IS IT A MESS? THE HIGH COURT AND THE WAR CRIMES CASE: EXTERNAL AFFAIRS, DEFENCE, JUDICIAL POWER AND THE AUSTRALIAN CONSTITUTION

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1. INTRODUCTION

Frolicking with the Australian Constitution can be fun.[1] Fortunately, state, federal and High Court judges are not the only revellers.[2] Neither are

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1. To ensure this remains a virtue, not a vice, Australian constitutional law scholars should emulate the American exemplar, Thomas Reed Powell:

> His wisdom, like that of Socrates ... was sheathed in playfulness. That is certainly the most palatable kind of wisdom, probably the most telling, and perhaps the most profound. With Vermont sagacity Robert Frost has said "The way of understanding is partly mirth."

P Freund "Foreword" in T Powell *Vagaries and Varieties in Constitutional Interpretation* (New York: Columbia University Press, 1956) vii, xi. See generally J Braeman "Thomas Reed Powell on the Roosevelt Court" (1988) 5 Const Comm 143; V Kramer "Recalling T R Powell's Course in Constitutional Law" (1988) 5 Const Comm 159; M Urofsky "'Dear Teacher': The Correspondence of William O Douglas and Thomas Reed Powell" (1989) 7 Law & Hist Rev 331. See also infra nn 88, 89.

2. Pre-eminent examples are legal scholars, Governors-General and politicians. The former include G Sawer (see A Schick "Bibliography of Works by Geoffrey Sawer 1935-1980" (1980) 11 FL Rev 271); L Zines (see eg *The High Court and the Constitution* 3rd edn (Sydney: Butterworths, 1992) and P Lane (see eg *Lane's Commentary on the Australian Constitution* (Sydney: Law Book Co, 1986)). For Governors-General see eg *Report of the Advisory Committee on Executive Government* [*to the Constitutional Commission*] (Canberra: Canberra Publishing & Printing Co, 1987) 37-39; G Winterton *Monarchy to Republic: Australian Republican Government* (Melbourne: Oxford University Press,

they, even four out of the seven High Court Justices,[3] the ultimate players.[4] Others can and, where non-justiciability matters[5] and referendums to amend the Constitution[6] are involved, occasionally must participate. Bereft of constitutionally mandated interpretative principles or guidelines,[7] frolicking

1986) 31-51. For Commonwealth politicians see eg J Thomson "Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes" (1982) 13 MUL Rev 597, 600 n 12 (citing references); Senate Select Committee on the Conduct of a Judge *Report to the Senate* Parliamentary Paper no 168 of 1984; Senate Select Committee on Allegations Concerning a Judge *Report to the Senate* Parliamentary Paper no 271 of 1984. For legislative and executive interpretations of the American Constitution see J Thomson "State Constitutional Law: Some Comparative Perspectives (1989) 20 Rutgers LJ 1059, 1087 n 83 (citing references); F Easterbook "Presidential Review" (1989-1990) 40 Case W Res L Rev 905. Others might include mathematicians, physicists, economists and religious leaders. See eg L Tribe & M Dorf *On Reading the Constitution* (Cambridge: Harvard University Press, 1991) 87-96; G Reynolds "Chaos and the Court" (1991) 91 Colum L Rev 110.

3. Although 6 Justices and a Chief Justice is the current statutory maximum (s 5 of the (Cth) High Court of Australia Act 1979) the Commonwealth Parliament can, under s 71 of the Constitution, increase or decrease that number. See G Sawer *Australian Federalism in the Courts* (Carlton: Melbourne University Press, 1967) 35 (High Court fluctuations: "1903-1906, three; 1906-1912, five; 1912-1931, seven; 1931-1947, six; 1947-[1992], seven.").
4. In addition to a "theoretical possibility" of Privy Council appeals (P Lane supra n 2, 387) there may be non-justiciable questions and there is the s 128 power to amend the Constitution. For the analogous debate over whether the US Supreme Court is the guardian and ultimate expositor of the American Constitution, see J Thomson "Using the Constitution: Separation of Powers and Damages for Constitutional Violations" (1990) 6 Touro L Rev 177, 197 n 107 (citing references).
5. See eg G Lindell "The Justiciability of Political Questions - Recent Developments" in H Lee & G Winterton (eds) *Australian Constitutional Perspectives* (Sydney: Law Book Co, 1992) 180.
6. Electors voting (which is compulsory under s 45 of the (Cth) Referendum (Machinery Provisions) Act 1984) in a referendum, under s 128 of the Constitution can obviate High Court constitutional law decisions. However, can the High Court declare s 128 amendments invalid? See eg *Boland v Hughes* (1988) 83 ALR 673. For US debates on judicial review of constitutional amendments see Thomson supra n 4, 182-183 n 20 (citing references).
7. Rules of interpretation are not expressly enunciated in the Constitution. Does the Commonwealth Parliament have constitutional power to alter or create rules of constitutional interpretation and require courts to utilise them? For a negative response, see *Sillery v Queen* (1981) 35 ALR 227, Murphy J, 233. For that Parliament's rules of statutory interpretation and their validity, see eg s 15 AA of the (Cth) Acts Interpretation Act 1901; P Anthony "Tax provisions not invalid, says Sawer" Sydney Morning Herald 11 Aug 1981, 13. Is it of any significance that the Constitution is a UK statute and that, prior to referrenda, s 128 amendments are passed by the Commonwealth Parliament? On the American Constitution see Tribe & Dorf supra n 2, 54 (Ninth Amendment "is the *only* rule of interpretation *explicitly* stated in the Constitution") (emphasis in original).

does not have to be curtailed by rigid adherence to sterile formalism.[8] It can be stimulating and creative. However, whether such creativity should be endorsed as the normative standard, especially when non-elected and tenured judges[9] are involved, remains a conundrum epitomising the euphoria which constitutional law discourse can engender.[10] *Polyukhovich v Commonwealth*[11] exemplifies many of these themes and phenomena.

2. LEGISLATION AND FACTS

Originally, the Commonwealth War Crimes Act 1945 provided for the establishment of military courts to conduct war crimes trials. A war crime was defined as "a violation of the laws and usages of war or any war crime within the meaning of the instrument of appointment of the Board of Inquiry

8. For other views of formalism in judicial opinions, see F Schauer "Formalism" (1988) 97 Yale LJ 509; E Weinrib "Legal Formalism: On the Immanent Rationality of Law" (1988) 97 Yale LJ 949.
9. For High Court and federal judges, see s 72 of the Constitution. For state judges, see J Crawford *Australian Courts of Law* 2nd edn (Melbourne: Oxford University Press, 1988) 55-58.
10. The classic enunciation of judicial review's counter-majoritarian dilemma is A Bickel *The Least Dangerous Branch*: *The Supreme Court at Bar of Politics* (Indianapolis: Bobbs-Merrill Co, 1962). One attempt to dissolve this conundrum is B Ackerman "The Storrs Lectures: Discovering the Constitution" (1984) 93 Yale LJ 1013. But see A Amar "Philadelphia Revisited: Amending the Constitution Outside Article V" (1988) 55 U Chi L Rev 1043, 1090-1096 (criticizing Ackerman). On the relationship between this debate and principles of interpretation, see eg "Constitutional Adjudication and Democratic Theory" (1981) 56 NYUL Rev 259-582; "Judicial Review Versus Democracy" (1981) 42 Ohio St LJ 1-434; "Judicial Review and the Constitution: The Text and Beyond" (1983) 8 U Dayton L Rev 443-831; "Symposium on Democracy and Distrust: Ten Years Later" (1991) 77 Va L Rev 631-879.
11. *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ("*Polyukhovich*"). See eg Zines supra n 2, vii-viii, 255-256; Current Topics "The High Court and the War Crimes Legislation" (1991) 65 ALJ 701; H Lee "The High Court and the External Affairs Power" in Lee & Winterton supra n 5, 60, 75-78. Pre *Polyukhovich* analyses include D Solomon "War crimes: judiciously tip-toeing through the legal minefield" The Australian 7 Sept 1990, 8; G McGinley "War Crimes Legislation and the External Affairs Power" (1990) 14 Crim LJ 342; G O'Neil "Prosecuting War Criminals in Australia" 16 no 1 Legal Serv Bull Feb 1991, 20. See also *Polyukhovich v Commonwealth* (1990) 95 ALR 502, Gaudron J (stay of proceedings granted).

appointed" on 3 September 1945.[12] This legislation enabled Australia to conduct trials in the Pacific.[13]

Allegations in 1986 that Nazi war criminals had entered Australia after the Second World War led to a report recommending that the 1945 Act be amended to allow Australian courts to try serious war crimes.[14] As a result the Commonwealth Parliament, by the War Crimes Amendment Act 1988 "almost entirely repealed and replaced" the original Act.[15]

Under the 1988 Act, it is an indictable offence to have committed a war crime between 1 September 1939 and 8 May 1945. A new definition of "war crime", replacing the 1945 concept, was also enacted. Three elements are involved. First, there must be a serious crime defined as an act which, if done in Australia, would have been, under Australian law, a specified offence, for

12. S 3 of the (Cth) War Crimes Act 1945. The instrument of appointment is in Australia, Parliament 1987 *Review of Material Relating to the Entry of Suspected War Criminals into Australia* Parl Paper 90, Canberra; *Australian War Crimes Board of Inquiry Report* (1946) 1-3 tabled in House of Representatives, 10 April, 1946 Cth of Australia 1946 *Parliamentary Debates* vol 186, 1294-1297.
13. On trials and military courts, established by the Governor-General under s 5 of the Act and conducted between 1945 and May 1951, see eg P Piccigallo *The Japanese on Trial. Allied War Crimes Operations in the East, 1945-1951* (Austin: University of Texas Press, 1979) 121-139, 242-247; G Triggs "Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?" (1987) 16 MUL Rev 382, 386. Prior to the 11 October 1945 commencement of the Act, three Inquiries were established - 23 June 1943, 8 June 1944 and 3 September 1945 - under reg 3 of the National Security (Inquiries) Regulations 1941 made under the (Cth) National Security Act 1939, to report on enemy war crimes. The 1943 Inquiry Report was handed to the Attorney General on 21 June 1944. See *Report* supra n 12, 3-4. The 1944 Inquiry Report was tabled in the House of Representatives on 12 September 1945: Australia, House of Representatives 1945 *Debates* vol 184, 5284-5285. For the 1945 Inquiry Report see *Report* supra n 12. See generally Piccigallo supra at 121-122. "Australia ... participated ... in approximately 1 000 war crimes trials in respect of the Pacific area": G Barwick: "Extradition of Migrant" Australia, House of Representatives 1961 *Debates* vol 30, 449, 451. For a contemporary analysis, see T Fry *The International and National Competence of Australian Parliaments to Legislate in respect of Extra-Territorial Crime (including War Crimes)* (1947) 1 no 2 Uni Qld Papers: Faculty of Law (St Lucia: University of Qld).
14. Australian Broadcasting Corporation's 13 April 1986 radio programme "Nazis in Australia" and 22 April 1986 television programme "Don't Mention the War." See P Durack "Debate: Suspected War Criminals in Australia" Australia Senate 1991 *Debates* vol 118, 3523; *Review of Material* supra n 12 discussed eg in *Debates* supra at 3522-3537; Australia House of Representatives 1987 *Debates* vol 153. 593-597; Triggs supra n 13, 383- 386.
15. *Polyukhovich* supra n 11, Mason CJ, 524. On the 1988 Amendment's text see Mason CJ, 524-528; Brennan J, 541-548; Dawson J, 639-641. For debate in Parliament, see eg L Bowen "Second Reading" in Australia, House of Representatives 1981 *Debates* vol 157, 1612. See also *Polyukhovich* supra n 11, Brennan J, 546. (1988 amendment's "turbulent legislative history").

example, murder, manslaughter, wounding or rape. Secondly, that serious crime must have been committed in specified circumstances such as during war hostilities or religious persecution in a country involved in war. Thirdly, war is confined to the war in Europe from 1 September 1939 to 8 May 1945. Finally, only an Australian citizen or resident can be charged with having committed a war crime.[16]

How might that legislative scheme be interpreted? For Chief Justice Mason:

> [T]he primary and substantial concern of the [1988] Act is with war crimes committed outside Australia, in other words, with conduct on the part of persons outside Australia. Further, the primary and substantial concern of the [1988] Act is with war crimes committed in Europe during the Second World War.
>
> [T]he person charged must be an Australian citizen or resident only at the time that he or she is charged. It follows that the [1988] Act makes criminal acts done by a person who, at the time of the commission of those acts, had no relevant connexion with Australia.[17]

Justice Brennan considered that:

> [T]he acts which attract liability for conviction for the statutory offence are past acts. It is an offence that cannot now be committed, but it is an offence for which a person may be convicted by reason of past conduct .... It is immaterial that, when the relevant act was done the person who did it was not then an Australian citizen or resident, that no Australian citizen or resident nor any person under or entitled to the protection of Australian law was the victim or likely victim, that the armed conflict in the course of which the act was committed did not involve Australia or that the act was lawful according to the laws of the place where the act was done at the time when it was done.[18]

On 26 January, 1990, Ivan Timofeyevich Polyukhovich, a 72 year old Australian citizen, resident and pensioner, was charged under the amended War Crimes Act with having committed war crimes in the Ukraine between 1 September 1942 and 31 May 1943 while it was under German occupation. During that period, Polyukhovich was not a citizen or resident of Australia.

16. Ss 5, 6, 7 and 11 of the amended 1945 Act. For recent overseas debates, legislation and trials, see eg T Teicholz, *The Trial of Ivan The Terrible: State of Israel vs John Demjanjuk* (London: MacDonald, 1991); W Fenrick "The Prosecution of War Criminals in Canada" (1989) 12 Dalhousie LJ 256; A Richardson "War Crimes Act 1991" 1991 Mod Law Rev 73; Symposium "Holocaust and Human Rights Law" (1992) 12 Boston Coll Third World LJ 33-63.
17. *Polyukhovich* supra n 11, 526.
18. Ibid, 541, 547-548. On other Commonwealth offences see eg D Sweeney & N Williams *Commonwealth Criminal Law* (Sydney: Federation Press, 1992).

Indeed, at that time, he had no connection with Australia.[19] Even if in 1942 and 1943 Polyukhovich had possessed such citizenship or residency, no Australian law made it an offence for Australians to commit in the Ukraine the war crimes with which Polyukhovich was charged.[20] Following his arraignment before the Adelaide Magistrates' Court,[21] Polyukhovich sought High Court declarations that the 1988 Act or various provisions of the amended 1945 Act were invalid. A concise question emerged:

> Is section 9 of the *War Crimes Act* 1945 as amended, invalid in its application to the information laid by [Robert William Reid] against [Polyukhovich]?[22]

Almost as precise was the answer: "No".[23] However, behind that facade lurks judicial discord and disunity.[24]

19. These facts and charges are in *Polyukhovich* supra n 11, Mason CJ, 523; Brennan J, 540; Toohey J, 651; Gaudron J, 693; *Polyukhovich v Commonwealth* (1990) 95 ALR 502, 503; D O'Brien "Newswatch" Bulletin 12 Nov 1991, 18, 19; P Hughes "850 War Murders: Man Charged" Sydney Morning Herald 27 January 1990, 1.
20. Polyukhovich was "not charged with offences against the laws of the Ukraine nor ... with offences against the laws and customs of war." Brennan J, 548.
21. Federal jurisdiction was invested by s 13 of the 1988 Act. Committal proceedings, before Magistrate Kelvyn Prescott commenced in October 1991, were adjourned in November 1991, and recommenced on 9 March 1992. A prosecution application on 27 August 1990 to have the South Australian Supreme Court determine Polyukhovich's fitness to be tried was stayed (*Polyukhovich v Commonwealth* (1990) 95 ALR 502) and, thereafter, not proceeded with. See eg P Hughes "Jury to Rule on War Trial Proceeding" Sydney Morning Herald 28 Aug 1990, 4; P Hughes "Witnesses tell of Jewish Massacre at Serniki" Age 2 May 1992, 22. See also R Sullivan "First War Crimes Trial To Go Ahead" Weekend Australian 6-7 June 1992, 1, 4. (Polyukhovich committed for trial).
22. *Polyukhovich* supra n 11, Mason CJ, 523; Brennan J, 540. However, Brennan J considered there were "more general" and "logically anterior" questions: "is s 9 as amended invalid? Or, even more generally, is the Act as amended invalid?" Of these three questions, the last "should [have been] addressed first." Ibid, 540. For the contrary view confining constitutional adjudication to the narrowest question, see eg Bickel supra n 10. But see S Wright "Professor Bickel, the Scholarly Tradition, and the Supreme Court" (1971) 84 Harv L Rev 769. Generally, the High Court pursues the Brennan approach. See eg *Port MacDonnell Professional Fisherman's Association Inc* v *South Australia* (1989) 168 CLR 340, 374-382 (validity of s 5(c) of the (Cth) Coastal Waters (State Powers) Act 1980 under s 51 (xxxviii)). See also *Polyukhovich* supra n 11, Toohey J, 565 ("unnecessary to enter into discussion"), Gaudron J, 696 ("unnecessary") (quoted infra n 66). Does this contravene the constitutional prohibition on High Court advisory opinions? See eg *Mellifont v AG (Qld)* (1991) 173 CLR 289, 302-306.
23. *Polyukhovich* supra n 11, 722 ("*Answer*: *No*") (emphasis in original).
24. S 9 was held valid 4 (Mason CJ, Dawson, Toohey and McHugh JJ) to 3 (Brennan, Deane and Gauldron JJ). All Justices (except Brennan J) held s 9 valid under s 51(xxix). Under the judicial power s 9 was held valid 4 (Mason CJ, Dawson, Toohey and McHugh JJ) to 2 (Deane and Gaudron JJ) with Brennan J not deciding. Under the defence power s 9 was held invalid by Brennan, Toohey and Gaudron JJ with Mason CJ, Dawson, Deane and

3. EXTERNAL AFFAIRS: THE GEOGRAPHIC DIMENSION[25]

Is geographic externality per se sufficient to sustain, under the external affairs power, the constitutional validity of Commonwealth laws? For example:

> [W]ould a [C]ommonwealth law be properly characterized as a law with respect to external affairs if it imposed a criminal penalty on a person who, being a citizen and resident of France, had dropped litter in a Parisian street 40 years ago?[26]

From a textual perspective section 51 provides:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
>
> ...
>
> (xxix.) External affairs:

To extract the literal or textual meaning of "External affairs" a dictionary may be of assistance. But which dictionary? Only Justice McHugh is explicit.[27] Other Justices simply promulgate a definition of the words "External affairs."[28] History might have been useful to provide or negate possible meanings. Despite more frequent judicial resort to Framers' intentions,[29] that approach was not utilized in *Polyukhovich*.[30] Except for Justice Brennan,

McHugh JJ not deciding. Could s 9 have been sustained by s 51 (xxvii) (immigration), s 51 (xix) (citizenship) or s 51 (xxviii) (influx of criminals)? No Commonwealth submission was made. *Polyukhovich* supra n 11, Brennan J, 556.

25. On other aspects (eg international concern, obligations, resolutions and recommendations) of s 51 (xxix) see *Polyukhovich* supra n 11, Brennan J, 556-592; Toohey J, 656-684; Zines supra n 2, 235-253.
26. *Polyukhovich* supra n 11, Brennan J, 552. On retrospectivity, see infra n 79.
27. Eg the English Oxford, American Webster or Australian Macquarie dictionaries. McHugh J refers to the Macquarie Dictionary (2nd rev edn, 1987). *Polyukhovich* supra n 11, 713. Does the publication date (eg 1900 or 1991) matter? What if the meaning or denotation of "affairs" changed between 1900 and 1987? Is use of a post 1900 dictionary changing the Constitution's meaning without using the s 128 amendment process? Without any citation Toohey J asserted: "Dictionaries commonly define 'affair' by reference to 'concern'." Ibid, 653.
28. *Polyukhovich* supra n 11, Brennan J, 550-551; Deane J, 599; Dawson J, 632; Toohey J, 653; Gaudron J, 695.
29. See eg *Cole v Whitfield* (1988) 165 CLR 360; *New South Wales v Commonwealth* (1990) 169 CLR 482; *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194.
30. But reference was made to early Australian constitutional law books. See *Polyukhovich* supra n 11, Deane J, 618-619; Toohey J, 654; McHugh J, 714, 720-721.

contextual, structural and purposive approaches to constitutional interpretation were also disregarded.[31] Instead, judicial precedent was invoked to sustain the validity of the 1988 amendment's applicability to conduct which had occurred outside Australia.[32]

Subject to express and implied constitutional limitations,[33] a range of views emerged concerning section 51 (xxix)'s geographic scope. Broadest, in terms of the amplitude of Commonwealth legislative power, is the response of Chief Justice Mason and Justices Deane, Dawson and McHugh: externality per se is sufficient to invoke section 51 (xxix). Thus the external affairs power can support the validity of Commonwealth legislation applying to persons, relationships, matters and things outside Australia.[34] It is a plenary extra-territorial legislative power.[35] Indeed, whether the external persons, relationships, matters or things had or "have some identified connection with Australia" is, for constitutional law, irrelevant.[36]

Other Justices refused to concede that section 51 (xxix) embodied such an unqualified geographic dimension. "A matter does not qualify as an external affair simply because it exists outside Australia."[37] For Justices

31. *Polyukhovich* supra n 11, 550 (quoted in text accompanying infra n 40).
32. Differing views were asserted about the extent to which prior cases endorsed geographic externality. Compare *Polyukhovich* supra n 11, Mason CJ, 528 with Brennan J, 549-550. See also G Sawer "Australian Constitutional Law in Relation to International Relations and International Law" in K Ryan (ed) *International Law in Australia* 2nd edn (Sydney: Law Book Co, 1984) 35, 43-44. See also differing interpretations of *R v Kidman* (1915) 20 CLR 425. *Polyukhovich* supra n 11, Mason CJ, 538-539; Deane J, 619-623, 626; Dawson J, 644-645; Toohey J, 690; Gaudron J, 705-706; McHugh J, 717-719.
33. See eg ibid, Dawson J, 634, 638.
34. Ibid, Mason CJ, 528-529; Deane J, 599-603; Dawson J, 632-638; Toohey J, 652-654, 684; Gaudron J, 694-696; McHugh J, 712-714. Geographic or physical externality - outside of Australia - is seaward from the low water mark. *New South Wales v Commonwealth* (1975) 135 CLR 337. No constitutional infirmity arises from the "domestic or internal operation" of legislation applying to external persons or conduct. *Polyukhovich* supra n 11, Mason CJ, 530. Is the amended Act's application to war crimes committed within Australia valid? Only McHugh J, who responded positively, provided an answer, 715-717. Deane J raised serious doubts about its validity. Ibid, 603-605. Other justices noted this issue was unnecessary to decide. Ibid, Mason CJ, 531; Dawson J, 639; Toohey J, 656.
35. This differentiates Commonwealth legislative power from state extra-territorial legislative power. See text accompanying infra nn 53-58.
36. *Polyukhovich* supra n 11, Deane J, 599. See also ibid, Mason CJ, 531 ("circumstance that the law operates on the past conduct of persons, who at the time of the commission of that conduct, had no connexion with Australia" was irrelevant).
37. Ibid, Toohey J, 654.

Brennan, Toohey and Gaudron more was required. Simultaneously, section 51 (xxix) granted Commonwealth legislative power and imposed a constitutional limitation; namely, the necessity for an Australian connection, concern or interest in the external persons, relationships, matters or things subject to the Commonwealth legislation. Why and how did this occur? All three Justices relied on the word "affairs."[38] To supplement this textual foundation, Justice Toohey invoked absurdity: "it might be thought more than passing strange that the Constitution solemnly conferred power on the [Commonwealth] Parliament to legislate with respect to a matter in which it had no interest."[39] An even more fundamental argument was articulated by Justice Brennan:

> If ... a connection [between Australia and the extraterritorial person, thing or event to which the particular Commonwealth law applied] were required, so the argument runs, there would be a lacuna in the plenitude of legislative powers which the Australian legislatures, Commonwealth and State, together possess .... But the powers conferred by the Constitution are not to be expanded beyond their true scope merely to supply what is thought, from the public viewpoint, to be a desirable or convenient power. Limits on power are the measure of private immunity from legislative action by the State. The legislative powers of the Parliament are limited by the terms of the Constitution, and the connotation of the phrase "external affairs" must be ascertained from its context and purpose. Accepting fully that s 51 (xxix) is not to be narrowly construed ... nevertheless the power thereby conferred is limited.[40]

Juxtaposition of this approach with the traditional view ("the grant of legislative power with respect to external affairs should be construed with all the generality that the words admit"[41]) reveals a stark contrast. Immediately, that engenders important questions: does the Brennan analysis constitute another attack on the orthodox view?[42] Is the parliamentary supremacy

38. Ibid, Brennan J, 550-551; Toohey J, 653; Gaudron J, 695-696. See also infra n 40.
39. *Polyukhovich* supra n 11, 654.
40. Ibid, 550. Brennan J required "some nexus, not necessarily substantial, between Australia and the 'external affairs' which a law purports to affect before the law is supported by s 51 (xxix)", at 551. For arguments against "a lacuna" see ibid, Mason CJ, 529; Deane J, 603; Dawson J, 638.
41. Ibid, 528. See also ibid, Deane J, 599. This is usually taken as emanating from *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. See generally Zines supra n 2, 13-15.
42. Brennan J's negative phraseology "that s 51 (xxix) is not to be narrowly construed" falls short of endorsing a wide or generous interpretation. Previous attacks have been from a federal balance perspective. See eg L Zines "The State of Constitutional Interpretation" (1984) 14 FLR 277; Zines supra n 2, 241-243. Although Brennan J's reference to "context" conveys a similar perspective, there is also a human rights premise implicated in the phrase "*private* immunity from legislative action by the State." *Polyukhovich* supra n 11, 550 (emphasis added).

premise of that traditional view being repudiated? Can Justice Brennan be perceived as disavowing the conclusion that the Australian Constitution's primary purpose and character is concerned with granting power, especially Commonwealth legislative power? Which approach (parliamentary power or constitutionalism) is being or ought to be adopted by the High Court and others who utilize the Constitution?

Having endorsed an Australian connection limitation, Justices Brennan, Toohey and Gaudron differed as to how and who determined whether that limitation was satisfied. As a result a narrowing (from Justice Gaudron to Justice Brennan) of the scope of section 51 (xxix) is perceptible. The former considered that enactment by the Commonwealth Parliament of legislation "necessarily established" the requisite Australian interest or concern.[43] Despite some equivocation, Justice Toohey appears to reserve this aspect for judicial, not parliamentary, determination.[44] Justice Brennan was more forthright:

> It is ... for the Parliament to determine in the first instance whether there is any connexion between Australia and a relationship, set of circumstances or field of activity which exists or occurs outside Australia and which a proposed law would purportedly affect, but, if the legislative judgment cannot reasonably be supported, the law will be held to be outside the power conferred by s 51 (xxix) ....[45]

Opposite conclusions emanated from Justices Brennan and Toohey on whether such a connection existed in *Polyukhovich*.[46] Compared to Justice

43. Ibid, Gaudron J, 696.
44. "Whether a matter [is of concern to Australia] is ... for the Parliament to determine. But [s 51 (xxix)] assumes the existence of a national interest in some person, thing or matter that enables one to say that the subject of the legislation concerns Australia ... [I]t would be to turn a blind eye to history to see no connection between the dates and the area identified in s 5 [of the Act] and World War II, or to conclude that "war" as defined [in the Act] could relate to a conflict in which Australia had no interest at the time, even if not directly involved. For these reasons, the law is one with respect to "external affairs" within s 51 (xxix)." Ibid, 653, 655.
45. Ibid, 552.
46. Brennan J held that no connection existed. Ibid, 552- 556. Toohey J considered that only by "turn[ing] a blind eye to history" could such a conclusion be reached. Ibid, 655 (quoted supra n 44). For Mason CJ "[t]hat Australia has such an interest or concern in the subject-matter of the [War Crimes Act], stemming from Australia's participation in the second world war, goes virtually without saying." Ibid, 531. Deane J also concluded that the Act had "a close and special connection with Australia regardless of whether the ... offence was committed overseas or whether ... the offender had any connexion with [Australia]". Ibid, 606. Similar differences pervade other s 51 (xxix) aspects. Compare Brennan J's conclusion that protection and conservation of cultural and natural heritage was not of international concern. *Commonwealth v Tasmania* (1983) 158 CLR 1, 222; P Hanks

Gaudron, both Justices, but especially Justice Brennan, were much more enamoured of the High Court's, as compared to Parliament's, ability to determine and overrule the legislative judgment as to whether there was that connection.[47] Again, in contrast to the majority, a perception of constitutionalism, enforced by the judiciary, controlling parliamentary power emerges.

4. PEACE, ORDER, AND GOOD GOVERNMENT

Was such a limitation; namely, the need for a connection between Australia and external circumstances, mandated by the section 51 preamble (that Commonwealth laws be made "for the peace, order, and good government of the Commonwealth") to the grant of power "with respect to ... external affairs"? No, Justices Brennan, Gaudron and McHugh responded.[48] Other Justices rendered an affirmative answer, but then proceeded to offer varying suggestions as to the limitation's justiciability. Judicial satisfaction that Australia "has an interest or concern in the subject matter of the legislation" was, for Chief Justice Mason, constitutionally superfluous.[49] Indeed, this is an exclusive parliamentary prerogative. "It is inconceivable that the Court could overrule Parliament's decision on [this] question."[50] Utilization of "could," not "would," precludes mere judicial deference or abnegation. Rather, non-justiciability is being advocated.

Justice Deane agreed: the Commonwealth Parliament, not the High Court, decided this issue and it did so by the process of enacting legislation. However, if more than parliamentary enactment was required to prove an Australian connection, Justice Deane assumed the decision was for judges to make and, unhesitatingly, held that in *Polyukhovich* the requisite connection existed.[51] A caveat concerning non-justiciability was also lodged by Justice Dawson. "Possibly [in] quite extraordinary circumstances" the courts could decide that Commonwealth legislation was not "for the peace, order, and

Australian Constitutional Law: Materials and Commentary 4th edn (Sydney: Butterworths, 1990) 9.024-9.027.

47. *Polyukhovich* supra n 11, Brennan J, 552; Toohey J, 653, 655. Two judicial decisions emerge. First, as to the existence of constitutional facts required to sustain an exercise of Commonwealth legislative power under s 51. Secondly, as to whether a legislative or parliamentary judgment concerning facts is sustainable. See eg *Richardson v Forestry Commission* (1988) 164 CLR 261, 294 Mason CJ and Brennan J; Zines supra n 2, 185-207, 382-392.
48. *Polyukhovich* supra n 11, Brennan J, 550; Gaudron J, 695; McHugh J, 714.
49. Ibid, 530.
50. Ibid.
51. Ibid, 606 (quoted supra n 46).

good government of the Commonwealth" and declare it invalid.[52] Unfortunately, other than that in *Polyukhovich* the Act was constitutionally valid, no hint clarifies the "extraordinary circumstances" concept.

Assistance cannot be garnered from state constitutional law. Identical words - "peace, order, and good government" - in Australian State constitutions[53] are judicially interpreted as a justiciable limitation on state extraterritorial legislative power.[54] In *Polyukhovich*, only Justice Dawson objected to this dichotomous treatment of federal and state constitutions.[55] However, if in practice state extraterritorial laws[56] are habitually held valid, except in "quite extraordinary circumstances",[57] that theoretical difference will dissipate. In these circumstances,[58] a state War Crimes Act modelled on the amended Commonwealth Act would be constitutionally valid.

5. DEFENCE POWER

Textually the defence power is more voluminous than the external affairs power. Section 51 provides:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
>
> ...
>
> (vi.) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:[59]

Any such textual difference is, however, more than counter balanced by a profound similarity. Both are "purpose" powers requiring courts to carry

52. Ibid, 636.
53. See R Lumb *The Constitutions of the Australian States* 5th edn (St Lucia: University of Queensland Press, 1991) 84.
54. *Polyukhovich* supra n 11, Mason CJ, 529; Dawson J, 633, 635-636.
55. Ibid, 635.
56. There are state offshore and interstate laws. As to the latter, see s 118 of the Constitution; *McKain v R W Millar & Co* (1991) 66 ALJR 186; M Gething "*Breavington v Godleman*: Where Now?" (1990) 20 UWAL Rev 607, 628-635 (s 118 a limit on state legislative power).
57. *Polyukhovich* supra n 11, 636.
58. Other aspects, eg inconsistent Commonwealth laws and s 109 of the Constitution, also need to be considered.
59. *Polyukhovich* dealt with the first limb. For the second limb see J Thomson "Are State Courts Invulnerable?: Some Preliminary Notes" (1990) 20 UWAL Rev 61, 68. Generally on s 51 (vi) see Lane supra n 2, 125-135; P Hanks *Constitutional Law in Australia* (Sydney: Butterworths, 1991) 325-338.

out the characterization process[60] on Commonwealth laws purporting to be made with respect to external affairs or defence by reference, not to the law's objective and substantive legal or practical operation, but to the ulterior purpose or object which the law was passed to serve.[61] However, that approach entails the possibility of section 51 (vi) and (xxix) conferring virtually plenary legislative power, particularly if the characterization test merely requires identification of "a relevant purpose of advancing [Australia's] external affairs or defence."[62] To avoid that possibility and retain judicial, not parliamentary, supremacy Justice Brennan utilized for section 51 (vi) in peacetime Justice Deane's section 51 (xxix) "reasonable proportionality" formulation:[63]

> In times of peace, an abridging of [freedoms which the law assures to Australian people] - in [*Polyukhovich*], freedom from a retrospective criminal law - cannot be supported unless the [High] Court can perceive that the abridging of the freedom in question is proportionate to the defence interest to be served.... The formation of the

60. On characterization of Commonwealth legislation see Zines supra n 2, 24-33.
61. See eg *Richardson* supra n 47, Deane J, 308, 310. See also *Commonwealth v Tasmania* (1983) 158 CLR 1, Brennan J, 232-234. But see *Richardson* supra n 47, Dawson J, 325-327 (s 51(xxix) not a "purpose" power).
62. Ibid, 310. Precisely at this juncture Deane J considered that:

    > There is inevitably a degree of tension between the legislative function of the Parliament and the judicial function of the [High] court in cases where legislative competence is claimed by reference to such an underlying purpose or object rather than by reference to the bare operation of particular law. It is for the Parliament and not for the court to decide what are the appropriate legislative provisions to achieve a desired result. On the other hand, nowhere is the role of the court as the ultimate custodian of the provisions of the Constitution more critical than in a case where challenged legislation is claimed to be within legislative competence on the ground that, nothwithstanding that it does not directly operate with respect to a designated subject matter of legislative power, its underlying purpose or object gives it character of a law with respect to external affairs (s 51 (xxix)) or defence: s 51 (vi).

    Ibid. Examples of Justices resolving this tension are supra n 46; infra nn 63-65, 68. Earlier Deane J asserted that:

    > It is to [the High] Court that the people have entrusted the ultimate responsibility of determining whether a law which the Parliament has purported to impose comes within the scope of the legislative powers which they have conferred upon the Parliament.

    Richardson supra n 47, 307. For debate as to Deane J's assertions concerning the constitutional warrant for judicial review, see infra n 70.
63. *Polyukhovich* supra n 11, 592. For the antecedents of this test under s 51 (vi), see Hanks supra n 59, 327-328. See also infra n 68. For the Deane test and its effect of invalidating legislation implementing treaties under s 51 (xxix), see Hanks supra n 59, 348-350.

> critical judgment as to whether the means adopted by the law are appropriate and adapted to serve defence purposes is entrusted to the [High] Court....[64]

Justice Brennan's evaluation of the sufficiency of the Act's connection to Australia's defence differed from that of the Commonwealth Parliament. In consequence, Justice Brennan again overruled Parliament.[65] Even more categorical was Justice Gaudron's rebuff. "[T]here is no basis on which [the war crime offence] can be said to be in the slightest degree relevant to defence."[66] Stunning in its simplicity is the ease and forcefulness of this exertion of judicial review.[67] Premised on the contestable view that constitutionalism is endangered when Parliament pursues defence interests,[68] courts

64. *Polyukhovich* supra n 11, 593. Compare infra n 68 (s 51(vi) during war time). Professor Zines has correctly observed that:

    > Characterization of laws in relation to federal subjects of power does ... provide ... an opportunity for having regard to traditional concepts of individual rights and freedoms. This is particularly so where it is necessary to determine whether a law can reasonably be regarded as appropriate and adapted to achieving a legitimate end....

    Zines supra n 2, 333.
65. *Polyukhovich* supra n 11, 593 (concluding that "[r]espect for the laws and customs of war cannot be secured by a law having such an oppressive and discriminatory operation.") See also ibid, 684 (Toohey J agreeing with Brennan J).
66. Ibid, 697. See also ibid ("very difficult to see any connection at all"). Gaudron J reached this conclusion although it was "unnecessary" to consider s 51 (vi). Ibid, 696.
67. As to the constitutional basis for judicial review, see infra n 70.
68. *Polyukhovich* involved a peacetime exercise of s 51 (vi). The situation is different during wartime. Eg at 593, Brennan J considered that:

    > In times of war, laws abridging the freedoms which the law assures to Australian people are supported in order to ensure the survival of those freedoms in times of peace.

    Compare text accompanying supra n 64. On this peace - wartime dichotomy see Lane supra n 2, 125-130; Hanks supra n 59, 328-337. For an English view, see eg *Liversidge v Anderson* [1942] AC 206 (power to detain not judicially reviewable because of security considerations and Home Secretary's responsibility to Parliament). But see ibid pp 225-247 (Lord Atkin, dissenting). For the view that American constitutionalism was preserved, not destroyed, by the Executive pursing defence objectives during the Civil War (1861-1865), see eg M Neely *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991). Indeed, President Lincoln considered that:

    > By general law life *and* limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. [M]easures otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.

    A Lincoln to A Hodges (letter of 4 April 1864) in R Basler (ed) *The Collected Works of Abraham Lincoln* vol 7 (New Brunswick, New Jersey: Rutgers University Press, 1953) 281 (emphasis in original).

are encouraged to be active, rather than deferential. The final result is obvious: judges, not elected parliamentarians, govern.

6. JUDICIAL POWER: PARLIAMENTARY INTRUSION OR ASSISTANCE?

Nowhere is that phenomenon more evident than when High Court justices explicate "judicial power"[69] and independence. Not only is judicial review's constitutional propriety proclaimed,[70] its exercise is pushed to virtually limitless proportions. For example, without a trace of concern, Justice Toohey postulates that judges might utilize unjustness - not constitutionality - as the criterion of legislative invalidity:

> Whether a court may declare a statute to be invalid because it is unjust is a question that goes to the very heart of the relationship between the courts and Parliament ... But that question does not arise [in *Polyukhovich*].[71]

Compounding this problem is the amorphous nature of judicial power. It is "an elusive concept" "insusceptible of comprehensive definition".[72] Nevertheless, protecting the independence and integrity of that power, not any express prohibition, constitutes the Justices' rationale for confronting the

69. S 71 of the Constitution mandates:

> The judicial power of the Commonwealth shall be vested in ... the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

70. Can that proclamation be supported? For High Court affirmations, see eg supra n 62; *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232; *Re Tracey, Ex parte Ryan* (1989) 166 CLR 518, Deane J, 579-580; *Harris v Caladine* (1991) 172 CLR 84, Toohey J, 135. For more negative responses, see eg P Lane *The Australian Federal System* 2nd edn (Sydney: Law Book Co, 1979) 1135-1144; J Thomson "Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution" in G Craven (ed) *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (Sydney: Legal Books Pty Ltd, 1986) 173.
71. *Polyukhovich* supra n 11, 687. This is comparable to the controversial substantive due process doctrine (in the economic - see eg *Lochner v New York* (1905) 198 US 45 - and human rights - see eg *Griswold v Connecticut* (1965) 381 US 479 - spheres) under the 14th Amendment to the US Constitution. See eg J Ely *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) 14-20; L Tribe *American Constitutional Law* 2nd ed (New York: Foundation Press) 565-586; C Sunstein "Lochner's Legacy" (1987) 87 Colum L Rev 873; Note "Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered" (1990) 103 Harv L Rev 1363.
72. *Polyukhovich* supra n 11, Mason CJ, 532 and *Love v NSW Attorney-General* (1990) 169 CLR 307, 319. See *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188 ("difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive").

constitutional validity of retrospective Commonwealth criminal laws.[73] In this context, separation of powers[74] is the label frequently used to signify why, for example, legislatures cannot exercise or intrude on judicial power.[75] A less prominently portrayed explanation also emerges: protecting individual rights against legislative annihilation.[76]

In *Polyukhovich*, a plethora of possibilities emerged: retrospective criminal or ex post facto laws, bills of attainder and bills of pains and penalties.[77] Six Justices would have invalidated all such bills because they legislatively usurped judicial power in contravention of separation of power requirements.[78] Five Justices indicated that other ex post facto criminal laws could be invalid.[79] That would occur if the intrusion or usurpation constituted trial by legislature. However, in *Polyukhovich* the Act did not, according to Chief Justice Mason and Justice Dawson, proceed that far. Unlike bills of attainder

73. See eg *Polyukhovich* supra n 11 Deane J, 607, 612-613; Dawson J, 648; Toohey J, 648-685; Gaudron J, 697, 703.
74. How is separation of powers constitutionalized? See eg ibid, Mason CJ, 536 ("in particular [by] the vesting of judicial power in Ch[apter] III Courts"); Deane J, 606 ("Constitution is structured upon [this] doctrine"); *Harris* supra n 69, Toohey J, 134 (implied in Constitution). See generally Zines supra n 2, 136-150.
75. See eg ibid.
76. *Polyukhovich* supra n 11, Deane J, 606 ("main objective" to protect subjects' life, liberty and property from arbitrary interference); Toohey J, 688-689. See also *Harris* supra n 69, Toohey J, 135; Zines supra n 2, 333 (quoted supra n 64), 337-339 ("increasing restlessness and boldness by some judges"). Compare text accompanying supra n 40.
77. "An ex post facto law, of which a bill of attainder was, or might be, an instance, is a retrospective law which makes past conduct a criminal offence." *Polyukhovich* supra n 11, Mason CJ, 535. See also ibid, Deane J, 608; Dawson J, 647; Gaudron J, 706; McHugh J, 720. "A bill of attainder is a legislative enactment which inflicts punishment without a judicial trial; initially a bill of attainder provided for punishment by death ..." ibid, Mason CJ, 535. See also ibid, Deane J, 612; Dawson J, 645-648; Toohey J, 685-686; McHugh J, 721. "A bill of pains and penalties inflicted ... punishment, involving forfeiture of property and, on occasions, corporal punishment less than death". Ibid, Dawson J, 645.
78. Ibid, Mason CJ, 539; Deane J, 612; Dawson J, 648; Toohey J, 686; Gaudron J, 706; McHugh J, 721. Brennan J did not discuss judicial power. Mason CJ, Dawson, Toohey and McHugh JJ held that the Act was not a bill of attainder. Ibid, 540, 649, 686, 721.
79. Ibid, Mason CJ, 536 ("If ... an ex post facto law did not amount to a bill of attainder, yet adjudged persons guilty of a crime or imposed punishment upon them, it could amount to trial by legislature and a usurpation of judicial power"); Deane J, 612-614; Dawson J, 649-650("the real question"); Toohey J, 686-690; Gaudron J, 706-708. This also indicates that ex post facto Commonwealth criminal laws can be constitutional. For the relationship between retrospective Commonwealth laws and s 109 of the Constitution see *University of Wollongong v Metwally* (1984) 158 CLR 447 (Cth Act could not retrospectively revive a State Act by retrospectively renunciating an intention to cover the field); Zines supra n 2, 331-333.

and bills of pains and penalties, issues remained for trial courts to determine.[80] Similarly, Justice Toohey conceded that not all ex post facto laws offended against the Constitution's vesting of judicial power in the High Court and federal courts. Only laws whose operation requires courts "to act contrary to accepted notions of judicial power" fell within that category.[81] Justices Deane and Gaudron were much more fastidious. Apart from some discrete exceptions,[82] retrospective Commonwealth criminal laws[83] were constitutionally impermissible. It was not sufficient for Parliament to leave with courts merely the task of determining whether the accused had done the activities which the legislation deemed to be a criminal offence.[84] Thus, the Act offended separation of powers principles and was invalid.

After *Polyukhovich*, what degree of concern for judicial power's integrity does the Australian Constitution mandate? Clearly it encompasses bills of attainder, bills of pains and penalties, and any law which Chief Justice Mason and Justice Dawson regard as trial by legislature. What remains are the difficult conundrums: are all other retrospective Commonwealth criminal laws valid? How wide is the *Polyukhovich* separation of powers constitutional prohibition? Answers depend upon the position of Justices Brennan and Toohey. In other circumstances, the former, who did not deal with this issue in *Polyukhovich*, has elevated judicial rectitude to a primary constitutional value[85] and has been willing to imply fundamental rights into the

80. Eg Mason CJ considered that:

> [I]f a law, though retrospective in operation, leaves it to the courts to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the rule prescribed, there is no interference with the exercise of judicial power. ...[The amended retrospective War Crimes Act] leaves for determination by the court the issues which would arise for determination under a prospective law.

Polyukhovich supra n 11, 536, 540. See also ibid, Dawson J, 649-651. But compare text accompanying infra n 84.

81. *Polyukhovich* supra n 11, 687.
82. Eg House of Representatives' and Senate's power to punish contempt and breach of privilege; military tribunals; trials for crimes against international law; Commonwealth laws retrospectively making conduct, already a state offence, a Commonwealth offence and criminal law in the Territories. Ibid, Deane J, 626-630; Gaudron J, 708.
83. For Deane and Gaudron JJ's explanation of such laws, see ibid, 629-632, 706.
84. Ibid Deane J, 632; Gaudron J, 706-707. But compare supra n 80.
85. See eg *Harris* supra n 69, 106-113 (impartiality, independence and non-delegation of judicial power) (Brennan J, dissenting).

Constitution.[86] The latter in *Polyukhovich*, while rejecting the absolutist Deane and Gaudron position, extends the prohibition further than the other Justices.[87] If that extension expands, the Deane, Gaudron and Toohey positions will begin to converge and may come close to coalescing. Inclusion of Justice Brennan would constitute a majority of Justices for the diminution of legislative power, an increased risk of statutory invalidity and more extensive protection of judicial power. Therefore, how much retrospectivity is constitutionally too much remains speculative.[88]

7. CONCLUSION

Splintered majorities, three dissenting opinions and unresolved constitutional conundrums are not infrequent occurrences in High Court decisions.[89] That *Polyukhovich* so easily synchronises with these judicial characteristics need not evoke despair. Rather, it should provoke, not suffocate, a robust and informed discussion focusing on the High Court's judicial processes, internal deliberations and institutional procedures. The reason is deceptively simple: constitutional decision-making is too significant to be shrouded in mystery.

86. See eg *Davis v Commonwealth* (1988) 166 CLR 79, 116 (freedom of speech). But compare supra n 68.
87. Eg Toohey J considered that:

> It is conceivable that a law, which purports to make criminal conduct which attracted no criminal sanction at the time when it was done, may offend Ch[apter] III, especially if the law excludes the ordinary indicia of judicial process.

Polyukhovich supra n 11, 689.

88. Compare Professor Powell's quip that:

> [H]e could easily prepare a Restatement of [American] Constitutional Law. In the usual form, the black letter - text would read: "Congress may regulate interstate commerce." A comment would add: "The states may also regulate interstate commerce, but not too much." And then there would follow a Caveat: "How much is too much is beyond the scope of this Restatement."

Freund supra n 1, ix.

89. See eg *Victoria v Commonwealth* (1975) 134 CLR 338; *Commonwealth v Tasmania* (1983) 158 CLR 1. But there is unanimity eg *Cole* supra n 29; *Precision Data Holdings Ltd* supra n 72. Of course:

> Unless we look behind the statistical compilations, in which votes are necessarily taken as values, we shall be in danger of emulating those institutes of social studies that ... T.R. Powell ... described as places where the counters don't think and the thinkers don't count.

P Freund *The Supreme Court of the United States: Its Business, Purposes, and Performance* (Cleveland: Meridian Books, 1961) 31.

Inevitably, this ferment will raise dilemmas. One is fundamental: can changes occur without sacrificing the value of flexibility and adaptability and without losing the freedom and vitality of dissents? Seeking answers by scrutinizing the High Court and constitutional law through a microscope and telescope[90] must be an initial response. That will extricate the elements - inarticulate judicial premises,[91] logic, philosophy, history, practical consequences and personal values and idiosyncrasies - and expose panoramas. Given such an intoxicating prospect - mixing intellectual exertion and the reality of judicial power - any adventure into these realms should not only be efficacious, but also enjoyable.

90. Compare the description of Brandeis J as:

> [T]he master of both microscope and telescope. Nothing of importance, however minute, escapes his microscopical examination of every problem, and, through his powerful telescopic lens, his mental vision embraces distant scenes, ranging far beyond the familiar worlds of conventional thinking.

C Hughes "Mr Justice Brandeis" in F Frankfurter (ed) *Mr Justice Brandeis* (New Haven: Yale University Press, 1932) 3-4.

91. See generally Zines supra n 2, 375-378 (discussing High Court Justices' major inarticulate premises as an element of their decisions).