# CONSTITUTIONAL LAW: "AT THE EYE OF THE STORM"

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*Until recently "legalism" has been identified as the dominant aspect of the High Court's technique in constitutional cases. Little attention has been given to the concept of constitutional law underlying that technique. A number of members of the current High Court have now discarded legalism. This article examines the significance of that change and raises the question, what concept of constitutional law lies behind the change? The article suggests that the Court's concept has moved from one of interpretation to development of the Constitution to ensure that it meets current community needs.*

## INTRODUCTION

There are many perspectives from which one could review the last 30 years in the field of constitutional law. This article addresses the question whether the High Court of the 1990's discharges its role as the constitutional court of Australia in a different manner from that of 30 years ago. If a change has occurred, what is its nature, what is its origin, and what are its implications?

## CHANGES OF TECHNIQUE — A DESCRIPTION

I begin with developments which have occurred in recent years. I do so to lay a foundation for consideration of the questions which I posed at the outset.

### 1. Commonwealth powers

One of the tasks often confronting the Court is to *characterise* a law. This process requires the Court to consider the meaning or scope of the

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relevant head of power and then to decide whether the law under consideration is one "with respect to" it.

Assigning a meaning to, or determining the scope of, a head of power is usually not difficult. At times there are problems, but it is well settled that the meaning to be given to constitutional terms is the meaning they bore in 1900.[1] The Court looks to the connotation of the terms in 1900, but is not bound by their denotation at that time. As an exercise in statutory interpretation that process of reasoning is familiar and well settled.[2]

More difficult has been the process of deciding whether a law can be described as one "with respect to" the identified subject matter. After 1960 it became established that characterisation requires one to consider the operation of the law according to its terms (and the matters upon which it operates) and the rights, duties and obligations which it creates. If these are within the head of power, the law is valid.[3]

The significance of this approach, which eschews questions of the real nature of the law,[4] has gradually emerged. Thus, a law controlling the export of minerals is a law with respect to exportation, even though it requires a Minister to consider environmental issues before consenting to the export of a mineral.[5]

The central point is that a law may be characterised as a law with respect to a subject within power even though it has features which enable it also to be characterised as a law with respect to a matter not within Commonwealth power.

Thus, with increasing confidence, the Commonwealth has begun to use its powers to achieve objects not within power, gradually eroding the legislative powers of the States in the process.

I do not believe that there is a correct "federal" balance between Commonwealth and State powers and that departure from that balance is contrary to the essence of our federation. I simply make the point that this technique of characterisation is altering the balance between the States and

1. *Attorney-General (Vic) (ex rel Black) v The Commonwealth* (1981) 146 CLR 559, 578.
2. However, cases such as *Nolan v Minister For Immigration & Ethnic Affairs* (1988) 165 CLR 178 illustrate that at times this process of reasoning can be complex. The case is also a neat illustration of the operation of changed circumstances and constitutional development on the current application of constitutional terms. On the same point, see *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 602 where Deane J comments on the significance of Australia's emergence as a sovereign State for the scope of "external affairs".
3. *Herald & Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418.
4. *Crowe v The Commonwealth* (1935) 54 CLR 69, 90.
5. *Murphyores Inc Pty Ltd v The Commonwealth* (1976) 136 CLR 1.

the Commonwealth and that it has really begun to work in relatively recent times.[6]

Another obvious change has been the recent more ready acceptance of the principle stated by O'Connor J in *Jumbunna Coalmine NL v Victorian Coal Miners Association:*

> [W]here the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrow interpretation will best carry out its object and purpose.[7]

In recent years the Court has embraced this principle, the result being a new life for some key Commonwealth heads of power. Three in particular are important: the power with respect to industrial disputes,[8] the external affairs power[9] and the corporations power.[10]

It seems that reliance on the *purpose* of the power has played a part also. In the *Franklin Dam* case,[11] a significant factor in the majority reasoning was the view that the purpose of giving power over external affairs to the Commonwealth was to enable it to play an appropriate part in international affairs. In deciding in *R v Coldham; Ex parte Australian Social Welfare Union*[12] that all disputes between employers and employees were within power, whether or not the business of the employer was "industrial", the Court relied on the fact that such an approach enabled the power "to fulfil the high object for which it was unquestionably designed".[13] In relation to the corporations power, in *Actors and Announcers' Equity Association v Fontana Films Pty Ltd*,[14] Mason J denied that the power allowed only the control of

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6. This approach to characterisation was confirmed as settled law in *The Commonwealth v State of Tasmania* (1983) 158 CLR 1 *("Franklin Dam Case").*
7. (1908) 6 CLR 309, 367–368.
8. Now read more widely as to occupations embraced and matters which have an industrial character in *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.
9. Read first to embrace any obligation assumed by the Commonwealth by treaty in the *Franklin Dam Case* and extended to matters external to Australia in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.
10. Now a wide power to regulate the activities of trading and financial corporations — terms given a wide meaning in *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 11, *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 and the *Franklin Dam Case* — notwithstanding the setback suffered by the Commonwealth in relation to control over incorporation in *State of New South Wales v The Commonwealth* (1990) 169 CLR 1.
11. Supra n 6.
12. Supra n 8.
13. Id, 314.
14. (1982) 150 CLR 169.

the trading acts of trading corporations. In his view, it "was intended to confer comprehensive power with respect to the subject matter so as to ensure that all conceivable matters of national concern would be comprehended."[15]

It is trite to say that purpose has always been important in relation to the scope of the so-called purposive powers, for example, defence. But my suggestion is that the reason for conferring a power on the Commonwealth, and the object the power should serve, appear to have a new significance in relation to non-purposive powers.[16] The Court seems more inclined now to consider the scope of a power not just by examining the meaning of the words used, but by considering also the purpose that the power was intended to serve.[17]

## 2. Convention debates and historical materials

Since *Cole v Whitfield*,[18] the Court has been willing to make use of the previously neglected Convention Debates. The Court does not allow the views expressed in the Debates to control the meaning of the words found in the Constitution, but will use the Debates (and other contemporary material) to identify:

> [T]he contemporary meaning of the language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.[19]

This may seem to be no more than the well known "mischief rule" of statutory interpretation. But until *Cole v Whitfield* the Court had either rejected the use of the Debates or allowed their use only with great caution.[20]

The relatively free use of this material since *Cole v Whitfield* does not mean that the High Court has joined the search for a doctrine of "original intent", under which the intent of the Founders is given great or decisive significance in the process of interpretation. But it does assist an approach which relies less on deductive reasoning and scrutiny of language, and more on an understanding of the purpose or object of constitutional provisions.

15. Id, 207–208.
16. L Zines *The High Court and The Constitution* 3rd edn (Sydney: Butterworths, 1992) 362.
17. In *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681, 688–689 Mason CJ gave considerable emphasis to purpose in relation to matters incidental to the subject matter of a power.
18. (1988) 165 CLR 360.
19. Id, 385; See also *Breavington v Godleman* (1989) 169 CLR 41 Deane J, 132–133.
20. See *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254, 261–262, 272–273; *Brown v R* (1986) 160 CLR 171, 189 & 214; *Attorney-General (Cth) (ex rel McKinlay) v The Commonwealth* (1975) 135 CLR 1, 17.

## 3. Substance and form

The Court has espoused the notion of substance over form in a number of areas, particularly when dealing with constitutional provisions which provide guarantees of one sort or another. In *Cole v Whitfield*,[21] speaking of the previous approach to section 92 which focused on the criterion of operation of the impugned law,[22] the Court summed up its reasons for rejecting the previous approach as follows:

> In truth, the history of the doctrine is an indication of the hazards of seeking certainty of operation of a constitutional guarantee through the medium of an artificial formula. Either the formula is consistently applied and subverts the substance of the guarantee; or an attempt is made to achieve uniformly satisfactory outcomes and the formula becomes uncertain in its application.[23]

The Court concluded that section 92 guarantees freedom from discriminatory burdens of a protectionist kind, accepted that there could be no reliance on a formula capable of automatic application and acknowledged that validity would raise issues of fact and degree.

In *Street v Queensland Bar Association*[24] (*"Street"*), the Court rejected the relatively narrow approach previously taken to section 117. The reasoning is replete with references to the function of the section and the illusory nature of the protection afforded by the narrow approach.[25] Deane J identified past decisions as "a triumph of form over substance"[26] and called for a generous approach to such provisions:

> [One which] requires that regard be had to substance rather than mere form both in the construction of such a provision and in the application to the facts of a particular case.[27]

Finally, in *Philip Morris Ltd v Commissioner of Business Franchises*,[28] the Court was unable to agree upon new principles to guide it in the

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21. Supra n 18.
22. The previous approach was to strike down a law which "takes a fact or an event or a thing itself forming part of trade commerce or intercourse, or forming an essential attribute of that conception ... and ... proceeds, by reference thereto or in consequence thereof, to impose a restriction, a burden or a liability" which constitutes "a real prejudice or impediment to interstate transactions ...": *Hospital Provident Fund Pty Ltd v State of Victoria* (1953) 87 CLR 1, 17.
23. Supra n 18, 402.
24. (1989) 168 CLR 461.
25. Id Brennan J, 518; Deane J, 522–523; Toohey J, 554; Gaudron J, 569; McHugh J, 588.
26. Id, 523.
27. Id, 527.
28. (1989) 167 CLR 399.

interpretation of section 90. Several judgments indicate dissatisfaction with earlier attempts to identify a criterion of liability for the payment of a tax which might identify the tax as an excise. The Court was clearly concerned that its rather formalised process of reasoning was leading to results which lacked coherence when tested against the purpose of section 90. Mason CJ and Deane J expressed the view that here too "the Constitution is concerned with substance not form; there is no reason at all for contemplating artificial results".[29]

To sum up: the insistence on substance rather than form has had a liberating effect, directing attention away from rather narrow legal reasoning towards notions of purpose and effect.

## 4. The Grand Design

Linked to the emphasis on substance, but to my mind a distinct thread, is the increasingly frequent reference to the role of particular provisions. I call this the "Grand Design" because the purpose of a provision is often identified as part of a very broad concept of the Australian federation.

A good example is found in *Street,* where Mason CJ referred to section 117 as "designed to enhance national unity and a real sense of national identity by eliminating disability or discrimination on account of residence in another State."[30] Another good example is given by Brennan J in *Davis v The Commonwealth.* In considering the scope of the executive power conferred by section 61 he put the matter thus:

> The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. The end and purpose of the Constitution is to sustain the nation ... [The executive power] extends to the advancement of the nation whereby its strength is fostered.[31]

One concept, in particular, occurs frequently. This is the notion of the "federal compact", whereby the Constitution is founded on the consent of the people. This notion has not yet found favour with a majority of the Court and just where it leads remains to be seen.[32] In the context of "repatriating" our Constitution, and establishing its legal basis firmly in Australia, it has

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29. Id, 433. See also Brennan J, 450; Dawson J, 473, McHugh J, 492. See also *Hematite Petroleum Pty Ltd v State of Victoria* (1983) 151 CLR 599, 630 where Mason J said, with reference to s 90: "What, one might ask, was the high constitutional purpose intended to be served by prohibiting the States from imposing a tax in this very limited form?"
30. Supra n 24, 485, 489.
31. *Davis v The Commonwealth* (1988) 166 CLR 79, 110.
32. It has been rejected by Dawson J in *ACTV* infra n 41, 108 ALR 577, 627.

obvious significance.[33] Such reasoning could easily complete the process of repatriation which began with the Statute of Westminster 1931 (UK), was furthered by the Australia Act 1986 (Cth), and now seems ripe for completion.[34]

Examples of the use of Grand Design reasoning can be found in other judgments.[35] The point is that such language indicates more than the conventional purposive approach to interpretation, which involves purpose in a relatively narrow, functional sense. Some Justices are clearly invoking purposes which find their origin in the nature of Australian federalism, in concepts of federalism or federation as a dynamic concept, and in concepts of the Australian nation. One of the most striking examples is to be found in the joint judgment of Deane and Toohey JJ in *Leeth v The Commonwealth*[36] *("Leeth")*. They develop the argument that the Constitution adopts, as a matter of necessary implication, a "general doctrine of legal equality", which doctrine both controls and guides their approach to a range of specific provisions.[37]

## 5. Individual rights

Another important development in recent times has been a renewed focus on individual rights and the protection of the individual against the State. Much of this has occurred in areas other than constitutional law. Examples are administrative law and criminal law. The decision in *Mabo v State of Queensland (No 2)*[38] provides clear evidence of the impact of current thinking on human rights. Brennan J put the position bluntly: "A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."[39]

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33. In *Breavington v Godleman* (1989) 169 CLR 41, 120, 123 Deane J seems to found the legal basis of the Constitution on the compact, rather than its historical basis of United Kingdom law.
34. In *ACTV* infra n 41, 108 ALR 577, 594 Mason CJ says that ultimate sovereignty now resides in the Australian people.
35. One of the most striking is the judgment of Deane J in *Breavington v Godleman* (1989) 169 CLR 41. He there draws from the elements of the Constitution the concept of the Australian legal system as a unitary system. See also Brennan J in *Leeth* infra n 36, 475, describing it as "offensive to the constitutional unity of the Australian people" to expose Commonwealth offenders to different maximum penalties according to the place of conviction.
36. (1992) 174 CLR 455.
37. Id, 485–487.
38. (1992) 175 CLR 1.
39. Id, 422. The same issue was addressed in more emotive terms by Deane and Gaudron JJ,

There has also been a strong emphasis on individual rights in the area of constitutional law. A recent striking example is *Polyukhovich v The Commonwealth*.[40] Mason CJ, Dawson, Toohey and McHugh JJ held that the separation of powers enshrined in the Constitution meant that a law would be invalid if it inflicted punishment without a judicial trial. The law in question was not invalid, although retrospective, because it left it to the courts to determine whether the person had engaged in the conduct alleged and whether that conduct infringed the prescribed rule. Deane and Gaudron JJ set their faces against the validity of laws which retrospectively create criminal liability. Protection of the individual from unjust treatment at the hands of Parliament permeates their judgments.

I select this case as an illustration of my point because of the vigour of the judgments and because it is a good example of reasoning which one would not have encountered as recently as 20 years ago.

## 6. Constitutional implications

The topic of constitutional implications has taken on a new significance as a result of the decisions in *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*")[41] and *Nationwide News Pty Ltd v Wills* ("*NWN*").[42]

In *ACTV*, there was a challenge to the validity of a Commonwealth law prohibiting the broadcast of a wide range of matters by radio or television in the lead up to an election.[43] The main issue was whether there was to be implied in the Constitution a right or freedom of communication. Six Justices held that an implication of some type was to be made. This implication was based on the fact that our Constitution provides for a system of representative government and is necessarily premised on the continued existence and effective functioning of that system. That in turn led to the conclusion that freedom of communication, at least in relation to public and political matters, was essential to the effective functioning of representative government. Thus the continued existence of such freedom was necessarily to be implied. Views as to the scope of the freedom varied but it was agreed that the freedom was not absolute and that the law in question could not reasonably be justified.

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451.

40. (1991) 172 CLR 501.
41. (1992) 108 ALR 577.
42. (1992) 108 ALR 681.
43. Part IIID (ss 95–95U) of the Broadcasting Act 1942 (Cth) inserted by the Political Broadcasts and Political Disclosures Act 1991 (Cth).

The decision is of the greatest significance. First, the implication protects one of the acknowledged fundamental human rights, freedom of speech. Secondly, the drawing of the implication, and the nature of it, signals a new willingness by the Court to play a creative role in the drawing of implications which are protective of human rights. Thirdly, in deciding whether a law infringes the new guarantee, the Court must balance the freedom guaranteed against the reason for and the severity of the restriction. Of necessity it will have to make judgments regarding the proportionality of the restriction to the interest which it serves.[44] Such judgments will often be highly sensitive in political terms.

Mason CJ noted that the framers of the Constitution had expressly decided against including comprehensive guarantees of human rights, and so it would be difficult to imply general guarantees of fundamental rights and freedoms. But that did not prevent a narrower implication, based on a specific feature of the Constitution.[45] The pushing aside of what had previously been seen as an almost impenetrable barrier to such implications shows the Court's determination.

## 7. Proportionality

In *NWN*, the Court considered the validity of section 299(1)(d)(ii) of the Industrial Relations Act 1988 (Cth) making it an offence to use words calculated to bring the Australian Industrial Relations Commission into disrepute.

Mason CJ found it unnecessary to rely on an implied right, holding that the law was simply beyond power under sections 51(xxxv) and 51(xxxix). The law was not one within the core of the subject matter of the power (the prevention and settlement of interstate industrial disputes). Although the purpose (the protection of the Commission) was within the incidental reach of the power, the law was valid only if there was reasonable proportionality between the designated purpose and the means selected by the law for achieving that purpose.[46] That reasonable proportionality was lacking.

In so holding, Mason CJ appears to have rejected the view adopted by the Court in *Herald & Weekly Times Ltd v The Commonwealth*[47] that if the purpose is within power that suffices, the extent to which the law goes beyond

44. See supra n 41 Brennan J, 609.
45. Id, 592.
46. Supra n 42, 688–689.
47. (1966) 115 CLR 418.

this not being relevant. McHugh J seems to have taken a similar approach.[48]

Thus, even here are the signs of a new issue for the Court. The approach of the Chief Justice suggests a greater role for the Court in the area of characterisation, because the Court's assessment of the law (not its merits, but the balance between means and ends) will be central. The difficulty of such assessments is, I think, illustrated by a case such as *Castlemaine Tooheys Ltd v State of South Australia*.[49] This case dealt with a challenge, under section 92, to the validity of the Beverage Container Act 1975 (SA). This Act imposed a regime of deposits on beverage containers which was designed to ensure their return in the interests of litter control and conservation of resources. The Court had to make a close assessment of the nature of the regime, its objectives, the need for the means shown and other ways of achieving the same result. Had the parties been unable to agree to the facts relevant to validity, a very lengthy hearing would have been needed. The sensitivity of such a decision-making process will, I think, be evident to all. It touches on issues which are close to the realm of legislative judgment (albeit from a different perspective) and close to the process one would expect a legislator to follow. Obviously it exposes the Court to attack in these areas. Such attacks the Court can endure, but its position in such a debate will be an unaccustomed one.

## CHANGES OF TECHNIQUE — AN ASSESSMENT

My next step is to make an assessment of the underlying nature and significance of the changes that I have described. They appear to be changes, but what sort of change are they?

### 1. Characterisation and purpose

The process of characterisation which I have described is not new. It has become settled and accepted, and applied wholeheartedly. In this respect there is a new willingness to let the words of the Constitution do their work (aided, of course, by the technique of characterisation). Although the doctrine of reserved powers has been dead since the decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[50] it seems to me that well after that decision there was an element of caution in the Court's approach to

48. Supra n 41, 671–672. Brennan, Deane, Toohey and Gaudron JJ found the law invalid on the basis that it infringed an implied right to communicate. Dawson J dissented.
49. (1990) 169 CLR 436.
50. (1920) 28 CLR 129.

the scope of Commonwealth power. It was one thing to say that the scope of Commonwealth power was not to be limited by notions of powers reserved to the States, but another thing to interpret those heads of power to the full. Of late, the Court has accepted more readily the implications of its own technique and is more likely than in the past to give an expansive meaning to Commonwealth powers.

I have also argued that the Court is taking a renewed interest in the purpose for which powers were conferred. It has been able to do so because of its willingness to resort to the Convention Debates and other material relevant to the foundation of the Commonwealth. Purpose has surfaced as an important inquiry in relation to the scope of heads of power and in relation to constitutional guarantees.

This approach raises a number of questions. First, when do we have regard to the purpose for which a power was conferred on the Commonwealth? Do we do so routinely or only when scrutiny of the text leaves us in doubt whether the power goes as far as claimed? Orthodox statutory interpretation principles would suggest the latter. But the Constitution is not an ordinary statute and should not be interpreted as if it were.[51]

It is reasonable to argue that in interpreting the Constitution one should give special significance to the purpose behind a provision. A constitution is a mechanism or framework for law-making and government, intended to endure, and capable of change only with some difficulty. It is necessarily cast in generalities. What better way, it might be argued, to interpret those generalities than by reference to the purpose behind the provision?

Are we moving towards a development which will see purpose installed as a routine and basic guide in constitutional interpretation? If not, then how do we decide when purpose is relevant and when it is not? When purpose is relevant, recent judgments suggest that it is to be found in materials from 1900 and earlier which cast light on the object behind the relevant constitutional provision. There is no reason to think that this means that the High Court has adopted the principle of originalism or original intent, a principle the subject of much debate in the United States. That principle, according to some, produces a value-free system of interpretation in which, in case of doubt or ambiguity, the identified intent of the founding fathers will replace value judgments by the Court. The passage already cited from *Cole v*

51. This point was accepted early in the life of the Court: see *Attorney-General (NSW) v Brewery Employees of NSW* (1908) 6 CLR 469 Higgins J, 611–612. It remains orthodox after the decision in *Engineers*.

*Whitfield*[52] denies any such principle. And the use of purpose in the case of the powers instanced (external affairs, industrial disputes and corporations) is much freer. It is not an attempt to identify how the question before the Court would have been answered in 1900 (a pointless and impractical approach) but a use of purpose in a fairly broad sense to guide the Court in determining the ambit of fairly general terms. But why do we confine ourselves to the purpose as conceived by the framers of the Constitution? If purpose is relevant to the scope to be given to a power, it is arguable that in a constitution the relevant purpose is the purpose that is best adapted to current circumstances. A constitution, of all instruments, serves and should be adapted to a changing community. Purposive interpretation, in relation to a constitution, throws up some issues which are important but as yet unresolved.

## 2. Substance and form

The change occurring here is of great significance. In the area of constitutional guarantees the significance is obvious and is linked to what I have already said about purpose. The Court will no longer approach the meaning of guarantees as a routine exercise in statutory construction. Purpose and function are central. It follows that the Court will not adhere to judicially approved formulas or principles arrived at in this manner. Rather, the Court will identify the purpose of the guarantee. If this can be found in relevant historical material, that will be the guide. If it cannot, I suggest that the Court will still be inclined to ascribe a purpose to the provision. In doing so, it will apply its own understanding of the apparent object of the provision and identify that as the intended purpose. The Court will then test the actual operation of the law (not just its terms) against the identified purpose.

The significance of this change is twofold. First, as pointed out in relation to proportionality, it requires the Court to make a decision about the practical impact of a law. Usually the Court will have to consider the purpose (in the sense of motive) of the law and the relationship of means and ends. This also has implications for the way in which cases are presented. Secondly, in testing the operation of the law against the ascribed purpose, the Court will have to make judgments of degree, that is, judgments about the reasonableness of the response of Parliament to a problem — judgments which look like value judgments.

The Court has clearly chosen to embark on this path and undoubtedly knows that in performing this new role it subjects itself to a new type of

52. Supra p 18.

scrutiny and runs the risk of being attacked for usurping the role of Parliament. The plain fact is that we are in the midst of a move away from reliance on relatively narrow modes of legal reasoning which were relatively "value free", and mainly a matter of logical deduction, to patterns of decision making in which factual, social and political judgments become part of the issue of validity. The Court is clearly willing to enter this field of discourse, a field which it overtly eschewed under Latham, Dixon and Barwick CJJ.

### 3. The Grand Design

Underlying the remarks in *Leeth*[53] and *Street*[54] are the signs of a new technique. It is one which calls in aid very broad propositions and concepts, for example, unity, equality, federation. These propositions and concepts are founded in notions or concepts of Australian federalism interpreted through contemporary eyes. The same Justices are trying to identify aspects of our constitutional structure which inhere in our own form of federalism. There is the potential for these broad concepts to play an important role in the interpretive process. I believe that some of these concepts, because they are implicit in identified sections, could later be a basis for further constitutional implications, for example, in relation to equality of all Australians under Commonwealth law.

### 4. Constitutional implications

Next we move to the fertile area of individual rights. The Court has, despite its warnings about the limited basis of the implications, opened a door to a house which has many rooms. The Court will be faced with claims that rights are implicit in many provisions of the Constitution. The Court is the source, interpreter and assessor of implied rights. Its decision whether a law is invalid because of the nature and extent of the infringement of such rights is a value-laden decision making process, and one which is only loosely guided by traditional legal reasoning. The Court will henceforth play a new social and political role.

## CHANGE — THE RATIONALE

Why have these changes occurred? Society has changed, the legal profession has changed, our attitudes and values and approaches to problems

53. Supra p 21.
54. Supra p 20.

have changed. But is this all part of some formless process lacking any rationale? Or is the change in the High Court's approach the product of an identifiable change in philosophy, in particular in the Justices' theory or concept of constitutional law?

The Chief Justice has provided a partial answer to this question. In two significant essays he has identified legalism as a dominant aspect of the High Court's technique and has asserted and supported a departure from it.[55] The most commonly cited description and justification of legalism is that given by Sir Owen Dixon at his swearing in as Chief Justice:

> Close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the court is thought to be increasingly legalistic ... There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.[56]

Legalism, as is well known, is associated with a close attention to the text, the exposition and application of clear legal rules, the exclusion of value judgments and policy considerations as part of such rules, and a disregard of the practical effect of the laws under consideration.

The advantage of a legalistic approach was identified by Mason CJ as follows:

> [D]ecisions proceed from the application of objective legal rules and principles of interpretation rather than from the subjective values of the justices who make the decisions.[57]

Anyone who has read Dixon J's judgments will know that if legalism is taken literally, his own words cannot be an accurate description of his stated approach. The tendency to caricature legalism is cogently demonstrated by Professor Zines.[58] For present purposes it suffices to say that legalism as it has operated in the High Court is associated with the approaches I have mentioned and that its adherents have identified it with stability, objectivity and certainty.

My description of the changes has identified, in a general way, why the Court has moved away from legalism. The reasons given by Mason CJ might be summarised as follows:

- Legalism is unachievable and so illusory; it conceals the true basis of

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55. Mason "*The Role of a Constitutional Court in a Federation*" (1986) 16 FLR 1 and "*Future Directions in Law*" (1987) 13 Monash LR 149.
56. (1952) 85 CLR xi, xiii–xiv. See the equally emphatic statement by Barwick CJ in *Attorney-General (Cth) (ex rel McKinley) v The Commonwealth* (1975) 135 CLR 1, 17.
57. (1986) 16 FLR 1, 5.
58. Supra n 16, ch 16.

decision making.

- Values are important to legal reasoning; values should be stated explicitly.
- Values should be current community values.
- A constitution cannot be interpreted legalistically.

Legalism does tend to conceal the non-legal beliefs and assumptions which play a part in judicial reasoning. If judges are conscious of the role that values can play in their decision making, they are more likely to be aware of the existence of a choice when values are relevant. Equally, they will be less likely to think (mistakenly) that precedent or logic dictate a result when they do not. By the same token, Mason CJ's views seem to pay little attention to some real problems. In a pluralist society how does a judge identify current community values with confidence? As to that, it is interesting to note that in *Dietrich v R*,[59] Brennan J, in a common law context, acknowledged the effect of values on the development of the law, the appropriate values being "the relatively permanent values of the Australian community" — perhaps even harder to identify in these changing times. How do we know when values should play a part and when they should not? How does one draw the line which marks the boundary beyond which one is making a legislator's judgment?

If we accept what the Chief Justice says, we may conclude that the Court has recognised the deficiencies of the previously prevailing techniques. This would explain the move to a purposive approach to interpretation and the insistence on substance over form. It also explains why so many issues in relation to purposive interpretation remain unresolved. The Court's move is the rejection of a deficient approach and we await the complete exposition of the new philosophy.

However, I do not think that what Mason CJ says explains everything. The rejection of legalism does not explain the new emphasis on individual rights. That development I attribute to a conscious belief (although not always openly avowed) by the Court that it must undertake in a more active way the task of protecting the individual against the State. The Court must have been influenced by the increasing emphasis on individual rights in other legal systems and by the failure of Parliament (by statute) and the Australian people (by referendum) to establish a Bill of Rights.

I cannot accept that the emphasis on individual rights has "just hap-

59. (1992) 67 ALJR 1. See P A Fairall "The Right not to be Tried Unfairly without Counsel: Dietrich v The Queen" (1992) 22 UWAL Rev 396.

pened" simply because other systems are emphasising rights. Yet, curiously, there has been little discussion of the proper role of the High Court in this area. The change is one which I welcome, but it seems odd that it should occur in this incremental manner with no clear statement of the Court's role. Perhaps this is a feature of our common law system.

The changes I have described indicate that the Court has altered its concept of its role as a Constitutional Court. I would summarise the new concept as follows:

- The Court is creative (by implication and by interpretation) in shaping the Constitution to the interests and needs of the Australian people;
- In doing this the Court will rely upon current community values which it will identify;
- The Court will identify the purpose of constitutional provisions (by reference to history and also its own views) and will mould those provisions (within limits) to enable them to achieve their purpose;
- The Court will be less deferential to the Parliament in its scrutiny of laws to determine if they are within power, and will be more willing to invalidate laws because of the means chosen to effect the end;
- The Court will actively promote and protect individual rights and protect the people against the State unless Parliament clearly and validly intends to override those rights; and
- The Court will by implication create constitutional and fundamental rights when such implication can fairly be drawn.

## Constitutional theory

If this reflects the Court's view of its role, what theory of constitutional law supports it? The theory of constitutional law behind legalism was that the Court was no more than an interpreter of the text of the Constitution and that the process of interpretation was one to be carried out in accordance with traditional legal techniques. This notion of the interpreter is not a simple one. It seems to be that the text is there to be understood and that the process of understanding is affected by the range of sources one may consult. For example, one interpreter may see use of Convention Debates as legitimate, another may not. But in the end the function of the Court is to find what is already there in the words or necessarily implicit in the provisions. It is a concept we recognise and still use for ordinary statutes and a concept which we recognise but have abandoned in relation to judicial development of the common law.

The theory behind this new concept must be that the Court is charged with the function of shaping the Constitution to ensure that it meets community needs, as far as it can do so consistently with the text. The theory must also be that the Court will seek to protect the individual against the State and, within certain limits, create rights to serve that end. The theory must also include a notion that decisions can be discarded, or positions changed, not because they are wrong in the sense of illogical or based on demonstrably unsound legal reasoning, but because the past decision or position is no longer suited to the current needs of the Australian community. In a sense decisions cease to be right or wrong but appropriate to the time or not appropriate.[60]

The light in which the Constitution is read is shaped by developments within and affecting our nation, which developments are themselves influenced by the Constitution. So, from 1901 to 1920 the emphasis may have been on what the States (formerly, Colonies) surrendered and on preserving what they kept, whilst after 1920 the emphasis shifted more strongly to the national role of the Commonwealth Government and the need for an approach to the Constitution which would allow the most ample use of its powers in the national interest. Thus follows the rejection of reserved powers in the *Engineers'* case, and the emphasis against the drawing of implications (which had tended to be restrictive of the Commonwealth). Today, we might say, part of the same emphasis remains but the Court has identified a need to shape and develop the Constitution and to protect the individual against the State.

This leads on to my final point. It is that in a special sense constitutional law can be said to be "in movement". This is a thesis developed by Professor Detmold. The thesis is not a simple one. The following two quotations illustrate his point. First, the general proposition:

> Constitutions work. I mean, they do things in communities. They change communities, and thereby change their own relation to communities. They are always in that

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60. This view of things is not completely new. Consider what Windeyer J said in *State of Victoria v The Commonwealth* (1971) 122 CLR 353, 396–397:

> I have never thought it right to regard the discarding of the doctrine of the implied immunity of the States and other results of the *Engineers' Case* ... as the correction of antecedent errors or as the uprooting of heresy. To return today to the discarded theories would indeed be an error and the adoption of a heresy. But that is because in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realisation that Australians are now one people and Australia one country and that national laws might meet national needs.

> sense in movement ... The movement is more than a change in the meaning of constitutional words: it is the movement of a constitution's actual working in a community ...[61]

Next, a more limited proposition, which is an aspect of the general one:

> Thus on a point where the text is ambiguous the question is not which interpretation best fits the text (its meaning, what the founding fathers intended...); it is which interpretation of the text best serves the practical enterprise of the governance of the Commonwealth.[62]

I suggest, therefore, that the current High Court has changed the concept of its role to that of development of the Constitution rather than mere interpretation and that lying behind that may be a more general theory of constitutional law as law in movement in a community rather than as a static set of rules and principles to be identified by the Court.

## "AT THE EYE OF THE STORM"

The distinguished American writer Edward Corwin began one of his essays as follows:

> 'We are very quiet there', Justice Holmes once wrote, referring to the Supreme Court, 'but it is the quiet of a storm centre, as we all know.' To remain at the centre of a storm one has to keep moving.[63]

In adopting a more active role the High Court moves to the eye of the storm of public affairs. Many would say that it has always been there, but has now shifted its theory from a conservative to a progressive one. Be that as it may, recent events show that the Court will have to look to its laurels if it has adopted the theory I have suggested. Outcomes can no longer be neutralised and immunised from criticism because they are the result of logic and precedent. The values adopted by Justices and the effect given to them become a legitimate subject of public debate. There are many implications for the practising profession and academic lawyers too.

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61. M J Detmold "Australian Law: Federal Movement" (1991) 13 Syd LR 31.
62. M J Detmold *The Australian Commonwealth* (Sydney: Law Book Company, 1985) 262.
63. E Corwin "Statesmanship on The Supreme Court" in R Loss (ed) *Corwin on The Constitution* (New York: Cornell University Press, 1987) Vol II, 375.