Aspects of Judicial Restraint

The Honourable Justice G F K Santow OAM[*]

> No other Anglo-American Court has ever overturned so many precedents and made so much new law in so short a time as the Supreme Court under Chief Justice Warren. Yet the prestige of the Supreme Court is surely greater than that of other branches of Government to-day, and I am inclined to think that it has never been higher.[1]

This too may fairly be said of Australia's High Court to-day, with a special and deserved emphasis on Sir Anthony Mason's recent retirement as its distinguished Chief Justice. He has sat on the High Court bench for 23 years. This represents the last quarter of the Court's existence since Federation in 1901, a considerably shorter history than the Supreme Court of the United Sates of America. He was its Chief Justice for the last seven years, though one of its influential figures for considerably longer.

The purpose of this paper is to examine two striking examples of the Mason High Court's recent decision-making. One deals with the common law and native title, *Mabo v Queensland (No 2)* ('*Mabo*'), the other with the constitutional implication of a right of free speech, *Theophanous v Herald & Weekly Times Ltd* ('*Theophanous*').[2] Both decisions were highly controversial and labelled activist. Yet they illustrate the need to look deeper than the simplistic labels of 'activist' or 'legalistic'. The process at work does not lend itself to so crude a taxonomy.[3]

A crucial aspect of the judicial process is the implication for division of power between the judicial branch, insofar as it trenches upon the legislative function. This is especially so in constitutional matters, where popular sovereignty is directly and fundamentally affected by the Court's decisions, unrepealable save by constitutional amendment.

I ask, therefore, how the Australian High Court plays its role in Australia's federal polity. What are the implications for exercise of that role of a more open resort to values and policy? What are the limits to that role in terms of judicial restraint?

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* Judge of the Supreme Court of New South Wales. Paper prepared for Seminar at Cornell University Law Faculty, 14 April 1995.

1 Archibald Cox, *The Role of the Supreme Court in American Government,* Oxford Unviersity Press, 1976.

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*'); *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1 ('*Theophanous*').

3 Posner, 'The Federal Courts', Harvard University Press, 1987, at 207, points to at least five different senses to the expression judicial self-restraint, namely:

(1) A self-restrained judge does not allow his own views of policy to influence his decision.
(2) He is cautious and circumspect, and thus hesitant about intruding those views.
(3) He is mindful of the practical political constraints on the exercise of judicial power.
(4) His decisions are influenced by a concern lest promiscuous judicial creation of rights result in so swamping the courts in litigation that they cannot function effectively.
(5) He believes that the power of his court system relative to other branches of government should be reduced.

That polity has rather more in common with the United States and its Supreme Court than the United Kingdom, with its unwritten constitution. The constitutions of Australia and the United States divide constitutional powers between federal and state governments; central government enjoys enumerated powers and the states residual power. The constitution in each case enshrines the separation of powers between the three branches of government, legislative, executive and judicial. However, in contrast to the United States, ours is a Westminster system by deliberate choice of the framers of our constitution. Our executive is responsible to Parliament, so avoiding the gridlock between Executive and Congress that has bedevilled American government. In Australia, separation of powers is also modified in that it has been long established that the executive may have legislative power to pass regulations. So that in this and other respects, the separation has never been wholly complete in either system. Recently the United States Supreme Court acknowledged that:

> [t]he doctrine does not create a 'hermetic division among the Branches'; but 'a carefully crafted system of checked and balanced power within each Branch'.[4]

Nonetheless, judicial power in Australia, as in the United States, has been the more stringently separated and preserved. Even so, the High Court has, in the exercise of its powers, been accused of partaking of the legislative function, though in the very different way a court operates by simply deciding the case at hand. This has instigated countervailing tendencies on the part of legislature and executive to curb the independent exercise of judicial power.

Much is at stake, as both Australia and the United States have a court with supreme power to declare laws unconstitutional and executive action unlawful. That power is constrained only by judicial self-restraint. Our High Court moreover, is the supreme appellate court not only for federal law, as in the United States, but also state law and, with it, the common law. Yet Australia has no bill of rights, entrenching individual rights in the way the American Constitution has done:

> In Australia, one view held that these bill of rights checks on legislative action was undemocratic, because to adopt them argued a want of confidence in the will of the people. . .[5]

America set about protecting individual liberties, even from the rule of those chosen by popular election. We did not; at least not expressly.

Turning to the High Court to-day, it is submitted that there is a continuing connection, defined in similarities as well as in subtle but significant shifts in emphasis and degree, linking the jurisprudence of the Mason High Court and the corpus of its decisions to the views so powerfully espoused by the late Sir Owen Dixon. The cumulative impact of those shifts is now apparent and quite remarkable in its scope. Yet the intellectual debt which the present High Court owes to that profound jurist is reflected in the frequent invocation of his writings, judicial and extra-judicial.

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4 *Mistretta v United States* 488 US 361, 381 (1989).

5 Sir Owen Dixon, 'Two Constitutions Compared', *Jesting Pilot*, Law Book Co, Sydney, 1965, p 102.

Influence of the Dixonian Legacy: 1929 – 64

Sir Owen Dixon's long period on the bench, over one-third of the High Court's history to date, had its origins in a more spacious, pre-war Aurelian age. Yet it was a period nevertheless riven by bitter constitutional conflicts between the Commonwealth and the states, deep enough to threaten the federal polity itself. The issues were fundamental. They were not just at the margin, but at the very core of the federal balance. Could the Commonwealth impose financial burdens on the state? Could the banks be nationalised? Could the Communist Party be proscribed? What did it mean to say in the Commonwealth Constitution s 92 that 'trade' between the states shall be absolutely free?

The imperative of that earlier age was to resolve such fundamental conflicts in a way which did not open up deep schisms, nor a secessionist fault line; and, above all, in a way which did not threaten the legitimacy of the court in its crucial adjudicative role above the fray. Individual rights tended to be secondary, though necessarily affected by those great conflicts, and were sometimes the catalyst for them.

Sir Owen Dixon retired in 1964 after 35 years on the bench. In 1955, and in contrast to the position in the United States, he wrote:

> But in our Australian High Court we have had as yet no deliberate innovators bent on express change of acknowledged doctrine.[6]

He little imagined the late Lionel Murphy, politician and former industrial barrister, waiting in the wings and who was to serve on the Mason High Court. Murphy took office 19 years later as a frank judicial activist, radical reformer and 'deliberate innovator'. I digress to deal with his role because he provides such a sharp contrast in judicial method, not only with the Dixon Court, but with the Mason High Court. In so doing, I seek to enlarge, by way of contrast, upon certain aspects of judicial restraint. Murphy was to say in a 1980 Press Club address:

> One part of the role of a judge, especially a judge in the higher courts, is that he not only applies the law, he often makes or helps make it . . . Judges used to pretend that they only interpreted the law, never made it. But the law-making role of judges is now openly accepted all around the world.

He made no bones about what he saw as the personal discretion of the judge: judge-made law represented the 'judge's idea of what is appropriate, ideas fashioned on the wisdom of their predecessors and adapted to meet changing conditions.'[7] His judicial opinions were notable for their iconoclasm rather than their subtlety and were notable also for early recognition of the fact that Australia, freed of Privy Council appeals, could develop a distinctively

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6 Sir Owen Dixon, 'Concerning Judicial Method', above note 5, p 158.

7 Lionel Murphy, transcript of National Press Club address, 22 May 1980, Parliamentary Library, Current Information Service, pp 4-5; and see Murphy J in *State Government Insurance Commission v Trigwell* (1978) 142 CLR 617 at 651:

> The legislatures have traditionally left the evolution of large areas in tort, contract and other branches of the law to the judiciary on the assumption that judges will discharge their responsibility by adapting the law to social conditions. It is when judges fail to do this that Parliament has to do this.

Australian common law, in which English precedent had no necessary primacy. Indeed, that is exactly what the Mason High Court has in recent years so successfully achieved. Lionel Murphy would have seen himself as attempting to clear away, against conservative opposition, past sophistical overlay and doctrinal complexity. However, his opinions, terse and at times dogmatic, exhibited few signs of intellectual struggle between genuinely competing values; the struggle that requires the kind of careful reasoning and weighing up which the late Paul Freund saw as essential to discerning and meticulous judgment:

> The great constitutional issues which come before the Court', he wrote, 'reflect not so much a clash of right and wrong as a conflict between right and right: effective law enforcement and the integrity of the accused; public order and freedom of speech; freedom of worship and abstention by the state from aiding as well as impeding religion.[8]
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> Hard cases called, at the end of the long path of careful analysis, for striking the balance by making a judgment having the aesthetic quality, perhaps best expressed in the observation that 'more than ever, law like life itself in Holmes' phrase, is not doing a sum, it is painting a picture.[9]

Lionel Murphy drew widely on American precedent.[10] For example, in his dissent from the decision upholding Commonwealth grants to Roman Catholic schools he would have given a wide interpretation to the Commonwealth Constitution s 116 prohibition against 'establishing any religion'. He based his opinion on the United States Supreme Court's doctrine of strict separation of church and state.[11] He was by no means a pioneer in resort to American precedent. Sir Owen Dixon wrote:

> In matters affecting the Constitution, the United States Supreme Court Reports are much in our hands and in matters of private law. . . by no means entirely neglected.[12]

It has been said that a number of Murphy's decisions, often in dissent, anticipated outcomes later to prevail in the Mason High Court when he was no longer on the bench.[13] That should be acknowledged. Yet in so doing, he may well have contributed to resistance by the terseness, and at times dogmatic quality, of his judgments, sharpened perhaps by his position in sole dissent. Let us consider two examples.

Consider first the Commonwealth Constitution s 92 as re-interpreted in *Cole v Whitfield.*[14] While s 92 declared that 'trade, commerce and intercourse between the States shall be absolutely free', it neglected to explain 'free from what'. The Mason High Court held that it prescribed freedom only from restrictions of a burdensome and protectionist kind that discriminated against

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8 P A Freund, 'Constitutional Dilemmas', (1065) 45 *B U L Rev* 13 at 22.
9 P A Freund, 'Mr Justice Frankfurter', (1962) 76 *Harv L Rev* 17 at 17.
10 For a selection of Murphy J's judgments see, *Lionel Murphy: The Rule of Law* (J and R Ely eds), Akron Press, Sydney, 1986).
11 *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559; 33 ALR 321.
12 *Jesting Pilot*, above note 5, p 156.
13 Justice Michael Kirby, 'Lionel Murphy and the Power of Ideas' (1993) 18 *Alt L J* 253.
14 (1988) 165 CLR 360.

interstate trade. It is however too simplistic to say this affirmed earlier views of Murphy J.[15]

Justice Murphy held that s 92 merely guaranteed freedom from fiscal charges. This was a limitation to s 92 which *Cole v Whitfield*[16] said 'would make no sense at all'.

In denying privilege against self-incrimination to a corporation, in earlier decisions Murphy J based his view on the broad proposition that the privilege is 'peculiarly a human right and thus not available to corporations or unincorporated associations or political entities'. He also drew for support on the International Covenant on Civil and Political Rights Art 14(3)(g). He drew almost exclusively on United States decisions, dismissing two contrary English decisions as 'not persuasive'.[17]

The Mason High Court in *Environmental Protection Authority v Caltex Refining Co Pty Ltd*[18] also reached this conclusion. It did so by a very different process. Certainly, it drew on that principle, and on international law, but also, importantly, on an exhaustive survey of authority, not limited to the United States. In that process, underlying competing issues of principle were articulated and properly weighed. The court showed itself attentive to the tensions inherent in competing policy and principle. It did so in striking a fair balance between state and individual as well as maintenance of an accusatorial system of justice. In the end, these were held not to outweigh considerations justifying removal of the privilege for corporations at common law.[19]

Thus, Murphy J did anticipate the outcome in *Caltex*, and one of the fundamental principles which underlay that conclusion. Yet, restraint applies as much to process as to outcome. Murphy J sought in his judgment writing to command assent, rather than, as with the great dissents of the past, to persuade through argument, grappling with competing principle.

The Mason High Court, though with very different judicial method, has, through various of its members frankly acknowledged the relevance of policy and values, at least in hard cases.[20] In *Bryan v Maloney,*[21] the High Court explicitly acknowledged the legitimate role of policy consideration, influenced by community standards in articulating the proximity rule in negligence for economic loss:

> . . . inevitably, the policy considerations which are legitimately taken into account in determining whether sufficient proximity exists in a novel category will be influenced by the courts' assessment of community standards and demands.

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15 *Buck v Bavone* (1976) 135 CLR 110 at 132; 9 ALR 481 at 498.

16 Above note 14, at 407.

17 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 489-90; 118 ALR 392 at 397-8 per Mason CJ and Toohey J; compare *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150; 43 ALR 659 at 670-1; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 346-7; 45 ALR 609 at 621-2; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, at 395; 57 ALR 751 at 757.

18 *Environmental Protection Authority v Caltex Refining Co Pty Ltd,* above note 17.

19 *Environmental Protection Authority v Caltex Refining Co Pty Ltd,* above note 17.

20 See for example, McHugh J, 'The Law-making Function of the Judicial Process - Part II' (1988) 62 *ALJ* 116 at 124, written before His Honour joined the High Court

21 (1995) 69 ALJR 375 at 377.

Sir Owen Dixon came close to just such an acknowledgment when he wrote that '[a] system of fixed concepts, logical categories and prescribed principles of reasoning' does not preclude reference to 'deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice'.[22]

Sir Owen Dixon clearly favoured a slower pace of incremental change; by subtle, at times innovative, adaptation of accepted principle, removed from the avowed reformer's fiat. He might well have said that one cannot justify flawed judicial process by any desired social outcome. Not only will that outcome be contaminated by the process, but the cumulative effect is to put the court's own adjudicative legitimacy at risk.

The supposed unbending observance of strict legalism, said to characterise the Dixonian era, was found in the words of Sir Owen Dixon, quoted below. He spoke them, taking oath of office as Chief Justice, 43 years ago. It is often overlooked that they were not spoken generally. They were spoken in the context of the judicial function of adjudicating federal disputes of a constitutional character; that is, disputes between the states and the Commonwealth. He was explicitly not referring to 'the great body of litigation between man and man or even man and government, which has nothing to do with the Constitution':

> Such a function has led us all I think to believe that 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 excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.[23]

Even a cursory reading of Sir Owen Dixon's writings, judicial and extra-judicial, show that he saw no inconsistency between traditional legal reasoning and the creative capacity of the common law for evolutionary adaptation to achieve just results but it was to be achieved restrainedly, without *wresting* the law to that result:

> By deduction, a new application is given to an existing principle; many single instances having been thus produced, in course of time a new or developed principle is discerned in them and expounded. By this process of imperfect induction, the secondary principle is established as part of the doctrine of the common law, and plays its part in turn in the production of still more doctrine. The process is so gradual that, although the literature of our law is very old and very full, the exact steps are never easy to trace.[24]

A striking illustration is the law of negligence, which has evolved incrementally through case law to cope with contemporary needs.[25] The High Court has thus refined and re-stated the principles of negligence in the process

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22 *Jesting Pilot*, 'Concerning Judicial Method', above note 5, p 165.

23 Above note 5, p 247.

24 *Jesting Pilot*, above note 5, 'Science and Judicial Proceedings', p 13.

25 Some of the cases which illustrate the incremental and diverging development of the Anglo-Australian law of negligence, include:

(a) *Donoghue v Stevenson* [1932] AC 562, in which it was authoritatively recognised that a duty to take care may arise independently of any contractual relationship, by reference to general principle rather than merely by reference to the facts of the instant case.

of accommodating economic loss with physical loss. It has done so by reference to the principle of proximity, as articulated in different categories of case, and in subsuming occupier's liability under the general law of negligence.

It is instructive to see how the Dixon High Court itself dealt with the problem of reconciling the Torrens system with the pre-existing system of equitable interests recognised by equity in the context of purported assignments for no consideration. In that situation, strict legalism would have merely recognised registered legal interests under the Torrens system, despite the injustice this would have caused for laymen who seek to make gifts of real property in an informal way. Thus, in *Brunker v Perpetual Trustee Co Ltd,*[26] Dixon J was able to save the volunteer's interest conferred by an unregistered transfer of property by recognising it as a right 'of a new description arising under statute', one which was neither equitable nor legal. It would arise upon the delivery of a registrable memorandum of transfer,[27] for the purpose of obtaining legal title for the volunteer transferee. Subsequent decisions of the

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(b) *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; 120 ALR 42. The rule in *Rylands v Fletcher* (1868) LR 3 HL 330 has now been absorbed by the principles of ordinary negligence in Australia.

(c) *Woods v Lowns* (SC(NSW), Badgery-Parker J, 14259/88, 9 February 1995, unreported). A medical practitioner may come under a duty to treat a patient in need of medical care where a request for assistance is made in a professional context, even though that practitioner is not the treating doctor. *Wood v Lowns* may be subject of appeal, but aptly illustrates the advancing reach of civil liability in professional contexts.

(d) *Hawkins v Clayton* (1988) 164 CLR 539; 78 ALR 69. A solicitor holding a will in safekeeping for a client testator is under a positive duty on learning of the testator's death to make reasonable efforts to inform the executor named in the will.

(e) *White v Jones* [1995] 2 WLR 187. Disappointed intended beneficiaries may sue for economic loss caused by a solicitor negligently delaying the preparation of a will, though not the clients of the solicitor and thus not in any contractual relationship.

(f) *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; 60 ALR 1, in which the two-step concept of a duty of care is abandoned in favour of a single concept of proximity, initially a departure from English authority but now followed in *Murphy v Brentwood District Council* [1991] 1 AC 398; [1990] 2 All ER 908.

(g) *Bryan v Maloney*, above note 21. The builder of a house was held liable in negligence to a subsequent purchaser for economic loss sustained when the inadequacy of the footings of the building first became manifest by reason of consequent damage to the fabric of the building, a result which diverged from the views of the House of Lords in *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 at 210, 216-17 and *Murphy v Brentwood District Council* [1991] 1 AC 398 at 475, 480, 488-9 and 494-8; [1990] 2 All ER 908 at 925-6, 929-30, 935-6 and at 939-40 per Lord Bridge of Harwich, Lord Oliver of Aylmerton, and Lord Jauncey of Tullichettle respectively. The case recognised that there was in the circumstances the necessary relationship of proximity between builder and purchaser, with respect to the builder's carelessness and damage resulting.

As Jane Stapleton points out in 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 *LQR* 300, much of this evolution has been about a principled containment of liability in the tort of negligence, even as the reach of the tort is expanded, case by case.

26 (1937) 57 CLR 555; [1937] ALR 349.

27 Perhaps having to be accompanied by the certificate of title. See the discussion in *Costin v Costin* (SC(NSW), Santow J, 3319/91, 13 September 1994, unreported).

Mason High Court, in particular *Corin v Patton,*[28] have declined so to contrive the creation of such a new species of statutory right. Deane J in particular preferred there be a candid recognition of the continued existence of equitable interests, co-existing in defined circumstances with the Torrens system, in order to achieve justice in such cases. Justice was thus achieved by a straightforward reading down of statute, avoiding the sophism of a device which might have camouflaged the process.

Sir Owen Dixon in his extra-judicial writing gives a striking illustration of the remedial, though sparing, powers of analogical argument in the development and refinement of common law to mitigate an inequity. He demonstrates how a discerning judge, with due restraint, might 'confess and avoid' the rigidities of the rule that a lesser sum cannot be consideration for a greater one.[29] The solution is not for every case. Where the obligation to pay is still executory, if then the prospective debtor offers, in reciprocal consideration, to forbear from some course which, if pursued, might have disadvantaged the creditor, that forbearance may suffice as consideration for accepting the lesser sum.

He then warns that to go further and totally disregard the rule would be to jettison the doctrine of consideration. That would overstep the legitimate role of the court, in order to take on the mantle of avowed reformist. However, he shows how, where the case justifies, rules may be outflanked or refined, or subordinated to other existing rules.

The process of so hollowing out a rule by continually distinguishing it may leave the rule so attenuated as to justify not merely its restatement in qualified terms, the mark of a Dixonian Court, but either its absorption under a wider category such as unconscionability, or even the more radical solution of its demolition. Indeed, this is what the Mason High Court has done on several occasions. Such wider categories themselves create leeways of choice in which injustice or inequity may be remedied. Yet, importantly, they do not invite the judge to exercise them based on some personal prejudice or idiosyncrasy. A notable example was when the High Court recently subsumed the rule in *Rylands v Fletcher* into the law of negligence, against the dissent of McHugh J. Another is in occupier's duty to an invitee, formerly a matter of classification into categories, which is now treated as an instance of the ordinary common law duty to take care.[30]

Sir Owen Dixon even in constitutional interpretation showed a greater willingness to depart from strict legalism than is generally acknowledged. For instance, he rejected the view that the *Engineer's* case[31] precludes the drawing of constitutional implications where such implications can be properly justified. An implication could be drawn from the text of the Constitution

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28 (1990) 169 CLR 540; 92 ALR 1.

29 *Jesting Pilot*, 'Concerning Judicial Method', above note 5, pp 160-5, discussing the rule in *Foakes v Beer* (1884) 9 App Cas 605. For a contemporary attempt further to refine that rule, in the context of whether 'practical' benefit suffices as consideration, see *William v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1; [1990] 1 All ER 512 and *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723.

30 See respectively *Burnie Port Authority v General Jones Pty Ltd,* above note 25, and *Australian Safeway Stores Pty Ltd v Zalusna* (1987) 162 CLR 479; 69 ALR 615.

31 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 155.

itself. It could also be drawn on a structural basis. This is where the implication is 'plainly seen in the very frame of the Constitution', deriving from what 'the efficacy of the system logically demands'.[32]

The Mason High Court

Between the Dixon High Court, and that which Sir Anthony Mason led from 1988, there were two Chief Justices, Sir Garfield Barwick, 1964-81, and Sir Harry Gibbs, 1981-88. The divide between Sir Garfield Barwick and the Mason High Court can be seen in the following words of Sir Garfield on constitutional interpretation. There is no suggestion of finding implications in the frame of the Constitution:

> The meaning remains as it was when the constitutional text was promulgated. There can be no judicial warrant for changing it. . . In deciding, the Court educes what was always present, though perhaps latent, in the constitutional text. As new federal legislation is found to be covered by the constitutional text, state powers, because of the terms of the text, appear to recede, though again in truth that power was from the outset no larger than by the court's decision it has proved to be.[33]

Similarly on implied freedoms, Barwick CJ in 1976 in a speech to the National Press Club distinguished the Australian High Court from the American Supreme Court on the grounds that the High Court did not make bill of rights decisions. He considered that such decisions were clearly political and questioned whether an unelected body such as the High Court could continue for long to exercise such a function. Barwick claimed that the Australian High Court's work was 'strictly legal' because it had no bill of rights to interpret:

> We have no general bill of rights situation in which we can go beyond the law, and as in the case of decisions about the bill of rights make what really are political decisions.[34]

He recently reiterated these views in a recent address to the Sir Samuel Griffiths Society, highly critical of the *Theophanous* free speech decision.[35] Barwick CJ was followed as Chief Justice by Sir Harry Gibbs, who led the court cautiously toward a less rigid adherence to Barwickian legalism, principally in the tax field. Given the divide between the Barwick era and the Mason era, it is not surprising that some of the most striking examples of the Mason High Court's judicial creativity reach back to draw explicitly on Sir Owen Dixon's recognition of the scope for its legitimate exercise, tempered by restraint.

Thus in *Australian Capital Television Pty Ltd v Commonwealth (No 2)*[36] Mason CJ pointed to a critical distinction which Dixon CJ had earlier drawn 'between an implication and an unexpressed assumption upon which the

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32 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 83.
33 Foreword in P H Lane, *Commentary on the Australian Constitution*, Law Book Co, Sydney, 1986, at vii-viii.
34 Speech reported in (1976) 50 *ALJ* 434.
35 *Parliamentary Democracy,* speech to the Sir Samuel Griffiths Society, 2 April 1995.
36 (1992) 177 CLR 106; 108 ALR 577 at 591.

framers proceeded in drafting the Constitution'.[37] Thus '[t]he former is a term or concept which inheres in the instrument'. It is structural in being 'logically or practically necessary for the preservation of the integrity of that structure', whereas 'an assumption [such as, that the Senate would protect the States though in the result did not do so] stands outside the instrument'. Dixon J had acknowledged that structural implications may be drawn from the Constitution.

The High Court explicitly acknowledged and drew upon this structural basis for constitutional implication. This was in holding that freedom of communication in relation to the publication of political discussion concerning elections is indispensable to the system of representative government, itself integral to the Constitution, and thus an implied freedom under it,[38] a theme which will be revisited when discussing how that notion became the progenitor for a right of free speech in the case of *Theophanous*

Yet even to-day, the residue of the classical theory of judicial restraint, which dictates that judges should not have regard to 'changing economic, social and political ideas' in the exercise of their judicial power[39] retains a degree of potency. Brennan J in *Mabo* sets out to delineate the limits of a contemporary notion of judicial restraint in a way which reflects the significance of Australia's shift to independent status from the United Kingdom. He does so in describing judicial development of a common law of Australia:

> In discharging its duty to declare the Common Law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. It is not immaterial to the resolution of the present problem that, since the Australia Act 1986 (Cth) came into operation, the law of this country is entirely free of Imperial control. The law which governs Australia is Australian Law. The Privy Council itself held that the common law of this country might legitimately develop independently of English precedent. Increasingly since 1968, the common law of Australia has been substantially in the hands of this Court. Here rests the ultimate responsibility of declaring the law of the nation. Although this court is free to depart from English precedent which was earlier followed as stating the common law of this country, it cannot do so where the departure would fracture what I have called the skeleton of principle. The Court is even more reluctant to depart from earlier decisions of its own. The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the

37 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 81 per Dixon J.

38 *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; 108 ALR 577, especially per Mason CJ at ALR 590-2; and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; 108 ALR 681.

39 D Menzies, 'Australia and the Judicial Committee of the Privy Council' (1968) 42 *ALJ* 79 at 81.

> values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.[40]

Justice Michael Kirby, President of the Court of Appeal in New South Wales, succinctly states this principle thus:

> . . .a rule of common law may be overturned by the appellate court if the postulated rule 'seriously offends the values of justice and human rights' but only if 'the disturbance to be apprehended would not be disproportionate to the benefit flowing from the overturning'.[41]

Sixteen years earlier, Mason J, as he then was, expressed the reasons for caution in such a process in *State Government Insurance Commission (SA) v Trigwell*.[42] He reminds us that 'a court is neither a legislature nor a law reform agency'; that its facilities, techniques and procedures are not adapted to such functions or activities. However, he left room for cautious creative change, concluding:

> These considerations must deter a court from departing *too readily* from a settled rule of the common law and replacing it with a new rule. (emphasis added)

Since then a limited law-making function has been more openly espoused and more openly exercised by the Mason High Court in both judicial and extra-judicial writings of its members, because for the court to exercise such a function clandestinely is not only intellectually dishonest but also risks the legitimacy of the court. Thus in the late 1980s, Mason CJ concluded:

> The asserted advantage of a legalistic approach is that decisions 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. Unfortunately, it is impossible to interpret any instrument, let alone a constitution, divorced from values. To the extent they are taken into account, they should be acknowledged and should be accepted community values rather than mere personal values. *The ever present danger is that 'strict and complete legalism' will be a cloak for undisclosed and unidentified policy values* . . . The High Court, immersed in the common law and statutes, has in the past been less inclined to veer from a legalistic approach. As the High Court moves away from 'strict and complete legalism' and toward a more

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40 *Mabo,* above note 2, at 29-30 per Brennan J.

41 Justice M Kirby, 'In Defence of Mabo' (1994) 1 *James Cook University Law Review* 55 at 70.

42 (1979) 142 CLR 617 at 633-4; 26 ALR 67 at 77-9. Similar caution was expressed by Brennan J in dissent in *Bryan v Maloney* (1995) 69 ALJR 375, perferring parliament to consider whther the builder's obligation should pass under an (implied) transmissible warranty, than the courts, 'inabsence of compelling legal rpinciple or considerations of justice reflecting enduring values of the community'.

> policy oriented constitutional interpretation, it is a natural parallel that the Court place greater emphasis on the purposive construction of statutes.[43][emphasis added]

Some commentators[44] contend that this activism has been motivated by a perceived need to remedy the failure of parliament to concern itself with such issues, whether from lack of political will or from a genuinely intractable impediment. Certainly in *Mabo*, the Commonwealth, in the end, declined to put any view to the court. Be that as it may, the motive to fill such a vacuum can be no part of the judicial function, even if that be the result, especially given the accidental nature of what comes before the High Court, filtered as it is by the necessity for leave to appeal.[45] On the dangers of heeding such external calls, one American judge has commented:

> In the American legal system, calls for judicial intervention . . . depend less upon the challenger's 'liberal' or 'conservative' ideology, and more on the pragmatic question, whose ox is being gored?[46]

While accepting the fundamental importance of judicial process and legal reasoning, the Mason High Court sought to apply these to a wide reaching refurbishment of the common law. Indeed that refurbishment now touches the Constitution itself as notably illustrated by the free speech cases. The High Court in doing so has found more play in the joints than was previously acknowledged in the Dixon era.

It is thus not surprising that there are now critics, aroused most vehemently by the *Mabo* decision upholding indigenous native title, and then *Theophanous* on free speech, who contend that the High Court has gone too far. This, despite its express disavowal of 'idiosyncratic notions of justice and fairness'[47] and the depth and scrupulousness of the court's case by case recourse to analogical precedent and principle. That has been increasingly reinforced by reference to the court's perception of enduring values, or community standards and values.

The High Court has continuously appealed to community values, disavowing personal and idiosyncratic, and populist values. Indeed as Sir Gerald Brennan said, when sworn in as the new Chief Justice:[48]

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43 Chief Justice Mason, 'The Role of a Constitutional Court in a Federation' (1986-87) 16 *Fed Law Rev* 1 at 5.

44 See P Finn, 'Of Power and the People' (1994) 1 *TJR* 255 at 272, and the examples he cites, particularly *McKinney v R* (1991) 171 CLR 468; 98 ALR 577 and *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385. On the fair trial principle and its implications, and explicit recognition of the consequences of particular holdings, such as denial of the privilege of self incrimination to corporations, see *Environmental Protection Agency v Caltex Refinery Co Pty Ltd,* above note 17.

45 See Santow and Leeming, 'Refining Australia's Appellate System and Enhancing its Significance in our Region' (1995) 69 *ALJ* 999.

46 Quoted by McHugh J in 'The Law-making Function of the Judicial Process' (1988) 62 *ALJ* 116. His Honour emphasised, at 120, that 'a judge does not have authority to remake laws generally'. The judge is confined 'by the forms of adjudication and the historical nature of judge-made law'. See also B Horrigan 'Crossing the Rubicon', address to the University of Queensland Law Graduates Association, 22 February 1995.

47 *Muschinski v Dodds* (1985) 160 CLR 583 at 615 per Deane J; and see Finn, above note 44.

48 Chief Justice Brennan was sworn in on 20 April 1995.

> Judicial method is not concerned with the ephemeral opinions of the community. The law is more needed when it stands against popular attitudes, sometimes engendered by those with power, and when it protects the unpopular against the clamour of the multitude.

There is always some tension between contemporary community values and more fundamental, or enduring, notions of fairness and justice. Thus, what would a referendum on aboriginal native title have produced? One might ask this question of a referendum before *Mabo*. More significantly, what answers would a referendum yield after *Mabo*? Are Australians, following that decision and the legislation dealing with its practical implications, more ready to view the process as redressing past deprivation of Australian Aborigines? And if so, what does this mean for our sense of nationhood? Has *Mabo* actually raised our consciousness of aboriginal dispossession and the unique relationship of an indigenous, nomadic people to their land? A fundamental value of the Australian community is one of fairness, of giving everyone a fair go. Did not the High Court touch that sense profoundly in its decision?

It is significant that since Mabo, there has been an appreciable shift in the view of influential mining companies such as CRA, whose chief executive was quoted as approving *Mabo's* central tenet and that of the legislation giving effect to it.[49] Perhaps the court's vulnerability as a crippled law-maker, lacking democratic accountability, means that it must find ultimate backing in enduring community values, though in a real sense helping to establish them. In that sense, the court is 'beckoning us the way that we are going', but from a point a little ahead. Yet not all would accept that courts have any right to do so.

Those same critics contend that with *Mabo* and *Theophanous,* the court has crossed the dividing line between principled judicial creativity to essay an activism so overt and excessive as to display judicial hubris. By prophecy which some may seek to make self-fulfilling, they suggest that even the court's legitimacy is ultimately in question, so threatening judicial independence. Once the court's legitimacy is lost, so too goes the dependent capacity to command community acceptance of the court's pivotal role in determining the great constitutional issues of the day.

With that looms the spectre of United States style confirmation hearings. As Sir Anthony Mason said in his retiring interview,[50] it may be doubted that these really elicit much about the prospective appointee, witness that for Stephen Breyer, recently appointed to the United States Supreme Court. He properly answered that he respected precedent but would give no indication as to how he would decide particular cases. The underlying premise is especially dangerous. With courts now acknowledging that they have resort to community values, this should lead the community to assume that the appointee would, disregarding argument, subvert the judicial oath and prove incapable of suppressing personal, idiosyncratic values, or of listening to argument. One should indeed be more suspicious of a candidate who would parade correct personal values, rather than having the restraint and integrity to decline to do so. Such a candidate should be in the best sense relatively

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49 *The Australian* of 21 March 1995.

50 Jack Waterford, *Canberra Times* of 25 March 1995.

unpredictable. I leave aside the other purpose of such hearings, to curb the appointing power of the executive by causing it to be subject to some public scrutiny. I merely pose the question whether that is preferable to more informal consultation that presently prevails in Australia.

The executive, who appoint our judiciary and fund our courts, may also be emboldened to reach for retaliatory weapons, just as Roosevelt did when threatening to stack a recalcitrant Supreme Court standing in the way of the New Deal, punishing resistance rather than activism. What such criticism misses is that it assumes even strict legalism is value free. Dworkin and others have long demolished that myth.[51] The late Julius Stone, in his seminal work, demonstrated in the 1950s, including to the generation of to-day's High Court, 'the leeways of choice'. These are leeways inherent in analogical reasoning and in the language and categories of logical reference.[52]

However, one may ask: is the High Court vulnerable as the critics say? The judicial process depends, for its legitimacy, on integrity, intellectual scrupulousness and objectivity, subordination of mere personal predilection and, importantly, on the tone of its language and openness of its reasons:

> The community accepts and insists upon adjudicative independence, so long as Judges function openly and explain their decisions.[53]

The essence of judicial restraint lies in recognising that choice does not always exist, or may be narrowly circumscribed by precedent or language, as well as the judge's place in the appellate hierarchy. When choice does genuinely exist, courts may be as vulnerable if they do not recognise it as if they exceed its bounds.

Parliament has recently inched towards legislating on matters touching the judicial process. For instance, where a particular provision of an Act would have an invalid application but also has at least one valid application, the statutory intention declared in a number of Commonwealth Acts is that such a provision is to be construed so as not to have the invalid application. Rather, it is to have every valid application. This is itself somewhat confusingly expressed to be subject to contrary intention in the statute. That, no doubt, has been to salvage as much as possible from the wreckage of successful constitutional attack. Nonetheless, the implications for the judicial process go further.

One newspaper commentator[54] described this as an attempt to subvert the separation of judicial power from legislative and executive power by attempting so to instruct the High Court in its judicial process by the Industrial

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51 R Dworkin, *Law's Empire*, 1987, Ch 10. Dworkin argues that the dispute between ostensibly 'non-interpretive' and ostensibly 'interpretive' constitutional interpretation is really a dispute about different interpretive approaches to constitutional interpretation.

52 J Stone, *The Province and Function of Laws,* 1946-61, Ch 7. However, Julius Stone went further than a modern view of restraint would go in recognising not only that leeways of choice exist, but in concluding that values should principally determine the way a judge makes such choices, rather than values, preferably community ones, merely having force *along with* precedent and principle, in both recognising and making such choices.

53 The Honourable Murray Gleeson, Chief Justice of New South Wales, 'Judicial Accountability', *Judicial Officers Bulletin,* March 1995.

54 P McGuinness, *Sydney Morning Herald,* 4 March 1995. This argument was put by David Jackson QC, counsel in *Re Dingjan; Ex parte Wagner* (1995) 128 ALR 81; 16 ACSR 92.

Relations Act 1994 (Cth) s 7A and by the Native Titles Act 1993 (Cth) s 208. Indeed, it initially sought to do so for all Commonwealth legislation by the addition of s 15AAA to the Acts Interpretation Act 1901 (Cth), though this was subsequently withdrawn. In *Re Dingjan; ex parte Wagner*[55] though this was argued, the court left for another day the constitutional validity of such a provision, as the relevant section was held not to apply retrospectively to the circumstances before the court.

One might predict that the High Court would, when this question arises, refuse the poisoned chalice of becoming an overt legislature in breach of the doctrine of separation of powers. In the second native title case, on the legislation implementing native title, the High Court held the legislative attempt in the Native Titles Act to give the common law of native title the force of Commonwealth statute to be unconstitutional. It did so precisely because that section breached the doctrine of separation of powers by parliament purporting to confer legislative powers on the judicial branch of government:

> That attempt must fail either because the Parliament cannot exercise the power of the courts or because the courts cannot exercise the powers of the Commonwealth.[56]

Furthermore it would unconstitutionally deny to the States the power, by statute, to abridge or alter the common law, though any such statute may be overridden by valid Commonwealth law. Had the attempt nonetheless been limited to the present common law of native title, excluding its future evolution, the result might, despite this consideration, have been otherwise.

The doctrine of separation of powers thus brings directly into play the notion of restraint between the judicial and legislative branch. The Supreme Court of the United States concluded[57] that Congress was precluded by that doctrine from reversing the effect of a series of final judgments dismissing certain securities frauds as time-barred. The retroactive effect of that legislation made the interference in the judicial arm all the more gross. However, the majority differed from the separate and narrower concurrence of Breyer J. The majority rejected the suggestion that the relevant provision might have been constitutional if it had exhibited prospectivity or a greater degree of general applicability. Scalia J, leading the majority in so doing, exhibited less 'restraint' than Breyer J, or the dissentients, in preserving judge made law (the time bar) from legislative reversal. It is ironic that as an avowed originalist, he has submitted to the greater constraint of subservience to the 'original' meaning of the Constitution. Congress was in fact attempting to reverse earlier judge-made law which brought the time bar into being in the first place[58] though doing so by upsetting retrospectively previous final judgments.

I now turn to looking more closely at the two decisions of the High Court,

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55 Above note 54.

56 *Western Australia v Commonwealth* (1995) 128 ALR 1. A further difficulty, not touched upon in that decision, was the attempt to give *retrospective* effect to the common law, as it was to be the common law as at 30 June 1993.

57 *Ed Plaut, Petitioner v Spendthrift Farm, Inc, et al,* 18 April 1995, summarised in the *United States Law Week*, BNA, Vol 63, No 39, section 4.

58 *Gampf v Gilbertson* 501 US 350, 364.

the shock waves of which are still being felt, which illustrate a number of aspects of judicial restraint. These decisions have a resonance in American jurisprudence, embracing as they do, fundamental issues in contemporary society. *Mabo* concerns the land rights of indigenous peoples under common law;[59] *Theophanous* the implied constitutional freedom of free speech and its limits.

Mabo

Native title to land of Australia's indigenous peoples was upheld by the High Court's interpretation of common law in *Mabo v The State of Queensland (No 2).*[60] The constitutional validity of the subsequent Commonwealth legislation to give detailed effect to its implications has recently been upheld following constitutional challenge in *Western Australia v Commonwealth*.[61] That case invalidated Western Australian legislation substituting a diluted version of native title as inconsistent with the Racial Discrimination Act 1975 (Cth) and thus invoking Commonwealth Constitution s 109.[62]

Mabo, and perhaps the violent criticism which it evoked from some quarters, led some to praise the approach of the High Court in recent times as substantially abandoning strict adherence to past authority and the notion of judicial restraint. That is far too simplistic. The shift of the High Court from the Dixonian legacy has been gradual and subtle, continuing to draw on its intellectual foundations. The High Court's view of judicial restraint is a contemporary one, more focused on process than result. However, judicial reatraint remains a constant temper on judicial expansiveness.

Criticism of *Mabo* was not only directed at the result. It was particularly directed at the fact that *Mabo* held that native title could subsist, not merely in relation to the settled cultivation of the native inhabitants, who had closely cultivated the Murray Islands, three small islands off the coast of Queensland, the sole subject of the litigation, but to the whole of Australia. This was notwithstanding that on mainland Australia, such aboriginal groups were nomadic, with a very different, but no less intimate, relationship to the traditional lands they occupied. Such groups had no notion of individual ownership; their use was for hunting and foraging, not for cultivation. It was accepted that group identification with the land, though alien to common law, was no less real.

However, *Mabo* held that such native title required continued connection to the land and was extinguished, without right of compensation according to the

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59 In the United States, the issue was not unconnected with whether a feudal system was introduced at time of first settlement, though soon abrogated in favour of an allodial system, or whether an allodial system was introduced from the outset of land ownership directly from the Crown, or indeed whether there was from the outset a hybrid drawing on features of each: see Edgeworth, 'Tenure Allodialism and Indigenous Rights and Common Law: English, United States and Australian Land law compared after *Mabo v Queensland*' (1994) 23 *Anglo-American Law Review* 397 at 399-403 citing the *Papers of John Adams* (R Taylor, M Kline and G Lint (eds)), 1977, p 118 and the *Papers of Thomas Jefferson* (J Boyd (ed)), 1958, p 314.

60 Above note 2.

61 *Western Australia v Commonwealth,* above note 56.

62 Section 109 renders a state law invalid to the extent that it is inconsistent with a valid Commonwealth law.

majority, by a subsequent, valid exercise of sovereign power inconsistent with the continued right of enjoyment conferred by native title. Thus native title is a fragile thing, easily lost. It is however only lost where the Crown has, incompatibly with that enjoyment, alienated the land or otherwise appropriated the land to itself, or otherwise taken such rights away by legislation. In the case of state legislation, this is subject to the state legislation in question not being passed in a manner which contravened the Racial Discrimination Act 1975 (Cth). Indeed it has been estimated that not more than five per cent of Australia's aborigines have any prospect of qualifying for native title. That said, the symbolic value of even this limited scope for native title, like the State of Israel to overseas Jews, should not be underestimated, particularly when backed by legislation to purchase land for aborigines who would not otherwise benefit from the decision.

Legal criticism of the process followed by the court turned on two principal and related grounds. Both were based on a claimed absence of an appropriate degree of judicial restraint. The criticism is epitomised in *The High Court in Mabo* by S E K Hulme QC.[63]

The first ground of attack states that the High Court departed from the traditional requirement that constitutional issues be dealt with as sparingly as possible and, where unavoidably they required to be dealt with, to confine them to their narrowest compass.

The second ground of attack holds that the High Court not only made their decision on the broadest of footings to embrace mainland Australia, but did so in the absence of interested parties, both aborigines and others. They also did so in the absence of evidence about the circumstances applicable both to aboriginal occupation of the mainland and of their subsequent dispossession and with language that was unjustifiably emotive. It was said that the court, Deane and Gaudron JJ, wrongly took judicial notice, without evidence, of:

> . . . the conflagration of oppression and conflict which was, over the following [19th] century to spread across the continent to dispossess, degrade and devastate the aboriginal peoples and leave a national legacy of unutterable shame.[64]

They explained that they had used such 'unrestrained language', 'unusually emotive for a judgment of this court' avowedly because:

> . . .the full facts of that dispossession are of critical importance to the assessment of the legitimacy of the [rejected] propositions that the continent was unoccupied for legal purposes and that the unqualified legal and beneficial ownership of all the lands of the continent vested in the Crown.[65]

In assessing each of these criticisms, it is necessary to look at what was actually argued before the court and, second, what was before the court by way of evidence and findings following the High Court's earlier remittance to Moynihan J of the Supreme Court of Queensland to determine all issues of fact.

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63 *Proceedings of the Second Conference of the Samuel Griffith Society,* July 1993, Ch 6 'Upholding the Australian Constitution', p 113 et seq. See also Ch 5 'Should the Courts Determine Social Policy?'.

64 *Mabo,* above note 2, at 104.

65 *Mabo,* above note 2, at 120.

The three small islands called the Murray Islands were occupied by the Meriam people long before the first European contact with the islands. Those islanders enjoyed a communal life in which settled cultivation of garden land was a pre-eminent feature. The High Court accepted the finding of fact that 'the Meriam people live in an organised community which recognised individual and family rights of possession, occupation and exploitation of identified areas of land'. Further 'under the traditional law or custom of the Murray Islanders there was a consistent focus on the entitlement of the individual or family as distinct from the community as a whole or some larger section of it'. These entitlements, with the exception of the area used by the London Missionary Society 'extended to all the land of the Islands', though it was not possible to identify any precise system of title, precise rules of inheritance or precise methods of alienation.[66]

The settled cultivation of the Murray Islands was in marked contrast to the aboriginal occupation on the mainland. Brennan J adopted what Blackburn J said in *Milirrpum v Nabalco Pty Ltd*[67] concerning the nature of Aboriginal society in the Northern Territory, though Brennan J did not adopt his conclusion that traditional native title failed to exist in the common law:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives which provided a stable order of society and was remarkably free from the vagaries of person, whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.[68]

The High Court rejected the notion of *terra nullius* postulated in early cases such as *Cooper v Stuart*.[69] That notion holds that the Colony of New South Wales was 'without settled inhabitants or settled law' prior to white occupation. The Privy Council, more than a century ago, had referred with remote ignorance to Australia at the time of first white settlement as 'practically unoccupied'. *Cooper v Stuart* was not a case dealing with native title or aborigines, but rather with a dispute as to the application of the rule against perpetuities in Australia. The High Court in *Mabo* was able, free of any binding precedent whose actual ratio was contrary to that conclusion, to reject the notion that Australia was a 'desert uninhabited' country, to use the words of Blackstone[70]. The court in *Mabo*, particularly Brennan J,[71] rejected as racially discriminatory the Privy Council's disregard for native people's original land occupancy, as exhibited also in the later case *In re Southern Rhodesia.*[72] Decided in 1919, the Privy Council in that case described such people as 'so low in the scale of social organisation' that it was 'idle to impute to such people some shadow of the rights known to our law'.

Cases which supported the doctrine of *terra nullius* were thus rejected as neither consonant with international law nor with contemporary notions of

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66 *Mabo,* above note 2, at 115.
67 (1971) 17 FLR 141.
68 Above note 67, at 267.
69 (1889) 14 App Cas 286 at 291 per Lord Watson.
70 *Commentaries,* Book 1, Ch 4, pp 106-8.
71 *Mabo,* above note 2, at 41.
72 *In re Southern Rhodesia* [1919] AC 211 at 233-4.

justice. As regards the wide variety of content for such a common law native title as was found, this was found 'in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown . . .'.[73] This leads to 'the preferable approach' which is to recognise the inappropriateness of forcing native title to conform to traditional common law concepts and to accept it as sui generis or unique.[74]

It was acknowledged that such significant refurbishment of the common law must be justified, if at all, by the benefits flowing from such an overturning of precedent, which outweigh the detriment of fracture to '*skeletal* legal principle'. The High Court had, with one dissentient, no difficulty in doing so. Indeed it is in reality a relatively modest accretion to the common law to recognise that native title might co-exist unaffected by the Crown's radical title, but subject to the Crown's capacity to bring about its extinction in the manner earlier described, free of compensation. Even the dissentient Dawson J differed from the majority only in concluding that native title, assuming it existed, in order for it to survive settlement, required some recognition from the Crown, expressly or by acquiescence. His Honour could find no evidence of such recognition.[75]

Yet the critics of *Mabo* take strong issue with the High Court, not so much for its decision to uphold the native title of the Meriam people, as for doing so on so expansive a basis. However each member of the High Court reached, at an early point in judgment, a fork in the road. This reflected the two alternative arguments put by the plaintiffs. The plaintiffs put their case primarily as an attack on the doctrine of *terra nullius* as a basis for denying indigenous occupation before white settlement. Only in the alternative did they dispute the application of that doctrine to the kind of settled occupation of the Meriam people. Naturally enough, Queensland also fought the case primarily on the first basis, though also on the second. Thus it was clear to the parties that it was always open to the High Court to place its decision on the broader basis.

The High Court could undoubtedly have left undisturbed for the time being the principle of *terra nullius*, so far as the mainland was concerned. It could have simply distinguished the Meriam people's settled rather than nomadic occupation, proclaiming it unaffected by Queensland's subsequent exercise of sovereignty when, in 1879, the Islands were annexed to the Colony of Queensland.

All members of the High Court deliberately took the other fork, choosing to attack *terra nullius* frontally. Even Dawson J in dissent did so. Of course, a court may legitimately base its reasoning on a broad or narrow ground, though it should be remembered that the broad ground creates a larger precedential footprint for cases yet to be heard. It justified this course by the fact that the narrow ground would have left undisturbed a major premise which the High Court in fact found fundamentally wrong, discriminatory, at odds with international law and when legal authority was divided. The parallel

73 *Mabo,* above note 2, at 88-9 per Deane and Gaudron JJ.

74 Above note 73.

75 See Dawson J's summary of his own views and how they differed from the majority in the *Western Australia v Commonwealth* (1995) 128 ALR 1 at 68.

with the American case *Brown v Board of Education*[76] is striking. In that case, the Warren Court was not so much interested in the personal circumstances of Linda Brown or whether negro and white schools were being equalised. The Supreme Court instead chose to grapple with a more fundamental issue, the effect of segregation on public education, for 'only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the law'.

Remember *Mabo* was not strictly a constitutional case, even if there be still such a principle of dealing with constitutional issues as sparingly as possible. Rather it was a case on the scope and content of the common law, admittedly of fundamental importance. In that case, the inhibitions on changing settled rules are less restrictive. They depend on whether the disturbance to be apprehended by overturning the common law rule exceeds the benefits in doing so; manifestly a value judgment. Had the court followed the views of those of its number who considered compensation should have been paid for that dispossession, that might well have been too radical a fracture and too gross a disturbance.

The High Court was therefore entitled to take the choice of overturning the *terra nullius* doctrine and then using that to justify a restricted view of the Crown's radical title. The result necessarily applied not only to the settled Murray Islands but to the nomadically occupied mainland. Brennan J put matters thus:

> Assuming that the Murray Islands were acquired as a 'settled' colony (for sovereignty was not acquired by the Crown either by conquest or by cession), the validity of the propositions in the defendant's claim of argument cannot be determined by reference to circumstances unique to the Murray Islands; they are advanced as general propositions of law applicable to all settled colonies. Nor can the circumstances which might be thought to differentiate the Murray Islands from other parts of Australia be invoked as an acceptable ground for distinguishing the entitlement of the Meriam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands. As we shall see, such a ground of distinction discriminates on the basis of race or ethnic origin for it denies the capacity of some categories of indigenous inhabitants to have any rights or interests in land.[77]

S E K Hulme QC attempted to attack the equation of white settlement of the mainland with what he considered to have been not 'settlement' of the Murray Islands but their conquest or cession, or something akin to that. Counsel for the plaintiffs in the *Mabo* case[78] correctly point out that the state of the law in regard to *terra nullius* did not focus on whether the Islands were 'settled' prior to their acquisition. It focused on whether they were 'occupied', as *Cooper v Stuart* illustrates when it referred to the whole of Australia as 'practically unoccupied' in 1788.

I turn next to the criticism of S E K Hulme QC[79] based on the claim that the High Court failed to require evidence as to the mainland. The High Court

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76 347 US 483 (1954).

77 *Mabo,* above note 2, at 25.

78 R Castan and B Keon-Cohen, 'Mabo and the High Court: a Reply to S E K Hulme QC' (1993) *Victorian Bar News* 47 at 49-50.

79 S E K Hulme QC, above note 63, p 152.

was also said to have consulted private references concerning the dispossession of aborigines on the mainland and their occupation of the land before white settlement. In fact, as counsel for the plaintiffs in *Mabo* point out, there was a vast amount of material properly before the High Court on those issues.[80] Even were that not so, and even if the material was considered in relation to facts in issue, one might ask why the bare fact (not detail) of the dispossession of the aboriginal people from their land and of their previous occupation is not itself a notorious fact; no less notorious than the Holocaust or the tenets of communism.[81]

The facts found concerning prior aboriginal occupation and later dispossession were undoubtedly true, as even the historian most critical of *Mabo* Professor Geoffrey Blainey had acknowledged in earlier writings.[82] In any event neither was a fact in issue in *Mabo*, but rather a reason for taking a choice legitimately open to the court. That choice was to overturn some past common law precedent rather than attempt to distinguish it from the facts before the court. Finally, in the constitutional context, Professor Zines says as to the rules of evidence:

> . . .it is difficult to accept the view that those rules that are primarily designed to deal with particular facts peculiar to the parties should apply to the social facts . . . which go to a determination of the law.[83]

In *Gerhardy v Brown* Brennan J, as he then was, specifically said they did not.[84]

As to the criticism that those directly affected by the choice of path to the ultimate conclusion should have been given the opportunity to be heard, one might equally argue that manufacturers of soft-drink as a class should have been heard before *Donoghue v Stevenson*[85] was decided.

That said, is there nonetheless a difference between cases that are constitutional not only in the sense of construing the Constitution but also in the sense of having constitutional fundamentality? That is to say, if the states and the Commonwealth are to be given the opportunity to be heard in the former kind of constitutional case, pursuant to notice given under the Judiciary Act 1903 (Cth) s 78B, should not the High Court as a matter of discretion, give similar notice to the states in such cases as fundamental as *Mabo*? They were given s 78B notices, as it happens, but they only related to an earlier constitutional ground which was dropped. In fact, the Commonwealth then chose not to be heard and because Queensland argued the case, opposing state interests were very much in mind. It is difficult to see what, apart from cost and delay, widening the class of those before the court

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80 Above note 78.

81 *R v Zundel (No 2)* (1990) CCC (3d) 161 and *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 196.

82 G Blainey, *A Land Half Won*, 1988, Ch 2; and see Professor W E Stanner's *Boyer Lectures for 1968,* ABC Books, or the *Oxford History of Australia*, 1993.

83 See L Zines, *The High Court and the Constitution,* 3rd ed, Butterworths, Sydney, 1992, p 382-96.

84 *Gerhardy v Brown* (1985) LLR 70 at 141, cited by the Honourable Hal Wootten, 'Mabo - Issues and Challenges' (1994) 1 *TJR* 303 at 308.

85 [1932] AC 562.

would have added; though it might have assisted aborigines who considered that *Mabo* did not go far enough.

Then, the matter of judicial language. Recall Lord Atkin's scathing dissent in *Liversidge v Anderson*:[86]

> It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.

With particular scorn, Lord Atkin equated the construction chosen by the majority to Humpty Dumpty's theory of semantics, namely that a word means 'just what I choose it to mean'. The judgment was expressed with such passionate and ringing emphasis that one critic considered it must have resulted from some sort of explosion in Lord Atkin's mind.[87]

The claimed extravagance of the language led Lord Maugham, who formed part of the majority, to exceed any supposed lack of judicial restraint on Lord Atkin's part by his own intemperate letter to *The Times* next morning. Under the guise of defending the barristers who appeared for the Crown, he described the earlier quoted portion of Lord Atkin's judgment in strongly critical tones.[88]

The lesson to be learnt from this is that reasoned persuasion, sharpened on the rare occasions which call for it by emotive language, is part and parcel of the great judgments which have commanded assent, though not always in their time. Nonetheless, a judge has precious capital easily squandered by descending from reasoned language. In *Mabo*, while the language may have been unrestrained, it followed a very detailed analysis of material which led the judges concerned to choose the broader basis for their decision. Furthermore, it was not directed at an opinion expressed by other members of the court. Nor was it to attribute individual moral guilt. Rather, it was directed at a history whose full facts of dispossession bore directly on the common law doctrine of *res nullius* and its consequences for the Crown's radical title.

I turn now to free speech and the Constitution.

Theophanous

In *Theophanous v Herald & Weekly Times Ltd*[89] a narrow majority of the High Court held that in the Commonwealth Constitution there is an implied freedom to publish material regarding government and political matters, which includes matters concerning Members of Parliament, the performance of their parliamentary duties and their suitability for parliamentary office. That freedom ensures publication will not be actionable under defamation law, whether common law or statute, provided the defendant establishes not having

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86 [1942] AC 206.

87 R F V Heuston, '*Liversidge v Anderson* in Retrospect' (1970) 86 *LQR* 36.

88 For a riveting description of the circumstances leading to the clash and its sequel, see G Lewis, *Lord Atkin,* Butterworths, London, 1983, pp 132-57.

89 Above note 2. For a discussion of its reasoning, see G Williams, 'Engineers is Dead, Long Live the Engineer' (1995) 17 (1) *SLR* 62.

been aware of any falsity of the material published and that publication was not reckless, but was reasonable in the circumstances. Deane J alone would have extended this protection for publication so it extended to anyone occupying high Commonwealth office, including the judiciary, so that the privilege so to publish was absolute.

That implication was not based on any explicit Bill of Rights; we have none. Rather it was base on the structure of our written constitution, and in particular the fundamentality of its provision for representative democracy. That implication was 'logically or practically necessary for the preservation of the integrity of that structure', contrasted with a (mere) unexpressed assumption upon which its framers proceeded to the effect that a Bill of Rights was not an appropriate fetter on Parliament. Thus the Mason led majority concluded that defamation law in its usual requirement of truth for a defence did chill political discussion, to a degree incompatible with representative democracy. However, truth could not be totally disregarded. Thus the implication should be no more than necessary for the purpose served:

> . . . it cannot be said to be in the public interest or conducive to the working of democratic government if anyone were at liberty to publish false and damaging defamatory matter free from any responsibility at all in relation to the accuracy of what is published.[90]

Hence the earlier qualifications to the privilege

This was a bold extension of two earlier decisions of the Mason Court in *Nationwide News Pty Ltd v Wills*[91] and *Australian Capital Television Pty Ltd v Commonwealth (No 2).*[92] Those decisions were not explicitly the source of positive rights, at least in any direct sense. They simply established an implied freedom operating as a restriction upon legislative and executive power. That restriction prevented interference with a right of free expression in relation to public affairs and political discussion, themselves considered indispensable to the efficacy of the system of representative government for which the Constitution makes provision. Thus in *Australian Capital Television*, federal legislation was held invalid which placed bans on the transmission of political broadcasts and advertisements, but not by the print media, during an election period. Though it was coupled with the provision of some 'free time' for political parties, to be allocated by the Australian Broadcasting Tribunal, this was under a regime held to be weighted in favour of the established political parties.

Had it not been so weighted, or not obviously so, the High Court would have had to balance the public interest in freedom of communication with the public interest in integrity of the political process. The latter is potentially at risk from the advantage of wealthy groups in access to airwaves and from the trivialisation of political debate by paid advertisements.[93] With no 'Brandeis brief' to determine such 'social' facts, balancing exercises are especially sensitive in relations between legislature and judiciary. *Theophanous* was

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90 *Theophanous*, above note 2, at 23 per Mason CJ, Toohey and Gaudron JJ.

91 Above note 38.

92 Above note 38.

93 *Australian Capital Television Pty Ltd v Commonwealth (No 2),* above note 38, at CLR 106; at ALR 577 per Mason CJ.

therefore especially bold, because there is no express parallel in the Australian Constitution with any of the provisions of the United States' Bill of Rights. The unexpressed assumption of the Constitution's framers was that such matters of individual rights were best left to the legislature.

Sir Garfield Barwick baldly described the entrenchment of individual rights in the American Constitution in the nineteenth century as denying 'the American community the democratic control of its affairs', as if democracy precludes safeguards for its preservation. He then described the High Court's finding of an implied freedom of communication as 'an undemocratic step'. He claimed that by doing so, those decisions:

> . . . have reduced the sovereignty of the parliament, withdrawn from the community its heretofore democratic control of its liberties and vested it in an unelected and unrepresentative judiciary.[94]

One might well ask, why would it be undemocratic to imply a prohibition on legislation which impaired democracy? But that should not beg the question whether defamation legislation in fact impairs democracy by chilling political discussion, so as to warrant the new constitutional defence.

Commentary on the decision in *Theophanous*

Were the premises in *Theophanous* too weak for the implication made? The Australian Constitution deliberately provided no equivalent to the First Amendment in the American Constitution, upon which the protection for free speech in *New York Times Co v Sullivan*[95] is founded. Nor did the Constitution, in providing for representative government, provide all that was necessary for representative democracy. Rather it relied on conventions only partly reflected in the Constitution, though it by no means follows that the High Court might not treat such conventions also as implied in the Constitution. Thus the basis for implying such a broad freedom into the Constitution has been said to rest on premises which are too weak.[96]

Justice Brennan's reason for not following the majority was based on his conclusion the Constitution did not set out to abridge the common law, so far as those rules of the common law which govern rights and liabilities of individuals inter se. The common law itself establishes a balance between protection of free speech in political and other discourse and the protection of reputation, operating in a different sphere from the Constitution. He considered that defamation law in imposing some restriction on absolute freedom to discuss government or political matters was nonetheless proportionate to the interest it was designed to serve, that is protection of reputation, and thus was not to be qualified by a constitutional implication.

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94 Sir Garfield Barwick, *Parliamentary Democracy in Australia*, address to the Samuel Griffiths Society, Sydney, 2 April 1995.

95 376 US 254 at 279 (1963), whose history and implications are discussed by Anthony Lewis in *Make No Law,* Vintage, 1991. Indeed because of that critical difference, media coverage in Australia of an O J Simpson type trial would avoid some of its more extreme elements. Media coverage is curtailed if there is a real and definite tendency or risk of prejudice to a fair trial: see Keith Mason QC, 'Free speech, Fair Trial and O J Simpson' (1995) 69 *ALJ* 153 at 157.

96 See J Goldsworthy, 'The High Court, Implied Rights and Constitutional Change', *Quadrant,* March 1995.

But here is something of a paradox. Any implication, if permitted at all, should be no more than necessary to achieve the purpose served. This in turn may entail an implication which descends into considerable complexity by way of qualification, so that it may remain proportionate. Does it then cease to be a legitimate structural implication, in the sense of being 'logically or practically necessary' for preservation of the structure of the constitution and in that sense, either logically drawn from it or necessarily and inevitably part of its frame?

Consider the following complexities. Would a qualification be appropriate to restrain publication which intrudes on the *privacy* of those in public life?[97] That might be said to be just as important to representative democracy as otherwise worthy candidates for office may be deterred or blackmailed. What about abridgment of the freedom of speech by wartime censorship inhibiting discussion of defence matters? And what of laws relating to racial vilification? What if damages were replaced with correcting speech, as the remedy in defamation, at least for political figures? And what of laws designed to keep political speech from being scurrilous, by preventing anonymous political comment in an election? Such laws have recently been struck down in the United States as infringing the First Amendment.[98] Would Australia follow suit?

In all of this one faces this difficulty. If in truth 'freedom begins at a boundary varying with the subject matter of each law',[99] the drafting of the implied term soon entails a detailed code and that is hardly the stuff of implication. This, indeed, is the very difficulty with express bills of rights. Their very generality and need for adjustment over time requires qualification be rather the subject of detailed legislation. That is why those who oppose bills of rights argue that they should be left to detailed legislation, thus remaining capable of amendment by legislation. How can you fashion such complexity from ineluctable implication? This is especially sensitive where not the common law but the Constitution is concerned. The common law may be altered by statute, but a constitution only by referendum.

It was held in *Codelfa Construction Pty Ltd v State Rail Authority of NewSouth Wales*[100] the conditions necessary to ground the implications of a term in private contracts include that 'it must be so obvious that it goes without saying' and 'it must be capable of clear expression'. While these may not be necessarily the precise tests in Constitutional interpretation, these requirements must be at least significant considerations in determining whether or not to draw constitutional implications.

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97 See L Tribe, *American Constitutional Law*, The Foundation Press Inc, 1988, pp 889-90, who suggests:

> Nothing in the Court's defamation decisions, and nothing in the three decisions coming closest to addressing the conflict between speech and privacy, remotely suggest that, when this point is reached, government must exalt an abstract right to know, here reduced to a right to gossip, above the deeper concerns of personhood. On the contrary, once this point is reached, it would deprive individuals of liberty or property without due process of law to provide no legal remedy [under the Fourteenth Amendment].

98 *Joseph McIntyre, Executor of Estate of Margaret McIntyre, deceased, Petitioner v Ohio Elections Commission,* Vol 63, No 39, *The United States Law Week* April 18 1995, at 4279.

99 *Theophanous,* above note 2, at 35 per Brennan J.

100 (1982) 149 CLR 337 at 347; 41 ALR 367 at 371 per Mason CJ.

Another puzzle which *Theophanous* poses is the relationship between the relative judicial freedom to develop the common law and the restraint appropriate to constitutional interpretation. Let it be accepted that the evolving common law provides the necessary context for the resolution of constitutional questions; the common law does not control the resolution of constitutional questions. Does this mean the common law at the time of the Constitution, or contemporary common law, or what might be called 'fundamental' common law rules or liberties, independent of any particular period?[101] Sir Owen Dixon concluded that:

> Constitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that expression the doctrines of equity, forms not the least essential part.[102]

Sir Anthony Mason was at pains to emphasise that:

> Sir Owen Dixon was not suggesting that the common law is superior or inferior to the Constitution. He was, we think, doing no more than setting the scene in which the Constitution operates. If the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former.[103]

In the result, the majority found the common law had no effect on the freedom implied by the structure of the Constitution. However, had it effect, one might assume that the majority would have agreed with Deane J that the Constitution must be treated as 'a living force' in its application to contemporary conditions and exigencies, not as a 'declaration of the will and intentions of men long since dead'.[104] It follows that 'if the Court must take full account of contemporary social and political circumstances and perceptions', it is contemporary common law that provides context, though not one prevailing over the Constitution itself.

It can be seen that the Mason High Court are not 'originalists', to adopt the words of Justice Antonin Scalia, who believe 'that the Constitution has a fixed meaning, which does not change. That it means to-day what it meant when it was adopted, nothing more and nothing less'.[105] Nonetheless there are discernible differences in the extent to which its individual members have been prepared to go in finding implications never contemplated by its framers.

The most controversial question posed by *Theophanous* is the potential scope of the freedom implied from the Constitution, if any is to be implied at all. At the extreme, the late Murphy J, based on his judicial utterances, would, one can assume, have rejected any implication falling short of the expansive notion of 'a free and democratic society', derived from the Constitution itself.

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101 See Dennis Rose, 'Reasonings and Responsibilities in Constitutional Cases' (1994) 20 *Monash ULR* 195 at 211.

102 Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation', *Jesting Pilot,* above note 5, pp 212-3.

103 *Theophanous,* above note 2, at 15.

104 *Theophanous,* above note 2, at 52 per Deane J, quoting Inglis Clark *Studies in Australian Constitutional Law,* 1901, p 20.

105 The Honourable Antonin Scalia, *The Role of a Constitutional Court in a Democratic Society*, address delivered in Sydney 29 August 1994, who reflects to a degree the view of, for example, Robert Bork, *The Tempting of America: the Political Seduction of the Law*, Macmillan, New York, 1990, criticised by Ronald Dworkin in 'Bork's Jurisprudence' (1990) *The University of Chicago Law Review* 657.

He would have thus read into the Constitution a large number of disparate restrictions on the power of both the Commonwealth and of the states.[106] For instance, in *McGraw-Hinds (Aust) Pty Ltd v Smith*[107] Murphy J said:

> In my opinion, other constitutional implications which are at least as important as that of responsible government, arise from the nature of Australian society. The society professes to be a democratic society—a union of free people, joined in one Commonwealth with subsidiary political divisions of states and Territories. From the nature of our society, an implication arises prohibiting slavery or serfdom. Also from the nature of our society, reinforced by the text (particularly Chapter III, 'The Judicature', and Chapter I, 'The Parliament') in my opinion, an implication arises that the rule of law is to operate, at least in the administration of justice. Again, from the nature of our society, reinforced by parts of the written text, an implication arises that there is to be freedom of movement and freedom of communication. Freedom of movement and freedom of communication are indispensable to any free society.

In the *Australian Capital Television* case, Gaudron J did not go so far, but she also emphasised 'the notion of a free society' when she carefully said:[108]

> The notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association [289] and, perhaps, freedom of speech generally. [290] But, so far as free elections are an indispensable feature of a society of that kind, it necessarily entails, at the very least, freedom of political discourse. And that discourse is not limited to communication between candidates and electors, but extends to communication between the members of society generally.
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> 289 See *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, per Murphy J at 670; 24 ALR 175; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, per Murphy J at 581; 67 ALR 321. In these cases Murphy J regarded the prohibition on slavery and serfdom, the rule of law, the prohibition on cruel and unusual punishments, freedom of movement and freedom of communication as flowing from a democratic society.
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> 290 See *Miller v TCN Channel Nine Pty Ltd*(1986) 161 CLR, per Murphy J at 581-2; 67 ALR 321; *Gallagher v Durack* (1983) 152 CLR 238, per Murphy J at 246; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR, per Murphy J at 88; 17 ALR 513. See also *Attorney-General v Times Newspapers Ltd* [1974] AC, per Lord Simon at 315; *Attorney-General v Guardian Newspapers Ltd* [1987] 1 WLR 1248, per Lord Bridge of Harwich at 1286, per Lord Oliver of Aylmerton at 1320; *Re Alberta Legislation* [1938] 2 DLR 81, per Cannon J at 119; *Switzman v Elbling* (1957) 7 DLR (2d) 337, per Rand J at 358, per Abbott J at 369 and *Retail, Wholesale & Department Store Union v Dolphin Delivery Ltd* (1986) 33 DLR (4th), per McIntyre J at 183 where it was held that freedom of expression was not a 'creature of the Charter' but was a 'fundamental concept' upon which 'representative democracy, as we know it today' is based.

If such a broad notion were adopted, it would therefore generate implications more unpredictably than the textual approach taken by McHugh J

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106 Zines, above note 83, p 335.

107 (1979) 144 CLR 633 at 667-70; 24 ALR 175 at 199-200.

108 *Australian Capital Television v Commonwealth (No 2),* above note 38, at CLR 211; at ALR 652; and see also implications from the separation of the federal judiciary from other arms of government, commented on by way of dicta at ALR 654.

in *Australian Capital Television*. That led him in *Theophanous* to reject any expanded implication for free speech, outside the domain of an election. He declined therefore to go further than his judgment in *Australian Capital Television* itself. He emphasised that the term 'representative democracy' found no express mention in the Constitution beyond what inhered in specific provisions of the Constitution relating to elections. He rejected the notion that the Constitution was intended to give effect to any general notion of representative democracy, as distinct from representative government, nor independently of the specific provisions of the Constitution dealing with elections.[109] The textual implications he would have drawn are thus limited to judicial review and separation of powers. He would also have drawn a further structural limitation based on what is necessarily upheld from 'the very frame of the Constitution'. It would be that which is necessary under the federal structure to protect the states from laws 'aimed at the restriction or control of a State in the exercise of [its] executive authority'.[110]

Summing Up

One may discern in these various formulations of what is said to be found in the frame of the Constitution varying levels of generality. The more abstract and undefined the notion, such as of a free and democratic society, as against representative democracy delineated by specific provisions in the Constitution, the more fecund and unpredictable that source of constitutional implication. For instance, whether laws imposing compulsory voting are compatible with the Constitution and its implications has apparently now become a live issue in current litigation. To the extent the High Court expands its reach, issues of restraint and legitimacy have the potential to re-emerge in tension between the judicial and legislative branch.

Indeed, the early history of the United States Supreme Court in the series of decisions rejecting enlightened labour laws as unconstitutional under the Fifth and Fourteenth Amendments by reason of their infringing the court's implication of liberty of contract shows that finding implications too readily can be a dangerous course for courts to follow. Popular support for such implications will inevitably depend on 'whose ox is being gored', as well as questions of degree.[111] Being, as then, a nay-saying court on matters of legislative reform adds to the dangerous sense of a court defying the popular will. On the other hand, a reforming court, which sets about creating or recognising individual rights, whether of free speech or otherwise, gives a greater appearance of activism, so courting a different kind of attack. Each kind of court is choosing between competing values. Cox puts it thus in relation to the earlier conservative United States Supreme Court:

> There was a sense in which the Justices made a mess of things when they attempted to enlarge their orbit, as they later did in resisting government regulation of the economy. There was a fear that the court must destroy confidence in its decisions

109 *Theophanous,* above note 2, at 70-6.
110 Above note 2 at 76, citing *Melbourne Corporation*, above note 32.
111 See for example *Lochner v New York* 198 US 45 (1905).

> and lose the ability to command voluntary acceptance if it persisted in defying the popular mandate expressed by the political branches.[112]

He adds this warning for a reformist court:

> *New York Times Co v Sullivan* overturned the law of libel as it had prevailed from the beginning. One could easily multiply examples. A nay-saying court engaged in invalidating novel legislation upon constitutional grounds seldom needs to overrule previous decisions. A reforming court must constantly overrule precedent, change established practices, and thus undermine the belief that judges are not unrestrainedly asserting their individual or collective wills, but following a law which binds them as well as the litigants.[113]

The corpus of the Mason High Court's jurisprudence: restraint overall

Restraint has another aspect: the interlocking and balancing impact of the whole corpus of a court's decisions taken over an extensive period, made possible where there has been continuity of leadership and membership. Consider the corpus of decisions of the Mason High Court, now that their cumulative effect is made apparent. Restraint is manifest in the way in which, on the one hand, the Commonwealth legislature has been empowered, by the trend of constitutional decision in its favour, to regulate the national economy, the environment, human rights and Australia's international relations. This has been achieved principally through an expansive interpretation of the corporations power[114] and of the external affairs power. Narrowing the reach of s 92 has removed a major impediment to regulating the national economy.

Yet there has been a countervailing and, in that sense, restraining trend in the High Court's curbing of the executive power in favour of the individual and of the public right to be informed. Thus the exercise of discretion by public officials may generally be reviewed on the merits and public officials may not shelter behind defamation laws, and government may not obtain injunctions to prevent publication of Foreign Affairs cables, simply because they might be embarrassing.[115] *Theophanous* itself fits into that frame by enhancing the individual's right to free speech on political matters.

In the common law, including in this sense equity, there has been a breaking down of the traditional classifications in order to achieve equity and to constrain conduct involving an abuse of position or power. Thus, for example, the traditional twofold classification of major obligations embracing tortious

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112 Archibald Cox, above note 1, p 33-4.

113 Archibald Cox, above note 1, p 50.

114 Though in *Re Dingjan; Ex parte Wagner,* above note 54, the High Court declined to permit the corporations power to be invoked as a source of power in the context of industrial law. This was where neither party to an enterprise agreement was a constitutional corporation. What was relied on to regulate such agreements was some adventitious connection between a party to that agreement and such a constitutional corporation, such as that the party supplied such a corporation in its business.

115 On the correction of conduct of public officials, see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; 106 ALR 11; *Johns v Australian Securities Commission* (1993) 178 CLR 408; 116 ALR 567; 11 ACSR 467; and *Annetts v McCann* (1990) 170 CLR 596; 97 ALR 177. In relation to publication of claimed confidential governmental materials, see *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39; 32 ALR 485.

and contractual obligations is giving way to a fivefold classification of major obligations comprising tort, contract, trust and/or fiduciary obligations, unjust enrichment and/or restitution, unconscionability and trade practices and/or fair trading obligations.[116] Along with a rejection of formulaic tests such as those in relation to s 92 of the Constitution, the presumption of Crown immunity and in the doctrine of penalties, there has been an increasing trend, based on purposive interpretation of statute, to prefer substance over form.

Finally, there has been the constant search for unifying legal concepts such as unconscionability, though this has been constrained by careful attention to their detailed exegesis. There remains the ever-present tension between the leeways of choice such concepts allow and predictability, whose balance remains the most fundamental aspect of restraint.

Concluding thoughts

Aeschylus in *The Agamemnon*[117] speaks of hubris in the fate of Agamemnon at the hands of Nemesis:

> . . .the feeling that is 'too much', the condemnation of hubris (pride or overgrowth) and of all things that are in excess . . . It is . . . the profound repudiation and reversal of hubris which is the very law of the cosmos.

The essence of judicial restraint is found in the avoidance of excess; in the Greek sense of 'nothing too much'. I have sought to show that conventional labels like strict legalism, activism and the like are too simplistic to explain that essence. We are reminded by Gunther's biography of Learned Hand[118] that even restraint can become 'too much'. That great judge, despite early prescient decisions on free speech, stiffened into an advocate of the strongest doctrine of restraint ever defended by a major judicial figure, as evidenced in Holmes Lectures at Harvard in 1958. He said then that there was no warrant in the Constitution for judges having any power to invalidate the acts of another department of government. He agreed that it was necessary to read such a power into the document, but only in order to save the nation from the paralysis that would follow if the President or Congress interpreted the Constitution in different ways. Thus the power should be exercised only when necessary to prevent that paralysis.[119] That immoderacy of restraint explains a paradox. Learned Hand, in both his public utterances and private correspondence, seems to have been no less immoderate in testing the limits of judicial propriety, impelled to do so by his very strong emotions on public questions.[120]

Consider Oliver Sacks' story of the judge who:[121]

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116 See Horrigan, above note 46, p 17.

117 Aeschylus, *The Agamemnon,* translated by Gilbert Murray, George Allen & Unwin Ltd, 1949, at xii.

118 G Gunther, *Learned Hand, the Man and the Judge,* Alfred A Knopf, New York, 1994.

119 See R Dworkin, 'Mr Liberty', the *New York Review,* 11 August 1994.

120 Book review by R Posner, Vol 104, *Yale Journal,* No 2, November 1994. Thus, for example, he criticised publicly *Brown v Board of Education* during the height of southern resistance to the decision and there are other instances cited by Gunther (above note 118).

121 O Sacks, 'An Anthropologist on Mars', reprinted in the *New Yorker,* December 27 1993, at 123.

> . . . had frontal-lobe damage from shell fragments in the brain, and, in consequence, found himself totally deprived of emotion. It might be thought that the absence of emotion, and of the biases that go with it, would have rendered him more impartial—indeed, uniquely qualified—as a judge. But he himself, with great insight, resigned from the bench, saying that he could no longer enter sympathetically into the motives of anyone concerned, and that since justice involved feeling, and not merely thinking, he felt that his injury totally disqualified him.

The capacity for empathy, essential in a judge, provides no warrant for unrestrained resort to social engineering under the guise of judicial decision. Greek tragedy reminds us how but slight excess, even a modest departure from judicial restraint in a matter of great moment, may bring the judicial institution to the point of 'profound repudiation and reversal.

Illuminating is that famous sequence of cases in South Africa starting with *Harris v Minister of the Interior*[122] and culminating in the final decision of *Collins v Minister of the Interior*,[123] regarding the removal of entrenched clauses in the South African Constitution preserving the Cape Coloureds' franchise. That decision, against the dissent of a great South African judge, Schreiner JA, finally accepted that the Cape Coloureds had lost their vote, this time by constitutional means, through the reconstitution of the Senate. Schreiner just could not accept the inherent injustice in that removal. His judgment is an eloquent and emphatic attack on the reasoning which brought it about, though really against the result itself. In truth, however, that result was legally impregnable, however morally indefensible.

The lesson for judicial restraint is that in the end the institution of justice and the legitimacy of the courts place limits on the leeways of choice. For instance, a judge, such as in Nazi Germany, faced with enforcing laws that have become so abhorrent as to be against all conscience, has a different, especially difficult choice: to resign rather than lend those laws legitimacy.[124] However, no judge is entitled to subvert judicial office by pretending what was done by the legislature was not done.

Restraint is also enjoined by the fact that as the court has before it only the exigencies of the instant case and past precedent, it must be cautious in pre-empting cases yet to come, with their unforeseen complexities. That said, it is undeniable that litigation tests legal principle empirically, in a way denied more theoretical exercises in law reform. Australia has been fortunate that its High Court has set out to maintain the essential balance which underlies

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122 [1952] (2) AS 428.

123 (1957) SALR 552.

124 R Posner, *Overcoming Law,* Harvard University Press, 1995, Ch 4, citing Ingo Müller, *Hitler's Justice: The Courts of the Third Reich,* (translated by Deborah Lucas Schneider, 1990), discusses how in fact during the Nazi period, German judges frequently enforced the law with more zeal and disregard of any kind of natural justice, than even the Nüremburg (and other) laws required. He instances, however, the courageous exception of Dr Kreyssig, who actually sought to injunct hospitals from shipping patients to concentration camps for extermination and dared to try, unsuccessfully, to have a Nazi leader prosecuted criminally for his role in the programme. When the Reich Ministry of Justice required him to overturn the injunction, Dr Kreyssig refused and requested early retirement, which was granted. This was in 1942. Dr Kreyssig was allowed to live out the war in peace and must have counted himself fortunate his courage did not receive a harsher fate.

judicial restraint, however views may differ about individual cases. It has done so in a way which has allowed Australia's Constitution and common law to adapt to the exigencies of contemporary society and to a maturing sense of nationhood.