more influential than is apparent from the reported cases. In this context, it is instructive to list the variety and number of issues on which Murphy J's then often highly controversial views have since become accepted orthodoxy:

- His hostility to appeals from State governments to the Privy Council in London and the acceptance of decisions of the House of Lords as merely persuasive along with judicial acceptance on an equal basis of decisions from other common law countries, including the United States;
- His line on s 92 in *Buck v Bavone*, adopted in *Cole v Whitfield*, that s 92 deals with protectionism, rather than economic libertarianism;
- His use of implied constitutional rights from *Henry*[27]onwards, sharply rejected by Mason J in *Miller*,[28] is very similar to that adopted in *Australian Capital Television* and *Nationwide News;*
- His introduction of international human rights norms into the interpretation of the common law, as Brennan J does in *Mabo*,[29] and Kirby J, the most recent appointment to the High Court, has long advocated as President of the NSW Court of Appeal;
- His assertion of the right to counsel in serious criminal cases; denied in *McInnes v The Queen* in 1979 and adopted in *Deitrich v The Queen* in 1992;[30]
- His enlarged interpretation of the term 'dispute' in Federal industrial relations law;[31]

27 *R v Director General of Social Welfare (Vic); Ex parte Henry* (1975) 183 CLR 369 at 388.

28 *Miller* (1986) 161 CLR 556.

29 *Mabo v Queensland (No 1)* (1988) 166 CLR 186. Compare Murphy J in *Dowal v Murray* (1978) 143 CLR 410 and *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

30 Murphy J's dissent in *McInnes v The Queen* (1979) 143 CLR 575 is in effect followed in *Dietrich v The Queen* (1992) 67 ALJR 1.

31 *The Queen v Bain; Ex parte Cadbury Schweppes Australia Ltd* (1984) 159 CLR 163 which prevailed in *Re Federated Storeman and Packers Union of Australian; ex parte Wooldumpers (Victoria) Ltd* (1989) 166 CLR 311.

- His objection in *Hughes v National Trustees Executors and Agency Co Australia Ltd*[32] and *Goodman v Windeyer & Ors*,[33] to the intrusion of 'moral claim' into the *Testators Family Maintenance and Guardianship of Infants Act* 1979 which was followed in *Singer v Berghouse (No 2)*;[34]
- His willingness to seek evidence of the intention of the legislature and of the constitutional framers to aid his interpretations of ordinary and constitutional law. As is now generally the case, he was prepared to draw on evidence of the constitutional debates,[35] just as in other cases he is open to using Hansard to determine Parliament's intention.

It is also interesting to note that some of his dissenting judgments in criminal appeals, such as the Chamberlain and the Ananda Marga cases, which turn on assessments of evidence, have (unusually in matters of criminal law) been formally vindicated by subsequent events.[36]

Yet, while it is easy to assume that Murphy J's opinions opened the way for these changes, this is hard to prove. The fact that he was ahead of his time is not in itself proof that he advanced the changes he espoused. He may have been more prescient than influential. In fact, taking into consideration his unpopularity in legal circles, it may be that he unwittingly retarded these developments.

Given these uncertainties and controversies with respect to Murphy J's historical impact, many of which are bound to remain matters of speculation, this article concentrates on a comparative analysis of the approach and the substance of the characteristic judgments of Justice Murphy on the one hand and the later Mason High Court on the other.

The objective is to pin-point the different strands of Murphy J's jurisprudence and, by way of contrast, to clarify the nature of the changes that are currently taking place in High Court judgments so that they may be better understood in their legal context.

32 (1979) 143 CLR 134.

33 (1980) 144 CLR 490.

34 (1994) 181 CLR 201.

35 As in *R v Pearson Ex Parte Sipka* (1983) 152 CLR 34.

36 *Chamberlain v The Queen* (1984) 153 CLR 521 and *Alister v The Queen* (1983) 154 CLR 404.

Overview

In all, Murphy J was involved in 632 decisions of the High Court, and in 404 of these he made a separate statement of his own views. Of these decisions, Murphy J dissents in over 130 judgments, almost one fifth of the total, a very large percentage for a High Court judge.[37]

These dissenting judgments are often quite substantial in comparison with his others and contain some of his most original opinions. However, even when he is in the majority, Murphy J's reasons are often quite different from those of other judges who share his conclusions.

We therefore have a substantial body of distinctive material requiring analysis.[38] Indeed, the most noteworthy fact about Murphy J's career in the High Court is his dogged and repetitive persistence as a lone voice. This suggests that he had deeply held and sustained convictions about the need to change the methods and ethos of the Court.

An important question in contemplating his approach is to ask whether Murphy J's attachment was principally to a reform of method and approach or whether his agenda was more to do with the substance of the decisions, to which end he adopted whatever method seemed most conducive. This article tends to the latter view.

A survey of the subject matter of his noteworthy judgments gives some idea as to his substantive interests as well as the sort of issues that came before the Court in his time. Blackshield *et al* classify the cases they select under the headings 'Democracy and Fundamental Rights', 'Trial by Jury', 'Abuse of the Criminal Process', 'Use of the Legal System', 'Federalism', 'The Separation of Powers', 'Free Trade and Excise', 'Tax Avoidance', 'Marriage and the Family', 'Industrial Arbitration', 'Damages and Personal Injuries', and 'The British Connection'. The cases dealt with under these headings suggest a concern for individual rights, judicial process and political power. More generally, Blackshield notes that Murphy J had a keen 'perception of social problems',[39] although not always, in Blackshield's eyes, a corresponding feeling for sensible solutions to these problems.

37 AR Blackshield, D Brown, M Coper, R Krever (eds), *The Judgments of Lionel Murphy* (Primavera Press, 1986) at pp xviii-xix. Sir Keith Mason regards this proportion as 'high' (in his paper to the conference on the Mason Court held in Melbourne, September 1995) and Michael Kirby speaks of it as 'hugely higher than that for any other High Court Justice': Kirby, 'Lionel Murphy and the Power of Ideas'.

38 Concentration on his distinctive judgments may, however, distort our view on his typical legal methodology, for which purpose a rather wider range of material needs to be considered.

39 AR Blackshield et al, *The Judgments of Lionel Murphy*, at p xiii.

More specifically with regard to Murphy J's substantive views, it is clear that there is a significant number of important and radical judgments under each heading dealing with civil liberties, especially with respect to the criminal law. Thus, in dissent or for his own distinctive reasons as a member of the majority, Murphy J found that Royal Commissions which investigate criminal matters are invalid because they impinge on judicial power;[40] similar fact evidence is unsound in criminal proof;[41] the test for provocation is subjective not objective;[42] it is double jeopardy for a criminal appeal to result in a third trial;[43] illegally obtained evidence is never admissible;[44] it is unsafe to convict on the basis of confessions alone;[45] the prosecution must disclose evidence favourable to the defendant;[46] acquittal is a finding of innocence;[47] persons accused of serious crimes have a right to counsel if necessary at state expense;[48] and mandatory life sentences may be unconstitutional.[49]

This line of cases represents a sustained effort to provide more protection for accused people, particularly those who are poor or unpopular. A related concern with social justice can be seen in many of Murphy's other judgments. The tax cases[50] can be regarded collectively as an attempt to thwart the objectives of better-off citizens seeking to avoid paying significant taxation by artificial schemes that allow 'the burden of taxation to be shifted increasingly from those taxpayers most able to afford it to those less able'.[51]

40 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (No 1)* (1982) 152 CLR 25.

41 *Perry v The Queen* (1982) 150 CLR 580.

42 *Moffa v The Queen* (1977) 138 CLR 601.

43 *Demirok v The Queen* (1977) 137 CLR 20.

44 *Bunning v Cross* (1978) 141 CLR 54.

45 *Cleland v The Queen* (1982) 151 CLR 1.

46 *Lawless v The Queen* (1979) 142 CLR 659.

47 *The Queen v Darby* (1982) 148 CLR 668.

48 *McInnes v The Queen* (1979) 143 CLR 575.

49 *Sillery v The Queen* (1979) 35 ALR 227.

50 Such as *Lucretia Investments Pty Ltd v Federal Commissioner of Taxation* (1975) 6 ALR 116; *Federal Commissioner of Taxation v South Australian Battery Makers Pty Ltd* (1978) 140 CLR 645.

51 *Federal Commisioner of Taxation v Everett* (1981) 143 CLR 440 at 457; *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55; and *Federal Commissioner of Taxation* (1980) 143 CLR 646.

Similar social concern is to be seen in his opinions in family law matters, such as *Gazzo v The Comptroller of Stamps (Victoria)*[52] which seeks to contain the costs of divorce, and those cases in which Murphy J argued for a broader reading of the powers of the Family Court in order to protect the interests of children.[53]

His opinions in personal injury cases can also be seen as attempts to extend protections and produce a fairer distribution of losses with a special emphasis on the needs of accident victims.[54] His objectives here are summed up in his opinion that, despite the limited application of existing precedent, damages should be awarded to an old man who injured himself through slipping on an oil slick, on the grounds that '[a] law which gives no remedy to a plaintiff in these circumstances is unjust'.[55]

Murphy J's concern for individual liberties and protections reflects a traditional liberal philosophy, although even here we can see an emphasis on defending individuals belonging to weak and powerless groups, such as Aboriginal people,[56] prisoners[57] and women,[58] that is more radical in nature.

Murphy J was also concerned with community or group-based solutions to social and political problems. In particular he defends a 'social' concept of property, which he sees as encompassing a range of interests far wider than market values and the individual's private rights. He has a socially oriented view of the duties of property holders and the restrictions which may be placed on their rights in view of the public interest.

Thus, in *Forbes v NSW Trotting Club*,[59] he does not uphold the absolute right of private-property owners to exclude others from their land without regard to natural justice and instead fastens on the public interest in that land as a source of employment, thus enabling him to give priority to the rules of trotting over the traditional absolutist ownership rights of the club. Forbes, a professional punter, had suf-

52 (1981) 149 CLR 227. As Attorney-General, Lionel Murphy introduced the Commonwealth *Family Law Act* 1975 which aimed to make divorce more accessible.

53 *The Queen v Lambert; Ex parte Plummer* (1980) 146 CLR 447; *Gronow v Gronow* (1979) 144 CLR 513.

54 *Kondis v State Transport Authority* (1984) 154 CLR, 672 and *Sharman v Evans* (1977) 138 CLR 563.

55 *Cartwright v McLaine & Long Pty Ltd* (1979) 143 CLR 549 at 574.

56 *Neal v The Queen* (1982) 149 CLR 583.

57 *Dugan v Mirror Newspapers* (1979) 142 CLR 583.

58 *Calverley v Green* (1984) 155 CLR 242.

59 [1979] 2 NSWLR 515; compare *Dorman v Rogers* (1982) 148 CLR 365.

fered a significant loss of earnings by being excluded from the paceways owned by the club.

Similarly his concern for the public interest in the use of private property led him to apply the *Trade Practices Act* 1974 (Cth) to a dispute between two commercial concerns with respect to a copyright question.[60] Murphy J's concern is not with the private rights of the individual parties as presented by them to the Court but rather with the effect their activities have on the community at large.

More evidently ideological is his willingness to accept the compulsory acquisition of the Clunies-Ross house as being within the constitutional power of the Commonwealth 'to acquire land for a public purpose',[61] in order to further the political purpose of removing quasi-feudal influence from the Cocos Islands.

It is clear, therefore, that there is a common theme in Murphy J's distinctive judgments that has nothing to do with judicial method as such. This does not mean that there is not also a continuity of method in his opinions but it suggests that he was at least as interested in outcomes as in method. This can give rise to a certain eclectic discontinuity in the totality of his legal argument.

Despite his commitment to political values, Murphy J systematically uses conventional forms of legal argument, although as we will see he does not confine himself to them. Thus, in the criminal procedure cases, analysis of the arguments used by Murphy J demonstrates that most of these opinions rest on citing and distinguishing precedents and working out the logical implications of basic common law and constitutional principles in the light of their traditional applications. Nowhere, in these cases, does he rely simply on such foundations as an assertion of a fundamental right embodied in the fabric of the Australian Constitution and in most of the cases these considerations do not feature at all.

In *R v Darby*,[62] for instance, in arguing against following the ratio in *Shannon*[63] and *Guimond*,[64] although Murphy J says that failing to treat an acquittal as equivalent to a finding of innocence 'is subversive of one of the most important constitutional principles on which the

60 *Interstate Parcel Express Pty Ltd v Time Life International (Dederlands BV)* (1977) 138 CLR 534.

61 *Clunies -Ross v The Commonwealth* (1984) 155 CLR 193. The relevant provision was s 51(xxxi).

62 (1982) 148 CLR 668.

63 *Director of Public Prosecutions v Shannon* [1975] AC 717.

64 *Guimond v The Queen* (1979) DLR(3d) 1.

freedom of our society depends', his prior argument depends on identifying a confusion in the argument of the cases and citing the evidence of law dictionaries with respect to the accepted legal understanding of 'acquittal'.[65] In the conclusion to his opinion, he depends more on the tradition of English law than on abstract political notions such as the idea of a democratic society.

None of the other criminal cases in which Murphy J does bring in human and fundamental constitutional rights actually turns on the existence of these rights. *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation (No 1)*[66] rests on the interpretation of the Constitution with respect to judicial power. *Sillery v The Queen*[67] is largely a matter of statutory interpretation together with the normal assumptions about sentencing powers embedded in traditional criminal law and procedure. *McInnes v The Queen*[68] relies primarily on overturning English cases by reference to American precedent, with some reference to the International Covenant on Civil and Political Rights, rather than on a direct appeal to the 'minimum universal standards of justice', a concept which Murphy J introduces towards the end of his judgment but does not develop.

Sillery v The Queen is characteristic of the way in which Murphy J uses the idea of fundamental rights in criminal cases to reinforce, rather than found, his opinions on matters concerning the rights of accused people. In this instance, having dealt with the matter (of whether the penalty for hijacking is mandatory or simply a maximum term) in terms of standard statutory interpretation with reference to US precedent and academic authorities, he concludes that these 'considerations alone would be enough to justify reading s 8(3) as providing a maximum penalty' rather than a mandatory one. Only then does he go on to argue that 'if [the penalty] is regarded as ambiguous, this ambiguity has to be resolved'.[69] Even at this point he does not introduce fundamental rights immediately but deals first with the propriety of an appeal to Hansard as an aid to interpretation of a statute, before he introduces the English Bill of Rights and its partial adoption in the constitution of the United States as being 'part of the Australian Constitutional fabric'.[70]

65 *R v Darby* (1982) 148 CLR 668 at 683.

66 (1982) 152 CLR 25.

67 (1994) 180 CLR 353.

68 (1979) 143 CLR 575.

69 (1994) 180 CLR 353 at 357.

70 For a contrary view according to which Murphy J bases his conclusion on a constitutional assumption against 'cruel and unusual punishment' see AR Blackshield, G

To round off his opinion, he does refer to ss 51 and 52 of the Constitution which require that government be exercised 'for the peace, order and good government of the Commonwealth' which he then reads as excluding as invalid legislation requiring 'cruel and unusual punishment' as not being for the good government of Australia. More detailed analysis of this arguments follows in the next section. The point to be made at this stage is that in the criminal law area, which is of primary concern to Murphy J, his method is conservatively based and cumulative rather than randomly ad hoc or routinely policy oriented. He uses orthodox reasoning on its own, or in a minority of criminal law cases, supplements his orthodox arguments with considerations of controversial fundamental common law or implied constitutional rights.

In the taxation cases, precedent also features centrally, although it is more by way of reversion to earlier precedent, as distinct from more recent ones which, in his view, resulted from narrow literal interpretations of statutes which evade their obvious meaning.

The core of these opinions is the insistence on reading statutes in the light of the intention of the legislature. This reflects Murphy J's strong commitment to his conception of democracy according to which Parliament is the overriding law-making authority, in itself an orthodox-enough position in Anglo-Australian jurisprudence, although one which, as we shall see, is in doubt in some areas of current constitutional law.[71]

The reliance by Murphy J on orthodox legal precedents is further evident if we survey his uncontroversial opinions. However, it must be emphasised that Murphy J uses a wide range of jurisdictional sources. In particular he makes extensive use of US case law, which was generally eschewed by his brethren at the time on the grounds that US tradition, constitution and history are significantly different from Australia's, a position recently reaffirmed with respect to electoral matters in *McGinty*.[72]

Murphy J's use of US precedents is illuminating. He was certainly at the fore of a trend which has greatly increased to broaden the jurisdictional sources of precedent. It may be argued that he is opportunistic in the rather cavalier uses he makes of these doctrines and

Williams and B Fitzgerald, *Australian Constitiutional Law & Theory* (The Federation Press, 1996) at p 758: 'Murphy J based his conclusion on a presumption against interpreting legislation to impose "cruel and unusual punishment".'

71 See per Mason CJ in *Australian Capital Television* (1992) 108 ALR 577.

72 *McGinty & Ors v The State of Western Australia* (1996) 134 ALR 289.

decisions at a time when his brethren were keen to point out the differences between Australia and the United States.[73] There is strong reliance on US precedents in *Attorney-General of the Commonwealth (at the relation of McKinlay) v The Commonwealth*.[74] In that case, the constitutional requirement that the 'House of Representatives shall be composed of members directly chosen by the people of the Commonwealth' was interpreted by Murphy J to mean 'one vote, one value,' as in a series of American cases, so that 'the weight of a person's vote will not depend on the district in which he lives'.[75]

His justification for this reliance on US precedent is that the framers of the Australian Constitution deliberately adapted the words of the US Constitution.[76] Similarly, in supporting the majority in *Western Australia v The Commonwealth*,[77] Murphy J drew on the US tradition and the idea of a democratic society and the authority of the constitutional historian Professor Moore.

His lone dissent against the use of state funds for church schools is based on a reading of s 116 ('The Commonwealth shall not make any law for establishing any religion') according to the US, not the British, tradition.[78]

In summary, we can identify at least four not-entirely-consistent strands in Murphy J's more orthodox methods:

- Standard precedent argument, citing authority and distinguishing cases according to similarities of fact situations;
- Reversion to earlier authorities embedded in traditional common law principles which have been neglected by more recent case law;
- The use of 'foreign' precedents, particularly from the United States, to override home-grown authorities;

and in contrast to these,

73 Thus, Gibbs CJ for Mason, Wilson and Brennan JJ: 'There is no reason to reconsider these principles in the light of US authorities, which are of course decided on the basis of constitutional provisions which have no counterpart in Australia, and which in any case lay down rules not dissimilar to those of the common law': *Gallagher v Durack* (1983) 152 CLR 238 at 239.

74 (1975) 135 CLR 1.

75 Id at 65-76.

76 The argument as to the relevance of US precedent has still to be won in the High Court: see for example Gummow J in *McGinty & Ors v The State of Western Australia* (1996) 134 ALR 289 at 369-374.

77 (1975) 134 CLR 201.

78 *Attorney-General (Victoria) (at the relation of Black) v The Commonwealth* (1981) 146 CLR 559.

- Direct appeal, over the heads of decided cases, to the texts of statutes and the Constitution, as in s 92 cases.

Overall, there is less basis for the assertion that Murphy J's judgments have a 'strong legalistic basis' than for the view that he manifests 'a breadth of legal learning'.[79] It is clear that as a common law judge, Murphy J believed it was his duty to develop the common law in accordance with the contemporary values he shared, which led him into sometimes decisive policy and philosophical arguments which are, as we shall see, closely allied to some of his implied-rights approaches. This fits with the fact that much of the precedent he does use to support his conclusions is American, and as such comes from a legal system in which appeals to policy and principle are generally uncontroversial.

Blackshield takes Murphy J's US citations as far from random since they can be seen as part of a general constitutional and political theory centering on the Jeffersonian idea of the separation of powers. This itself, however, seems to confirm that Murphy J's method is sometimes a form of political philosophy, a view which is reinforced by the impression given by the samples reproduced in the available collections of excerpts from his judgments.[80] However, I have noted that a wider-ranging inspection of his judgments reveals a more orthodox justice at work.

Beyond his conventional techniques stand Murphy J's more radical methods which involve direct appeals to social and political ideas or to previously unconsidered constitutional implications and assumptions. Here, too, we find a variety of different lines of argument. Murphy J's direct appeals to justice are to be found mainly in those cases where he puts aside precedent in the interests of developing the common law. His democratic principles do not appear to inhibit his view that judge-made law is permissible, but this is circumscribed by his belief that the common law is not governed by ancient or even recent precedent so much as by a strong sense of justice and justified policy.

These two goals come neatly together, for instance, in his insistence that road-accident victims should receive full compensation, thus doing justice to these individuals while also providing an incentive to government to reduce the incidence of road accidents.

79 Blackshield in Blackshield et al, *The Judgments of Lionel Murphy*, at p xvii.

80 In addition to Blackshield et al, see J & R Ely (eds), *Lionel Murphy: The Rule of Law* (Akron Press, 1986).

> [The] sensible answer to this very serious social problem lies not in the artificial transfer of the social costs to the injured persons, but in reduction of avoidable causes including unsafe vehicles, unsafe roads, driving and unsafe industrial systems and equipment.[81]

In contrast to his developments of common law, Murphy J's indirect appeals to justice are usually in the guise of implied constitutional rights, variously defined, to which I now turn.

However, in concluding this section it is important to emphasise that an examination of the full texts of these cases and a sample of his uncontroversial opinions reveals just how much traditional legal apparatus, such as citations of precedent and quotations from decided cases, reaching far back into legal history, feature in Murphy J's judgments. Blackshield's claim that '[t]owards the law's authoritarian trappings he is almost subversive; towards its fundamental principles and true institutional values he is almost conservative'[82] is understandable in view of Murphy J's use of long-standing common law principles, but Murphy J is far from conservative in that he sometimes has very little respect for recent precedent.

With this in mind, it is time to turn to Murphy J's most radical innovation, the various constructions of fundamental (and often implied) constitutional rights.

Implied Constitutional Rights

Although it was by no means a novel concept in Australian jurisprudence,[83] Murphy J was the first High Court judge to make extensive and persistent use of the idea of implication as a source of new constitutional rights. Despite the founding fathers' rejection of the idea of a list of constitutional rights, Murphy J asserts these rights repeatedly even when it is not necessary to do so in order to reach his decision. It is not surprising, therefore, that his name is closely associated with this approach.

The general notion of implication is well established in orthodox legal methodology and Murphy J has a package of precedents which he uses to considerable effect in giving orthodox legal arguments for his own adoption of implication. He points to and gives extensive US authority for the view that 'even where specific rights are spelled out,

81 *Todorovic v Waller* (1981) 150 CLR 402 at 454.

82 Blackshield et al, *The Judgments of Lionel Murphy*, at p xvi. For further discussion on Murphy see Williams, '*Engineers* is Dead, Long Live *Engineers!*' at 62-87.

83 *R v Smithers; Ex Parte Benson* (1912) 16 CLR 99 ('the right of access to the institutions, and of due participation in the activities of the nation').

for example, in the United States Constitution, there are many others which are implied'.[84] He cites *West v The Commissioner of Taxation (NSW)*[85] as an example to back his claim that the 'history of interpretation of the Australian Constitution shows that implications have been freely made'.[86] He relies particularly on Dixon J's assertion that:[87]

> since the *Engineers'* case, a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied. I do not think that the judgment of the majority of the Court in the *Engineers'* case meant to propound such a doctrine. It is inconsistent with many of the reasons afterwards advanced by Isaacs J himself for his dissent in *Pirrie v McFarlane*.[88]

Murphy J points out that:[89]

> Later, as Chief Justice, in *Australian National Airways Pty Ltd v Commonwealth*[90] ... [Dixon J] said 'We should avoid pedantic and narrow construction in dealing with an instrument of government and I do not see why we should be fearful about making implications'.

Other examples are then cited, particularly with respect to the federal nature of the Constitution, and Windeyer J's endorsement of Dixon J's opinion.

He moves rather quickly, however, from this general idea of implication as an aid to constitutional interpretation, to the more specific and very different hypothesis that there are implied rights which can be used to render otherwise-legitimate legislation invalid.[91]

84 *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 668.

85 (1937) CLR 657 at 681-682.

86 Ibid.

87 Id at 669.

88 (1925) 36 CLR 170 at 191.

89 Ibid.

90 (1945) 71 CLR 29 at 85.

91 See M Coper, *Encounters with the Australian Constitution* (CCH, 1987) at 350: 'these implied rights and freedoms emerged either in dicta or as an aid to the construction of an ambiguous statute. But in two cases, Justice Murphy actually applied his theory of implied rights to invalidate duly enacted legislation, in one instance of State and in the other of the Commonwealth (*McGraw-Hinds* and *Miller*)'.

Murphy J first introduces an idea of fundamental rights which are not explicitly stated in the Constitution in *R v Director-General of Social Welfare (Vic); Ex Parte Henry*[92] and in *Buck v Bavone*.[93]

In *Henry* he declares laws which provide for guardianship of normal adults to be invalid:[94]

> The reason lies in our Constitution. It is a constitution for a free society. It would not be constitutionally permissible for the Parliament of Australia or any of the States to create or authorise slavery or serfdom. A law which (apart from justifications relating to infancy, unsoundness of mind, quarantine or administration of the criminal law) kept migrants or anyone else in a subordinate role inconsistent with the status of a free person, would be incompatible with a fundamental basis of our Constitution.

The following year, in *Buck v Bavone*, he concurred with the other justices in allowing an appeal concerning the interpretation of s 92 in relation to a legal requirement to register as a potato grower. In the case he takes the opportunity to develop a radical departure from precedent with an interpretation of the section which does away with the precedent-enshrined distinction between mere regulation (which is allowed) and actual restriction of trade (which is not). In dismissing the established precedents he goes directly to the text of the Constitution to vindicate his view that s 92 relates only to tariff barriers between states.

Nevertheless, it is noteworthy that he cites ten cases in support of his reading, a number which is not matched by any of the other judges in the case. Only briefly does he mention a right to freedom of movement:[95]

> The right of persons to move freely across or within State borders is a fundamental right arising from the union of the people in an indissoluble Commonwealth. This right is so fundamental that it is not likely that it would be hidden away in s 92, restricted to interstate intercourse in a clause dealing with uniform duties of customs, in a chapter headed 'Finance and Trade'. The right is not an absolute right, but is almost absolute and could not be impaired, except on extremely strong grounds, such as the administration of criminal justice in serious cases.

In neither case is the right described as an implication. He asserts the rights in question as 'fundamental' by which he appears to mean that

92 (1975) 133 CLR 369.

93 (1976) 135 CLR 110.

94 (1975) 133 CLR 369 at 388.

95 *Buck v Bavone* (1976) 135 CLR 110 at 124.

they are in some sense prior to the Constitution, an assumption rather than an implication. If they are implicit, they are implicit in that the very idea of a democratically established Constitution presupposes or manifests an intention to create a 'free society', since all are equally involved in the compact. He appears to assume that those adopting the Constitution are in some way already 'free'. I refer to these as assumptions of the constitutional compact, or 'assumed rights', for short.

Thus, because the Constitution derives its authority from the people, it sets up a free democratic society which involves (implied) rights as part of its essence. This strand appears in a number of cases. For instance, in *Buck v Bavone*:[96] 'The right of persons to move freely across or within state boundaries is a fundamental right arising from the union of the people in an indissoluble Commonwealth'. The theme is repeated in *Uebergang v Australian Wheat Board*:[97] 'Our society is a union of free people joined in one Commonwealth. From these facts flow implications of freedom of speech and assembly and other forms of communication and travel...' and again in many other cases, such as *A-G (Cth); Ex rel McKinlay v Commonwealth*,[98] *Sillery v The Queen*,[99] *Miller v Channel Nine*[100] and *McGraw-Hinds v Smith*,[101] where Murphy J speaks characteristically of 'a union of free people, joined in one Commonwealth'.

These assumptions are also taken to include the basic constitutional presuppositions of the time, such as responsible government and the separation of powers. Here Murphy J uses Isaacs J's judgment in the *Engineers* case where he quotes Lord Haldane to say that 'responsible government' is 'the greatest institution which exists in the Empire and ... pertains to every constitution established within the Empire'. Isaacs J concludes that responsible government is 'part of the fabric on which the written words of the Constitution are superimposed'. Such flowery language is difficult to interpret, but one element within the rhetoric which may be picked out is that we can only give effect to the words of the Constitution if we understand the basic ideas of responsible government, an assumption of the original contractors. However, it should be noted that Murphy J foreshadows current

96 Id at 137.
97 (1980) 145 CLR 266 at 312.
98 (1975) 135 CLR 1 at 70-71.
99 (1981) 35 ALR 227 at 232-34.
100 (1986) 161 CLR 556 at 581-83.
101 (1979) 144 CLR 633 at 670.

High Court judgments in replacing the idea of 'responsible government' enshrined in the *Engineers* case (indicating the responsibility of the executive to the Parliament, giving legal sovereignty to Parliament) by the idea of representative democracy which has legal sovereignty residing with the people.[102]

A similarly brief, but in parts rather different, version of implied rights occurs in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*.[103] After some passing references to a 'free society', and an indication that this notion 'is not necessary in this case', Murphy J declares that there is a constitutional 'guarantee of freedom of intercourse':[104]

> In my opinion the concept of the Commonwealth and the freedom required for the proper operation of the legislative, executive and judicial branches in the democratic society contemplated by the Constitution necessitate the implication of such a guarantee. Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative government requires the same freedoms between elections. These are also necessary for the proper operation of the Constitution of the States (which now derive their authority from Ch V of the Constitution). From these provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them in the Constitution.

The *Ansett v The Commonwealth* approach, while it does refer generally to a 'free society' and matters 'too fundamental' to require a mention, adds a more explicit use of the idea of 'implication' in terms of the necessary requirements for reaching a goal which is explicitly stated in the Constitution, in this case representative government as connected to the provision of an elected legislative assembly. I refer to those implied rights which are concerned with the necessary preconditions of a stated constitutional provision as necessary implications of the text or structure of the Constitution, or 'textually necessary rights' for short. As we shall see these now represent the current orthodoxy.

102 See *Bistrick v Rokov* (1976) 135 CLR 552 at 565-567; *China Ocean Shipping v South Australia* (1979) 145 CLR 172 at 236-239; *Kirmani v Captain Cook Cruises Ltd* (1985) 159 CLR 351 at 382-84.

103 (1977) 139 CLR 54.

104 Id at 87-88.

An interesting case in which textually necessary rights feature is *Gallagher v Durack*,[105] a contempt-of-court case arising from statements by Mr Gallagher, a trade union official, that the Federal Court had been influenced by industrial action in overturning his conviction on a previous contempt charge. In his judgment, Murphy J appeals directly to the idea of freedom of speech as a requirement of representative government in conjunction with the evident political nature of the view that courts are the instruments of capitalism. He classifies the case as having 'important implications for freedom of speech' as well as the integrity of the courts and the principles of sentencing. He establishes his position by citing *Pennekamp v Florida*[106] which requires the presence of a clear and present danger to judicial administration to justify a restriction of speech on the grounds of contempt of court. He uses this authority to set aside *R v Dunbabin; Ex parte Williams*,[107] a case which involved a contempt finding against a newspaper article critical of the judiciary, and points to the vagueness of the charge of contempt in relation to 'scandalising' the court and the gravity of the infraction of freedom of speech. Murphy J pits the US doctrine of freedom of speech against the Australian tradition and finds the latter wanting on the grounds of democratic principle and the increasing readiness of democracies to tolerate criticisms of courts.[108]

His crucial assumption is that a strong principle of freedom of speech is part of a democratic society, for, in his view '[n]o free society should accept such censorship'. Interestingly he bases the use of the power to punish for contempt of court in the same way: 'use of the contempt power is a limitation on freedom of expression which is essential to the achievement and maintenance of a democratic society'.[109]

Another case with overt talk of implied rights is *Ansett Transport Industries Australia v Wardley*.[110] In a matter concerning the non-employment of a woman pilot, he notes that:[111]

> Larger questions may arise, for example, whether Parliament has authorised the tribunals established under the *Conciliation and Arbitration*

105 (1983) 152 CLR 238.

106 (1946) 328 US 331.

107 (1935) 53 CLR 434.

108 Noted by the Phillimore Committee on Contempt of Court in the UK in 1974.

109 *Gallagher* (1983) 152 CLR 238 at 241.

110 (1980) 142 CLR 237.

111 Id at 267.

> *Act* to make or certify awards or agreement which provide for unjustifiable sex discrimination. It may be that an implication should be drawn from its terms that the Parliament's legislative powers do not extend to authorising arbitrary discrimination between the sexes.

However, this appears to be an appeal to the text of the Act rather than the Constitution itself, and is difficult to classify as involving either textually necessary or assumed constitutional rights.

A more elaborate exposition of implied rights is to be found in *McGraw-Hinds (Aust) Pty Ltd v Smith*.[112] This is a case in which Murphy J agreed with the rest of the court in finding invalid a badly drafted Queensland statute penalising demands for payment for unsolicited goods, but he gave a distinctive reason: that the law infringed an implied right of free communication. 'The Australian Constitution does not express all that is intended by it; much of the greatest importance is implied. Some implications arise from consideration of the text; others arise from the nature of the society which operates the Constitution'. This thesis linked in with the idea that constitutions are 'designed to enable a society to endure through successive generations and changing circumstances'.[113] The argument relates to the interpretation of s 92 of the Constitution, the appellant being engaged in trade and commerce.

The reference to the text in this case suggests that Murphy J is referring back to *Ansett v The Commonwealth* and the textually necessary right of freedom of communication. However, this is associated here with a very different notion which has to do with the beliefs which are present in the society in which the Constitution now operates. This has little to do with either assumed or textually implied rights. Rather what we have here is a direct appeal to existing social values independent of the words or assumptions of the Constitution. I call these '(Australian) current social rights' to echo Murphy J's contention that some constitutional rights are derived, not from the Constitution, but from 'the nature of Australian society':[114]

> From the nature of our society, an implication arises prohibiting slavery or serfdom. Also from the nature of our society, reinforced by the text in my opinion, an implication arises that the rule of law is to operate, at least in the administration of justice. Again from the nature of our society, reinforced by parts of the written text, an implication arises that there is to be freedom of movement and freedom of communication.

112 (1979) 144 CLR 633.

113 Id at 668.

114 Id at 669.

> Freedom of movement and freedom of communication are indispensable to a free society.

Finally, sometimes there appears to be an assertion of the 'great constitutional principles' which are tied neither to terms of the Constitution nor the nature of Australian society nor the prerequisites of responsible government but to the historical development of the common law itself as modified by great constitutional developments. Thus, in *Gallagher v Durack*, when it comes to the matter of the severe sentence passed on Mr Gallagher, Murphy J talks of 'unexpressed limits deriving from great constitutional principles which prevent the imposition of excessive fines or the imposition of cruel and unusual punishment' and refers to his own judgment in *Sillery* where he repeats his citation of Isaacs J's reference to 'silent constitutional principles' and asserts that the 'Constitution and written laws are superimposed on a fabric in which "silent constitutional principles" operate'.[115] Thus, he makes repeated use of the opinion of Isaacs J in *Commonwealth v Kreglinger & Fernau Ltd*,[116] where Isaacs J urges that:

> Constitutions made, not for a single occasion, but for the continuing life and progress of the community may, and indeed, must be affected in their general meaning and effect by what Lord Watson in *Cooper v Stuart* (1989) [14 App Cas 286 at 293] calls 'the silent operation of constitutional principles'.

These rights I call 'fundamental common law rights'.

These variations on implied rights are not entirely distinct. Murphy J often runs them together in a disorganised way. Indeed, fundamental common law rights may be viewed as a type of assumed right, if they are identified with the basic common law principles that were taken for granted in 1901. However, his different implied-rights approaches must be identified and isolated in order to follow out the affinities between Murphy J and later High Court opinions. When we do this, we can see that Murphy J's various approaches take us in very different directions. That which is assumed in the very making of the Constitution is not the same as that which is necessary to implement the text of the Constitution, nor is it the same as contemporary social values, or basic common law principles.

115 *Sillery v The Queen* (1981) 35 ALR 227 at 233.
116 (1926) 37 CLR 393 at 413.

The Recent Implied Rights Cases

In his time, Murphy J was not supported in his thesis of implied rights, although some justices, such as Deane J, appear to have found his arguments unnecessary rather than necessarily wrong.[117] Mason J seems to have been generally hostile.[118] None of the justices explores any of the rather different strands of reasoning in Murphy J's eclecticism. Nor do they seek to defend the literalism of *Engineers*, or to explore the traditional limits of the implication method beyond a general rejection of 'external' sources for legal argument. We do not know whether they objected primarily to Murphy J's general appeal to the ideals of a free society, which evidently invites the intrusion of subjective political opinions based on the individual judge's view of what a free society might be like, or to his more textually based appeals to the prerequisites of elections or the idea of representative government.

It is intriguing, therefore, to see many of the strands we have identified in Murphy J's judgments reappearing in recent High Court jurisprudence, particularly the recent High Court decisions involving an implied right of freedom of communication, on which I now concentrate: *Nationwide News*[119] and *Australian Capital Television*[120] establishing the right to freedom of political communication and *Theophanous*[121] and *Stephens v West Australian Newspapers*[122] using the new right with respect to defamation.

The main contrast between Murphy J's arguments and the recent decisions which appear to echo his approach is the relative bulk of the latter and, of course, their varied forms adopted by the different justices. Almost all the elements of Murphy J's opinions on implied rights are picked up by some of the current justices. Thus, the line of precedents used by Murphy J supporting a relaxing of the legalism encouraged by *Engineers* is repeated and extended by Brennan J in *Nationwide News*.[123]

117 *Miller v TCN-Nine* (1986) 161 CLR 556.

118 'It is sufficient to say that I cannot find any basis for implying a new s 92A into the Constitution': id at 579.

119 (1992) 177 CLR 1.

120 (1992) 177 CLR 106.

121 (1994) 182 CLR 104.

122 (1994) 182 CLR 211.

123 *Nationwide News* (1992) 108 ALR 681 at 699-700.

Similarly, most justices repeat Murphy J's assurance that the implied rights are 'not absolute'[124] and many concentrate on the premise of representative (rather than responsible) government and its prerequisites as the textual basis for the implied rights. US precedents abound. Murphy J's practice of referring to academic law journals is also now commonplace.

One evident difference is the concentration on the limitation of government powers under different heads by applying a developed test of proportionality between the legislation in question and the power expressly provided or its incidentals. Departing from the more orthodox line adhered to by Dawson J that there only has to be a sufficient connection between an enactment and a power, there is a move to ask whether the legislation questioned is reasonably proportionate to the purpose of government identified in the Constitution. This enables the judiciary to render invalid legislation which they see as only tenuously connected to a legitimate government purpose.

While this is not a matter of implied rights derived from constitutional powers it can have the same dramatic effect. The validity of legislation can be determined by the exercise of an essentially political judgment as to whether the worth of a proper purpose overrides any negative side effects of the means used to serve that purpose. Proportionality also arises with great complexity in the question of whether a reasonable intrusion into an implied constitutional right is proportional to the legitimate objective sought, as in the control of political advertising to counter political corruption in *Australian Capital Television*.

In considering the recent judgments in relation to the strands I have identified in Murphy J's many approaches to implied rights, it could be argued that *Australian Capital Television* is focused on rights derived from the electoral provisions of the Constitution and the implications of representative government, rather than the vaguer idea of what constitutes a democratic society; a matter of 'textually necessary rights' rather than 'Australian' or 'current society rights'. Much energy is devoted in *Australian Capital Television* to tracing the connection between freedom of speech and the electoral process. This is clearly Mason CJ's core argument, and one which he considers limits the scope of the implication method: 'Indispensable to that accountability and that responsibility is freedom of communication, at least in

124 *Australian Capital Television* (1992) 108 ALR 577, per Mason J at 590, per Deane and Toohey JJ at 618; *Nationwide News* (1992) 108 ALR 681, per Brennan J at 726, per Gaudron J at 741, for example.

relation to public affairs and political discussion';[125] and 'Freedom of communication in the sense discussed is so indispensable to the efficacy of the system of representative government that it is necessarily implied in the making of that provision'.[126]

While it is doubtful if unrestricted communication really is a necessary precondition of everything which may be called representative government, Mason CJ seems to hold that it is. He is certainly hostile to the notion of an individual right to communication derived from the notion of a free society. Similarly, other members of the majority, such as McHugh J, hold that 'the Constitution embodies a system of representative government which involves the conceptions of freedom of participation, association and communication in respect of the election of the representatives of the people'.[127]

Murphy J would have had no trouble with this approach in so far as it sees the Constitution as providing a framework for democratic government. This is clear in his commitment to establishing the principle of one vote one value in *McKinlay*[128] and *McKellar*.[129] His opinions in tax avoidance cases are similarly devoted to respecting the will of a democratically elected parliament.[130]

It is probable, however, that he would not have regarded the idea of political-advertising bans in election periods as undermining representative government rather than sustaining it. In *Australian Capital Television*, Brennan J at least is prepared to consider the control of election broadcasting as a reasonable aim in a representative system. On the facts of *Australian Capital Television*, Murphy J would probably have joined Brennan J in his view that the scheme of political broadcasts suggested was obviously related to a government power, or even Dawson J's tighter view that it is not for courts to take a view on this as long as there is a connection. Murphy J is unlikely to have shared the majority's open suspicion of politicians, for he is cautious about allowing courts to look into the motives and justifications for parliamentary or executive decisions, as in *R v Toohey; Ex parte Northern Land Council*: 'the judicial power does not extend to invalidation of

125 *Australian Capital Television* (1992) 108 ALR 577 at 594.

126 Id at 596.

127 Id at 668. But see below.

128 *A-G(Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1

129 *A-G(NSW); Ex rel McKellar v The Commonwealth* (1975) 135 CLR 66.

130 *Lucretia Investments v FCT* (1975) 6 ALR 116; *FCT v South Australian Battery Makers* (1978) 140 CLR 645; *FCT v Everett* (1980) 143 CLR 440; *Westraders v FCT* (1975) 144 CLR 55 and *FCT v The Commonwealth Aluminium* (1980) 143 CLR 646.

any exercise of legislative power (including delegated exercise) on the ground of its misuse'.[131] Again, in *FAI Insurance Ltd v Winneke*[132] he stated that:

> Traditionally in our system of government, certain functions are committed to the executive branch of government which are to be determined, not in a judicial or quasi-judicial way, but in an executive way.

Similarly, Murphy J's opinion in *Clunies-Ross v The Commonwealth* gives an expansive reading of land acquisition 'for a public purpose' along the lines of the US doctrine of eminent domain, which suggests that he would be prepared to see controls over commercial television as part of a democratic system.

Other justices in *Australian Capital Television* are as free as Murphy J with implications which derive from the idea of a democratic society, rather than merely its method of representative government. For examples of the 'assumed rights' approach, there is Gaudron J:[133]

> Fundamental Constitutional doctrines are not always the subject of exhaustive constitutional provision, either because they are assumed in the Constitution or because what they entail is taken to be so obvious that detailed specification is unnecessary.

See also Deane and Toohey JJ in *Leeth v Commonwealth*: 'implicit in the free agreement of the people was the notion of the inherent equality of the people as parties to the compact'.[134]

More common are examples of Murphy J's 'current social rights' strand. Gaudron J in *Nationwide News* is happy to render invalid provisions 'which are inconsistent with a Commonwealth which is a free society governed in accordance with the principles of representative parliamentary democracy'.[135] In *Australian Capital Television* she footnotes Murphy J in *McGraw-Hinds* and *Miller* in saying that 'the notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement, freedom of association, and perhaps freedom of speech generally'.[136] Deane and Toohey JJ also, in the context of a discussion relating to the possible justifications for curtailing freedom of communication, talk of 'what is conducive to the overall availability of the effective means of

131 (1981) 151 CLR 170 at 231.

132 (1982) 151 CLR 342 at 375.

133 (1992) 108 ALR 577 at 650.

134 *Leeth v Commonwealth* (1992) 174 CLR 455 at 486.

135 *Nationwide News* (1992) 108 ALR 681 at 741.

136 *Australian Capital Television* (1992) 108 ALR 577 at 652.

communication in democratic society'.[137] This is more explicit in *Cunliffe v Commonwealth*.[138]

A crucial point is whether such implications are textually based. Williams argues persuasively[139] that they may be so considered in so far as the strictly political aspects of representative government are concerned, but he is doubtful about the wide view of political discussion adopted in *Cunliffe* where the majority take political discussion to include legal advice given to immigrants. As Brennan J points out, we do not expect aliens to be part of the representative system so we can hardly give them implied rights on the basis that they are part of the representative system. If aliens have such rights they must be derived from Murphy J's extra-constitutional appeal to a democratic society rather than an institutional idea of representative government.

In contrast, Dawson J sticks to the idea of 'textually necessary rights' as against what he sees as Murphy J's approach:[140]

> ...it is clear that Murphy J based the implication which he asserted, not upon the text of the Constitution, but upon the 'nature of our society'. In so doing he failed, in my view, to recognise the true character of the Australian Constitution, which as I have endeavoured to explain, limits the implications which can be drawn to those which appear from the terms of the instrument itself.

That is, Dawson J rejects Murphy J's 'current social rights' approach.

The 'current social rights' view of implied rights is one which cuts free of the assumptions of the founders and rests on current political ideas and theories. We have seen this in the judgments of Murphy J and it is also evident in the recent cases where Deane J for instance speaks of the Constitution as a living organism which is therefore detached from the intentions of its originators. This is similar to Murphy J's view that 'constitutions are designed to enable a society to endure through successive generations and changing circumstances'.[141] Such a position is rejected by Dawson J and strongly criticised by McHugh J in *McGinty*.[142]

137 *Nationwide News* (1992) 108 ALR 681 at 727. This is where reference is made to *Miller v TCN Channel Nine Pty* Ltd (1986) 161 CLR 556.

138 *Cunliffe v Commonwealth* (1994) 182 CLR 272.

139 Williams, *'Engineers* is dead, long live *Engineers!'*

140 *Australian Capital Television* (1992) 108 ALR 577 at 631.

141 *McGraw-Hinds* (1979) 144 CLR 633 at 668; Williams, *'Engineers* is dead, long live *Engineers!'* at 80 and n117.

142 *McGinty and Others v The State of Western Australia* (1996) 134 ALR 289 at 344.

Finally, Murphy J's 'fundamental common law rights' are not in evidence in current High Court decisions except in arguments about proportionality, where these rights can be used to judge a law as disproportionate to a legitimate government purpose.[143] Deane and Toohey JJ in *Leeth* do speak of the 'equality of all persons before the law' as 'a fundamental and generally beneficial doctrine of the common law' but this is made relevant to constitutional matters by a version of the assumed rights approach according to which the Constitution is taken to assume the basic doctrines which were in force at the time of its origin. They bring these common law rights into consideration by arguing that they were assumed at the time the Constitution was enacted. Deane and Toohey JJ's approach is not therefore to be equated with Murphy J's direct use of fundamental common law doctrines.

Conclusion

Once analysed into different strands, all aspects of Murphy J's many methods can be seen at work in various parts of recent High Court jurisprudence. There is no general acceptance of the more free-floating uses of a 'free society'[144] despite Gaudron and Deane JJ in *Leeth* and *Lim*,[145] and there may be a general retreat from even the looser forms of derivation from the text of the Constitution via the concept of representative government in *McGinty*. There is certainly no general appeal to political philosophy as in the idea of an ideal democracy, although even Murphy J did not go this far, relying instead on an appeal to US theory through US precedents which is now commonplace.

But in the central notion of textually necessary rights related to such matters as the electoral system and its associated notion of representative government, there seems to be an established consensus that this is a legitimate approach, although not as to what it actually involves. It is not clear, for instance, how much scope different justices would give to such matters as parliamentary variations on the theme of democracy in relation to questions such as the size of constituen-

143 See Mason CJ in *NationwideNews* (1992) 108 ALR 681 at 691.

144 For example Brennan CJ in *McGinty* (1996) 134 ALR 289 at 295: 'Implications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or on its structure'.

145 *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1.

cies and voting methods when giving substance to the phrase 'chosen directly by the people' (ss 7 and 24 of the Constitution). At present it appears that the majority of justices do not take 'representative government' itself to be part of the text of the Constitution as distinct from a label to describe its content. Nor do they identify representative government with any particular model of the electoral process.

As far as Murphy J's more traditional methods go, there is as yet little support for going back to the idea of fundamental common law rights as an independent source of law, although they do seem to figure in discussions of proportionality and are arguably at work in *Mabo* and via the notion of constitutionally assumed rights.

It seems, therefore, that while all the multiple facets of Murphy J's approach are generally alive and at work in some way in the judgments of most of the recent members of the High Court, it is his use of 'textually implied rights' which is now most entrenched in the High Court. A diminishing minority of current justices are toying with his 'current social rights' strand and may even be attracted to 'fundamental common law' rights under the guise of assumed constitutional rights.