# BOOK REVIEW

GOVERNMENT BY JUDICIARY—THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT. By R. Berger. Harvard University Press, 1977. Pp. x, 483. Recommended retail price $15 (U.S.).

> Whoever hath an absolute authority
> to interpret any written or spoken
> laws, it is he who is truly the
> Law-giver to all intents and purposes,
> and not the person who first wrote
> or spoke them.*
>
> A word is not a crystal, transparent
> and unchanged, it is the skin of a
> living thought and may vary greatly
> in color and content according to
> the circumstances and the time in
> which it is used.**

Oliver Wendell Holmes[1] has reminded us that "[t]he life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only axioms and corollaries of a book of mathematics."[2] Doubtlessly many who have watched

* Benjamin Hoadly, Bishop of Bangor, Sermon preached before the King, 31 March, 1717, quoted in J. C. Gray, *The Nature and Sources of Law* 102, 125, 172 (2 ed., 1921 rep. 1972).

** Towne v Eisner, (1918) 245 U.S. 418, 425 (Holmes, J.).

1 1882-1899 a Justice of the Supreme Judicial Court of Massachusetts, 1899-1902 Chief Justice of that Court, 1902-1932 a Justice of the Supreme Court of the United States. See generally, "Symposium—Mr. Justice Holmes: The Man and His Legacy," (1976) 28 *U. Florida L. Rev.* 365.

2 O. W. Holmes, Jr., *The Common Law* 5 (M. DeWolfe Howe ed. 1963). This book, published in 1881, was a revision of a series of lectures given by Holmes

constitutional developments[3] within the Australian polity would agree. Others hold a differing viewpoint. But this merely serves to illustrate the public's growing awareness of the Commonwealth Constitution Act and its ramifications.[4]

What better time can there then be to turn our attention to the experience under the comparable[5] constitution of the United States of America—not only to find answers but more importantly to discover alternative methods, approaches and solutions to the increasingly complex range of questions within Australian constitutional law.[6] Valuable information can be gleaned from over four hundred volumes of United States Supreme Court reports, treatises,[7] and law reviews.[8] To this list can now be added four books by Raoul Berger.[9]

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in November and December of 1880 at Lowell Institute in Boston. This famous aphorism, had been used in a somewhat different form by Holmes in March, 1880 in an unsigned Book Review of *A Selection of Cases on the Law of Contracts, With a Summary of the Topics Covered by the Cases* by C. C. Langdell (1879) in (1880) 14 *Am. L. Rev.* 233, 234. See generally, Note, "Holmes, Pierce and Legal Pragmatism," (1975) 84 *Yale L. J.* 1123.

3 For example, *Labor and the Constitution* 1972-1975 (G. Evans ed. 1977); *Commentaries on the Australian Constitution* (L. Zines ed., 1977); G. Sawer, *Federation Under Strain: Australia 1972-1975* (1977); Sawer, "Seventy Five Years of Australian Federalism," (1977) 36 *Aust. J. Pub. Admin.* 1.

4 A bibliography concerning the events in October-November 1975 is in *Constitutional Seminar* 64-68 (1977); *Australian Constitutional Convention—The Senate and Supply—Special Report of Standing Committee D to Executive Committee* 149-150 (23 June, 1977).

5 "Indeed it may be said that, roughly speaking, the Australian Constitution is a redraft of the American Constitution of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions" Dixon, "Two Constitutions Compared," (1942) *A.B.A.J.* 733, 734; See also, Cowen, "A Comparison of the Constitutions of Australia and the United States," (1954) 4 *Buffalo L. Rev.* 155. A comparative table of the provisions of both constitutions is in P. H. Lane, *The Australian Federal System with United States Analogues* 1005-1007 (1972). See, however, Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd., (1920) 28 CLR 129, 146-148.

6 Supra notes 3 and 4.

7 J. Story, *Commentaries on the Constitution of the United States* (2 vols. 5th ed., 1905); W. W. Willoughby, *The Constitutional Law of the United States* (3 vols. 2d ed., 1929); L. H. Tribe, *American Constitutional Law* (1978).

8 For example concerning judicial solicitude for state interests see, Note, "Municipal Bankruptcy, The Tenth Amendment and the New Federalism," (1976) 89 *Harv. L. Rev.* 1871; Tribe, "Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services," (1977) 90 *Harv. L. Rev.* 1065; Michelman, "States' Rights and States' Roles: Permutations of 'Sovereignty' in National League of Cities v Usery," (1977) 86 *Yale L. J.* 1165.

9 Formerly Charles Warren, Senior Fellow in American Legal History, Harvard University.

Firstly, Congress v. The Supreme Court[10] which examined the Exceptions Clause and the origins and constitutional warrant for the power of judicial review. Both aspects have their counterpart in the Australian context. Article 111 section 2 of the American document gives the Supreme Court appellate jurisdiction "with such exceptions, and under such regulations as the Congress shall make".[11] Section 73 of the Australian Constitution confers appellate jurisdiction on the High Court "with such exceptions and subject to such regulations as the Parliament prescribes".[12] As to the High Court's "constitutional duty"[13] to pass upon the validity of federal and state legislative and executive acts similar arguments supporting and denying the power can be formulated in both jurisdictions.[14]

Secondly, Berger produced, Impeachment: The Constitutional Problems.[15] Its particular value for comparative purposes lies in the discussion of the judicial "good behaviour" clause of Article 3 section 1. While textual aspects of section 72 (ii)—"proved misbehaviour or incapacity"—may differ, English parliamentary and common law precedents examined in the book will be relevant sign posts along the road of constitutional interpretation.[16] The same may be said of arguments canvassed concerning the possibility of judicial review of the impeachment process.[17]

10 1969. Harvard University Press. Pp. xiii, 424. For a list of book reviews, see, Berger, "Judicial Review: Counter criticism in Tranquility," (1974) *Nw. U. L. Rev.* 390.

11 "The high-water mark of judicial abnegation in construction of this provision is represented by Ex Parte McCardle, where the Congress had withdrawn jurisdiction to consider a reconstruction measure upon a petition for habeas corpus that was then 'in the bosom of the Court'," Berger, supra note 10, at 2 (footnotes omitted).

12 See generally, P. H. Lane, supra note 5, at 413-418.

13 Queensland v Commonwealth, (1977) 16 A.L.R. 487, 495 (Gibbs, J.).

14 Kadish, "Judicial Review in the United States Supreme Court and the High Court of Australia," (1958) 37 *Texas L. Rev.* 1, 3-11; G. Sawer, *Australian Federalism in the Courts* 76 (1967); Blackshield, "The Courts and Judicial Review," in *Change the Rules: Towards a Democratic Constitution* 119 (S. Encel, D. Horne and E. Thompson ed., 1977); P. H. Lane, supra note 5, at 911-919.

15 1973. Harvard University Press. Pp. xii, 345. Emerson, Book Review, (1974) *Colum. L. Rev.* 131.

16 R. Berger, supra note 15, at 125-135. See also, Pratt, "Judicial Disability and the Good Behaviour Clause," (1976) 85 *Yale L. J.* 706; Roberts, "The Law of Impeachment in Stuart England: A Reply to Raoul Berger," (1975) 84 *Yale L. J.* 1419.

17 R. Berger, supra note 15, at 103-121. See also, C. L. Black, Jr., *Impeachment: A Handbook* 53-63 (1974); *The Law of Presidential Impeachment* 36-43 (Committee on Federal Legislation of the Bar Association of the City of New York 1974).

The third book—Executive Privilege: A Constitutional Myth[18]—appeared at the time when the events, now known as "Watergate",[19] were under public, legislative and judicial scrutiny. Amongst other aspects this book examines Executive power and the Commander in Chief Clause. Again these topics have Australian companions.[20]

Subsequently Berger has turned his attention to an examination of the judicial role and process in relation to the Fourteenth Amendment to the United States Constitution. The result is a fourth book: Government by Judiciary—The Transformation of the Fourteenth Amendment.[21]

Section 1 of the Fourteenth Amendment to the United States Constitution, ratified in 1868, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Thirty years later at the Melbourne session of the Australian Federal Convention Mr. Carruthers proposed to insert in the draft Constitution Bill a similar clause:[22]

> The citizens of each State, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth shall be citizens of the Commonwealth and shall be entitled to the privileges and immunities of citizens of the Commonwealth in the several States, and a State shall not make any law abridging any

18 1974. Harvard University Press. Pp. xiv, 425. Winter, Book Review, (1974) 83 *Yale L. J.* 1730; Albert, Book Review, (1974) 74 *Colum L. Rev.* 1360; Richman, Book Review, (1975) 27 *Stan. L. Rev.* 489; Rosenblum, Book Review, (1974) 69 *Nw. U. L. Rev.* 653; Sofaer, Book Review, (1974) 88 *Harv. L. Rev.* 281; Berger, "Executive Privilege, Professor Rosenblum, and the Higher Criticism," [1975] *Duke L. J.* 921; Berger, "Executive Privilege: A Reply to Professor Sofaer," (1975) 75 *Colum. L. Rev.* 603.

19 See generally, *The Final Report of the Committee on the Judiciary—House of Representatives* (1975 Bantam Books); L. Jaworski, *The Right and the Power: The Prosecution of Watergate* (1976); R. Ben-Veniste and G. Frampton, Jr., *The Real Story of the Watergate Prosecution* (1977).

20 U.S. Const. Art. 2.; Aust. Const. ss 61 and 68. A satirical review of the Governor-General's constitutional powers is presented by D. Horne, *His Excellency's Pleasure: Satire* (1977).

21 1977. Harvard University Press. Pp. x, 483. Hereinafter cited as "Berger".

22 Official Record of Debates of the Australian Federal Convention, Third Session Melbourne January 20 to March 7, 1898 at 666-667 (1898).

> privileges or immunity of citizens of the Commonwealth, nor shall a State deprive any person of life, liberty or property without the due process of law, or deny any person within its jurisdiction the equal protection of the laws.

The proposal was defeated.[23]

Having advised readers of his agreement with the United States Supreme Court's substantive results in recent Fourteenth Amendment cases[24] Berger proceeds to castigate the Court not merely for its reasoning but also for its very involvement in these issues. Indeed, he goes for the jugular—*Brown v. Board of Education*[25] and the reapportionment decisions.[26]

## THE ORIGINAL INTENTION—A RULE OF CONSTITUTIONAL INTERPRETATION

In answering his own question—"Why is the 'original intention' so important?"—Berger adopts the words of James Madison: if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers."[27] Were it otherwise the Supreme Court would become a "continuing constitutional convention"[28] and the Constitution merely a blank piece of parchment.[29] Using this premise Berger

23 Supra note 22, at 691. In many other respects "[t]he framers of our Federal Commonwealth Constitution (who were for the most part lawyers) found the American instrument of government an incomparable model. They could not escape from its fascination. Its contemplation dampened the smouldering fires of their originality." Dixon, "The Law and the Constitution," (1935) 51 *Law Q. Rev.* 590, 597.

24 Berger at 4.

25 (1954) 347 U.S. 483 (government-mandated racial segregation in public schools violates the equal protection clause of the Fourteenth Amendment). R. Kluger, *Simple Justice: The History of Brown v Board of Education and Black America's Struggle for Equality* (1975). Berger at 117-133.

26 Baker v Carr, (1962) 369 U.S. 186 (equal protection challenges are justicable); Reynolds v Sims, (1964) 377 U.S. 533 (representation apportionment for a State Legislature must be closely based on population—one person one vote—unless a legitimate state objective demands otherwise). Berger at 69-98, 419-427. Compare, Attorney-General for Australia, ex rel. McKinlay v. Commonwealth, (1975) 7 A.L.R. 593.

27 Berger at 364.

28 J. M. Beck, *The Constitution of the United States* 221 (1922) quoted by Berger at 2.

29 "A judicial power to revise the Constitution transforms the bulwark of our liberties into a parchment barrier. This is what caused Jefferson to say, 'Our peculiar security is in the possession of a written constitution let us not make it a blank paper by construction'." Berger, at 364 (footnote omitted).

discusses what he considers must be the predominant inquiry of constitutional interpretation; namely, "what did the framers mean to accomplish; what did the words they used mean to them?"[30] His reason for giving this aspect of constitutional interpretation pre-eminent ranking is twofold. Firstly, today's mechanical aid to interpretation—judicial "effectuation of the draftsman's intention"—played a vastly more important role for the Founders. . . . "[31] Secondly, he maintains, to argue[32] that the Founders intended to commission judges "to rewrite the 'living' constitution anew"[33] is to fly in the face of historical fact. Finally, to discover the "original intention" of the Fourteenth Amendment Berger turns to a vast array of historical sources; most notably the debates and draft constitution amendment Bills of the Thirty Ninth Congress.

Such an emphasis might well seem strange, if not startling, to the antipodean reader. For "[u]nlike the Americans, Australians hold their Founding Fathers of the 1890's, for all their achievement, in no special reverence or affection. Many of them are already forgotten; few are quoted; today they tend to be regarded as just another generation of run-of-the-mill politicians—a species whose stocks have never stood high in this country which sets no more special store by its leaders than by its historical roots."[34]

Perhaps "the High Court of Australia,"[35] despite its early composition of Founding Fathers,[36] has contributed in no small way to this state of affairs. Within the first year of its existence the High Court

30 Berger at 8.

31 Berger at 365.

32 See for example the references in Berger at 363 n. 3 and infra notes 53 and 54.

33 Miller, "An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis upon the Doctrine of Separation of Powers," (1973) 27 *Ark. L. Rev.* 584, 595 quoted by Berger at 363 n. 3.

34 L. F. Crisp, *Australian National Government* 39 (3rd ed., rep. 1967); McDonald, "The Eighty Founding Fathers," (1968) 1 *Qld. Hist. Rev.* 38; La Nauze, "Who Are The Fathers," (1969) 13 *Hist. Studies* 333; J. A. La Nauze, *The Making of the Australian Constitution* 328-333 (1972); Fredman, "Economic Interpretation of the Constitution: Australian Style," (1968) 1 *U. N.S.W. Hist. J.* 17.

35 Aust. Const. section 71. There is no full length treatise describing the institutional history of the High Court. For the United States Supreme Court see, C. Warren, *The Supreme Court in United States History,* (2 vols., rev. ed., 1926); C. G. Haines and F. H. Sherwood, *The Role of the Supreme Court in American Government and Politics,* (2 vols. 1944-1957); *History of the Supreme Court of the United States* (P. A. Freund ed., projected 11 volumes funded by the Oliver Wendell Holmes Devise).

36 See generally, E. Neumann, *The High Court of Australia: A Collective Portrait 1903 to 1972* (2nd ed., 1973).

adopted the view that judicial interpretation of the Commonweatlh of Australia Constitution Act of 1900[37] could not be premised upon nor aided by constitutional convention debates and opinions of members of those conventions.[38] Despite the availability of official reports of the convention at the time of the Court's ruling on this matter,[39] criticism of this judicial attitude,[40] at least as applied to a Constitution[41] and at least one notable departure,[42] the High Court has adhered to its original decision and not adopted the American practice.

Draft constitution bills of 1891, 1897 and 1898 may, however, be

37 63 and 64 Vict. c 12. The Constitution of the Commonwealth of Australia which comprises 128 sections, is contained in the ninth clause of the British statute. See also [1901-1927] 4 Cth Stat. Rules 3621.

38 Convention debates "are no higher than parliamentary debates, and are not to be referred to execpt for the purpose of seeing what was the subject-matter of discussion, what was the evil to be remedied, and so forth." Municipal Council of Sydney v Commonwealth, (1904) 1 C.L.R. 208, 213-214 (Griffith, C. J.) (arguendo). "We think that as [a] matter of history of Legislation the draft bills which were prepared under the authority of the Parliaments of the several States may be referred to. That will cover the draft bills of 1891, 1897, and 1898. But the expressions of opinion of members of the Conventions should not be referred to." State of Tasmania v Commonwealth and State of Victoria (1904) 1 C.L.R. 329, 333 (Griffith, C.J.) (arguendo). See also, Baxter v Commissioners of Taxation (N.S.W.), (1907) 4 C.L.R. 1087, 1104-1117; State of Victoria v Commonwealth (1957) 99 C.L.R. 575, 603. See generally, P. H. Lane, supra note 5, at 886-888, 891-898.

39 This is in contrast to the American position. Although the United States Supreme Court became operative in February 1790 reports of the Debates in the Federal Convention of 1787 did not become available until more than 30 years after the Convention. Thus a record of the debates was not available when Chief Justice Marshall delivered his famous opinion in McCulloch v Maryland, (1819) 17 U.S. (4 Wheat.) 316. If such a record had been before the Supreme Court it may have made a vital difference. 2 *The Records of the Federal Convention of 1787, at* 615-616 (M. Farrand ed. 1911).

40 G. Sawer, supra note 14, at 12. P. H. Lane, supra note 5, at 887.

41 Attorney General for the State of New South Wales v Brewery Union of New South Wales (1908) 6 CL.R. 469, 611-612 (Higgins, J..); Queen v Public Vehicles Licensing Appeal Tribunal of the State of Tasmania ex parte Australian National Airways Pty. Ltd. (1964) 113 C.L.R. 207, 225. Others, however, have seen more significance in the fact that the Austrailan Constitution is a British statute. For example, Latham, "Interpretation of the Constitution" in *Essays on the Australian Constitution* 5 (R. Else-Mitchell ed., 2d ed., 1961); Dixon, supra note 23, at 597. A possible basis for reconciliation is available. Bistrick v Rokov, (1976) 11 A.L.R. 129, 140 (Murphy, J.): Robinson v W.A. Museum, (1977) 16 A.L.R. 623, 674 (Murphy, J.).

42 Re Webster, (1975) 132 C.L.R. 270, 279 (Barwick, C.J.). Hammond, "Pecuniary Interest of Parliamentarians: A Comment on the Webster Case," (1976) 3 *Monash U. L. Rev.* 91, 95 n. 23. But even this may fall within Baxter v Commissioners of Taxation (N.S.W.), supra note 38, at 1104.

used as an aid to judicial interpretation.[43] But this extends only to draft bills prepared pursuant to authorization granted by the Australian colonies[44] thereby excluding others such as drafts prepared by Andrew Inglis Clark,[45] Charles Cameron Kingston,[46] Samuel Walker Griffith[47] and drafting sub-committees.[48]

Given this dichotomy between American—particularly as exemplified in Berger's approach—and Australian judicial experience a preference for either course will to a large extent in turn depend on the answer to the question "[w]hether the "original intention" of the framers should be binding on the present generation. . . . "[49]

As readers of this review may already have surmised, Berger's answer is affirmative.[50] If it were otherwise, he argues, "the Court may substitute its own meaning for that of the Framers" and thereby "rewrite the Constitution without limit."[51] That the Court has no warrant for such an enterprise is evidenced by the provision within the constitutional text of a specific amendment procedure.[52]

Of course, as Berger notes,[53] there are those who disagree. They maintain that an affirmative answer by the Berger thesis is wrong—both as to the intentions of the Founding Fathers and the method in which the Court should and does approach the process of adjudication. For example, Professor Levy has commented:[54]

43 State of Tasmania v Commonwealth and State of Victoria, supra note 38; Bank of New South Wales v Commonwealth (1948) 76 C.L.R. 1, 366 (Dixon, J.).

44 State of Tasmania v Commonwealth and State of Victoria, supra note 38.

45 Clark's draft constitution Bill dated 6 February 1891 is reproduced in the Appendix to Reynolds, "A. I. Clark's American Sympathies and his Influence on Australian Federation," (1958) 32 *A.L.J.* 62, 67-75.

46 J. A. La Nauze, *The Making of the Australian Constitution,* supra note 34, at 295-296.

47 S. W. Griffith, "Sucessive Stages of the Constitution of the Commonwealth of Australia," (Dixson Library of the Library of N.S.W., Add. 501).

48 Ibid. But see Bank of New South Wales v Commonwealth, supra note 43 at 366. La Nauze, *The Making of the Australian Constitution,* supra note 34 at 289-291, contains a list of "successive printed versions of a Bill to constitute the Commonwealth of Australia, 1890-1900". Regrettably the draft Bills are not collected together in a bound volume but remain scattered in various archives throughout Australia.

49 Berger at 8.

50 Berger at 363-418.

51 Berger at 370.

52 U.S. Const. Art 5. Aust. Const. section 128. Berger at 363-364.

53 Berger at 363, 373-396.

54 L. Levy, *Judgments: Essays on American Constitutional History* 17 (1972) partly quoted in Berger at 363. For other American judicial authorities and scholarly writings supporting this concept of an organic constitution see Berger at 373-396. A similar view has often been taken in respect of the Australian

> The framers . . . had a genius for studied imprecision or calculated ambiguity. . . . It thereby permitted, even encouraged, nay necessitated, continuous reinterpretation and adaption. Men trained in the common law habitually avoid minute specifications which become obsolete with a change in the particular circumstances for which they were adopted; such men tend rather to formulate principles that are expansive and comprehensive in nature. The principles themselves, not their framers' understanding and application of them are meant to endure.
> . . . The Constitution, designed by an eighteenth-century rural society, serves as well today as ever, perhaps better than ever, because an antiquarian historicism that would freeze its original meanings, even if discernible, has not guided its interpretation and was not intended to.

To Berger this represents judicial usurpation which eventually culminates in government by judiciary.

## JUDICIAL SUPREMACY

Unlike the vast reservoir of scholarship concerning the relationship of the judiciary to the Constitution and other branches of government in American constitutional law, examination of the somewhat analogous Australian enterprise has been sparse and sporadic.[55] There is nothing to compare with the historical, textual and process analysis of Brinton Coxe, Alexander Mordecai Bickel and Raoul Berger.[56]

That the High Court plays an extremely important role in Australian politics can hardly be doubted. Decisions such as the *Bank*

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Constitution. Isaac Alfred Isaacs expounded: "We are taking infinite trouble to express what we mean in this constitution; but as in America so it will be here, that the makers of the constitution were not merely the conventions who sat, and the states who satisfied their conclusions, but the Judges of the Supreme Court. Marshall, Jay, Storey [sic] and all the rest of the renowned judges, who have pronounced on the constitution, have had just as much to do in shaping it as the men who sat in the original conventions. I therefore think that, at the beginning, we should take the utmost care to establish a judiciary to effectuate the work we are here preparing." Supra note 22 at 283 (vol. 1). See also Baxter's Case, supra note 38; Spratt v Hermes, (1965) 114 C.L.R. 226, 272 (Windeyer, J.); North Eastern Dairy Co. Ltd. v Dairy Industry Authority (N.S.W.), (1975) 134 C.L.R. 559, 615 (Mason, J.).

55 Evans, "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society" in *Australian Lawyers and Social Change* 13 (D. Hambly and J. Goldring ed., 1976); P. H. Lane, supra note 5, at 911-941; G. Sawer, supra note 14; See also, supra note 3; E. G. Whitlam, *On Australia's Constitution,* 15-45 (1977).

56 B. Coxe, *An Essay on Judicial Power and Unconstitutional Legislation: Being a Commentary on Parts of the Constitution of the United States* (1893). A bibliography of Bickel's extensive writings is contained in A. Bickel, *The Morality of Consent* 143-150 (1975). R. Berger, supra note 10.

*Nationalization Case*,[57] *Airlines Monopolies Case*,[58] *Communist Party Case*,[59] *Offshore Case*[60] and section 92 cases testify to the permanent effect which the Court has on the legal, political, social and economic structure and processes of this country. Yet this aspect of the judiciary's role—being one of the three arms of government—is hardly recognized by legal scholars[61] and political scientists[62] and even less so by the general public.[63]

The role of the judiciary in the Australian polity as the ultimate and exclusive expositor of the Constitution[64] has laregly been accepted by the legal community[65] and the legislative and executive branches of government.[66] Thus the High Court has felt no need to develop the techniques of "passive virtues"[67]—standing, case and controversy,

57 (1948) 76 C.L.R. 1 (High Court); (1949) 79 C.L.R. 497 (Judicial Committee of the Privy Council).

58 (1946) 71 C.L.R. 29.

59 (1951) 83 C.L.R. 1. Sheldon, "Public Opinion and High Courts: Communist Party Cases in Four Constitutional Systems," (1967) 20 *Western Pol. Q.* 341.

60 New South Wales v Commonwealth, (1975) 8 A.L.R. 1.

61 Some semblance of such an approach can be seen in the writings already referred to supra notes 3 and 55.

62 There is, however, some literature. For example, Schubert, "Political Ideology on the High Court," (1968) 3 *Politics—J. Australasian Pol. Stud. Assoc.* 21; Douglas, "Judges and Policy on the Latham Court," (1969) 4 *Politics—J. Australasian Pol. Stud. Assoc.* 20; Blackshield, "Quantative Analysis: The High Court of Australia, 1964-1969," (1972) 3 *Lawasia* 1 [Blackshield is a legal scholar]; Douglas, "Courts in the Political System," (1958) 1 *Melb. J. Pol.* 36; Playford, "Judges and Politics in Australia," (1961) 6 *Aust. Pol. Sc. Assoc. News* 5.

63 Note for example the disturbing lack of discussion concerning the Constitution Alteration (Retirement of Judges) 1977. The pamphlet outlining the referendums held on 21 May 1977 distributed by the Chief Australian Electoral Officer contained arguments in favour but not against this proposed amendment. There were, however, important arguments to be made against the proposal. Thomson, "Judges and the Referendum," (11-16 April, 1977) *The National Times* 2. See now, Aust. Const. section 72.

64 Australian Communist Party v Commonwealth, supra note 59 at 262-263 (Fullagar, J.); Queensland v Commonwealth, supra note 13.

65 Supra note 14.

66 Professor Sawer holds the view that "there have . . . been frequent suggestions —mainly from disappointed governments—that the power of the courts generally, and in particular of the High Court, to invalidate legislation should be abolished or abridged." G. Sawer, *Australian Government Today* 108 (Rev. ed. 1977). No examples, however, are given in support of this assertion. One instance is the Constitution Alteration (Power of Amendment) 1930. See (1930) 123 Parliamentary Debates. 177; G. Sawer, *Australian Federal Politics and Law 1929-1949* at 23-24, 33 (1963); J. Robertson, *J. H. Scullin: A Political Biography* 232-233, 235 (1974).

67 A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111 (1962). But see, Gunther, "The Subtle Vices of the 'Passive

political questions, ripeness and mootness. And the Parliaments have felt no need to debate constitutional aspects of the Executive's legislative programme.[68] Thus Justice Stone's dictum that "the only check upon our own exercise of power is our own sense of self restraint"[69] seems particularly apt in the Australian context.[70]

But in a system of constitutional government incorporating specific written limits on all branches Berger eschews unchecked power[71]—especially in the judiciary.[72] Within the context of Fourteenth Amendment cases Berger explores the role which the Constitution intended the judiciary to undertake and that which the Court has taken. He concludes that a divergence exists. "[T]he Court", he expounds, "has been overleaping its bounds".[73]

Berger's view of the ultimate consequences of such a course deserves careful attention:[74]

> How long can public respect for the Court, on which its power ultimately depends, survive if the people become aware that the tribunal which condemns the acts of others as unconstitutional is itself acting unconstitutionally? Respect for the limits on powers are the essence of a democratic society; without it the entire democratic structure is undermined and the way is paved from Weimar to Hitler.

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Virtues'—A Comment on Principle and Expediency in Judicial Review," (1964) *Colum. L. Rev.* 1; Wright, "Professor Bickel, The Scholarly Tradition, and the Supreme Court," (1971) 84 *Harv. L. Rev.* 769. G. J. Lindell, *Justicability of Political Questions under the Australian and United States Constitutions,* (unpublished LL.M. thesis, Barr-Smith Library, University of Adelaide, 1972).

68 It may, however, be noted that the Senate of the Commonwealth Parliament has now established a Standing Committee on Constitutional and Legal Affairs. Professor Sawer gave evidence before the Senate Standing Committee on Foreign Affairs and Defence, (18 March 1975). "The Role and Involvement of Australia and the United Nations in the Affairs of Sovereign Australian Territories," 145-171 (Official *Hansard* Report). See also, Z. Cowen, *Isaac Isaacs* 89-91, 101-105 (1967). Compare, D. G. Morgan, *Congress and the Constitution: A Study of Responsibility* (1966); Choper, 'The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review," (1977) 86 *Yale L. J.* 1552.

69 United States v Butler, (1936) 297 U.S. 1, 79 (Stone, J., dissenting) quoted by Berger at 414.

70 There are, of course, some checks—the power of appointment, removal of justices, packing the court, taking away jurisdiction and ultimately it is Parliament, not the judiciary, which controls the purse and the sword. See, Winterton, "The British Grundnorm: Parliamentary Supremacy Re-Examined" (1976) 92 *Law Q. Rev.* 591 n. 2.

71 Berger at 414.

72 Berger especially at 407-418.

73 Berger at 415.

74 Berger at 410.

Two corrective measures are suggested. Firstly, "a rollback" where "the judges might begin by curbing their reach for still more policy making power, by withdrawing from extreme measures such as administration of school systems—government by decree—which have disquieted even sympathizers with the ultimate objectives."[75] Secondly, "[i]f government by judiciary is necessary to preserve the spirit of our democracy, let it be submitted in plainspoken fashion to the people—the ultimate sovereign—for their approval."[76]

What does such a thesis have to offer the Australian reader? It should, it is suggested, open up a number of avenues of inqury. Most importantly, it may serve to bring forth discussion concerning the legitimacy and scope of the exercise of judicial review within the Australian Constitution. This in turn may lead to questions concerning judicial activism and deference which will ncessitate an understanding not only of institutional relationships but also of judicial personalities. For while the study of constitutional law is confined to minute analysis of individual High Court decisions without addressing these larger questions the picture is only half complete. To finish the canvas merely requires learning to see the general in the particular.[77] It is an aid to this task that Berger's efforts can greatly contribute.

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75 Berger at 413.

76 Berger at 418.

77 Professor Paul A. Freund, writing on the encounters of Justice Brandeis at the bar, has eloquently expressed this ideal: "What is appropriate to recall is that in all these controversies, following hard upon each other year after year, he developed his larger conceptions from immersion in the facts of specific cases, in the best tradition of the common law. That tradition is not unlike the method of scientific discovery which abstracts general truths through reflection on a mass of specific phenomena—a process which has been well described as "thinking on the side". Many a competent scientific investigator has missed being counted a discoverer of scientific truth because he has failed to detach himself from his immediate focus and to reflect on the data under a larger aspect. In the law, too, this capacity to discern, in Justice Holmes's phrase, the universal in the particular, marks off the competent practitioner from the architect of legal institutions." Freund, Mr. Justice Brandeis in *Mr. Justice* 177, 182 (A. Dunham & P. B. Kurland ed., rev. ed. 1964).