The New Constitutional Law

M J DETMOLD*

1. *Judicial Creativity*

We have the good fortune now to have the most creative High Court in our history. And, it follows from this, the one exposed to the widest range of hostile criticism. Fundamentally, the legitimacy of judicial creativity is questioned. But from the fact that the High Court is creative it does not follow that its adjudication is illegitimate. Many of the High Court's present critics are committing the equivalent of the old howler (familiar to old-fashioned students of logic): 1 all dogs are mortal, 2 Socrates is mortal, 3 therefore Socrates is a dog. In the current debate this takes the following form: 1 all legislation is creative, 2 the court is creative, 3 therefore, the court legislates.

It is undoubtedly illegitimate for courts to legislate. They are not (usually) elected and they are not open to lobbies. These are the two essential elements in democratic theory, and they are the basis of the illegitimacy of judicial legislation. Nor are the courts qualified in simple competence to legislate — they do not have access to the wide set of interconnexions of policy that is the essence of complex government (there is a fuller argument of these points in my *Courts and Administrators*).[1] But the critics confuse judicial legislation (necessarily creative) with creative adjudication. There is no doubt that the High Court is creative, but it does not follow that it must be (is) as a legislator that it is creative.

Much of the criticism is wild and obtuse (in the newspapers, and in circulated tracts). One of the careful and scholarly pieces is Jeffrey Goldsworthy's "Implications in Language, Law and Constitution".[2] Goldsworthy takes up Zines's criticism of High Court activism (that the Court's impositions of unexpressed limits to power "provide no guidance or check to judicial aggrandisement or personal predilections"[3] and transforms it from a problem of policy to a breach of constitutional principle):

> I agree with him, but would add that those impositions would be objectionable even if they did provide guidance and checks. The most fundamental objection is not to the lack of future guidelines and checks on the judges, but to the failure of some of them to observe existing ones. ... Judges above all others should meticulously observe the constitutional constraints to which they are subject. If they do not how can they expect other organs of government to do so? To deny that such constraints really exist — to deny that

* Professor of Law, University of Adelaide, South Australia.

1 Detmold, M J, *Courts and Administrators* (1989) at 143–176.

2 Goldsworthy, J, "Implications in Language, Law and Constitution", in Proceedings of a Conference on Future Directions in Australian Constitutional Law (in honour of Leslie Zines) held at Australian National University, 3–4 December 1993.

3 Zines, L, *Constitutional Change in the Commonwealth* (1991) at 51.

> there is a tenable distinction between genuine and creative interpretation — is to deny that law really exists. But that is surely not a view open to judges.[4]

Now, their adjudications of recent times in all fields, but certainly in the constitutional field, have been creative adjudications. But Goldsworthy misunderstands judicial creativity. He contrasts genuine and creative interpretation. But there is in common law adjudication no such contrast.

Much of his argument is very effective for its targets. At times the judges have said that such and such a principle is implicit in the words of the Constitution; sometimes in particular sections and sometimes in the words (all the words) rather broadly conceived. In the former case it has been easy for critics to show that the implications are not there or that they are contradicted by some other section. In the latter case scepticism in the face of vagueness is effective. On the right of equality (which we discuss extensively in later sections of this essay) Goldsworthy writes (of the judgment of Deane and Toohey JJ):

> They say that "the Constitution does not spell out" the doctrine of legal equality. Rather, "there is to be discerned in the Constitution as a whole an assumption" of the doctrine, which was and is "implicit" in the original agreement to federate and in the Constitution's separation of judicial power ... The specific textual grounds offered by Deane and Toohey JJ are too flimsy to merit discussion.[5]

Goldsworthy fails to distinguish the question of what is implicit in the words of the constitution (specifically or broadly, it makes no difference) from the question what is implicit in *the having of a constitution.*

We, the citizens, have a constitution. Granted that premise, we have it equally. And, having the Constitution equally, we have the power that it generates equally. The justification for the implied right of equality as a control on our equally held power is as simple as that.

It is a simple step, and of course it is creative. It is a creative act of understanding the nature of constitutions. It bears no resemblance to legislative creativity. This can be shown by supposing the step to be legislated. Suppose an amendment were passed to the Constitution which declared that we the people owned the Constitution equally. How odd, we would say. Of course we own it equally. How could it be that some own it more than others? Most acts of creative imagination immediately attract an "of course" — the great advances in physics, for example — the creativity is in the focus of the question, the asking of something that has not been asked before. It is the purpose of common law adjudication to decide things that have not been decided before; that is to say, to ask questions that have not been asked before.

Of course, we own the Constitution equally. But do we, the citizens, own the Constitution? Should the stated premise be granted? It is the fundamental premise of what I shall call the new constitutional law.

---

4 Above n2.
5 Ibid.

2. *Individuals and Political Entities*

The old constitutional law concerned mainly the political entities, Commonwealth and States, and to a diminishing degree, United Kingdom. Indeed, it was often remarked that the absence of a systematic concern for the rights of citizens made a sharp distinction between our constitution and that, say, of the United States. This has now changed. In a very short time the High Court has created a new constitutional law of individual (citizens') rights that is profound and far-reaching. Moreover, it is not just that there is a new law of individual rights on top of the old — the new is taking over from the old in the sense that old problems of the relations of the political entities (loosely referred to as problems of federalism) are actually being solved in terms of citizens' rights. The most important of the new cases, *Leeth v The Commonwealth*,[6] illustrates this point; and I shall discuss it shortly. I want to refer first to the two cases where I believe the transformation began.

University of Wollongong v Metwally,[7] concerned a New South Wales law which had been invalidated by section 109 of the Constitution for inconsistency with a Commonwealth law, but whose status was in issue because the Commonwealth had retrospectively amended its own law to remove the conflict. The issue was: were the citizens involved, when they considered their lawful actions prior to the retrospective amendment, entitled to rely on the Constitution's invalidation of the relevant State law or not? The majority held that they were; but it was a close thing and they might under the old constitutional law of political entities have held otherwise. The emphasis on individual rights is shown in this passage from Deane J's judgment:

> [T]he provisions of the constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called Commonwealth and States derive their authority [the people having a constitution: MJD]. So viewed, s109 is not concerned merely to resolve disputes between the Commonwealth and a State as to the validity of their competing claims to govern the conduct of individuals in a particular area of legislative power. It serves the equally important function of protecting the individual from the injustice of being subjected to the requirement of valid and inconsistent laws of Commonwealth and State parliaments on the same subject.[8]

Zines commented that it is a strange application of section 109, a provision designed to augment Commonwealth power, to use it to deny power (retrospective power) to the Commonwealth.[9] But this concern with power rather than rights is the old constitutional thinking. It is the citizen's right that determines the case. Furthermore, when you do look to the real concerns of citizens you find a perfectly satisfactory account of the (correlative) political power. *Metwally* really does augment the power of the Commonwealth — it augments the power of Commonwealth citizens to look to their Constitution as a lawful guide to their conduct. The opposite decision is just a set of logical

---

6 (1992) 66 ALJR 529 (hereinafter *Leeth*).
7 (1984) 59 ALJR 48 (hereinafter *Metwally*).
8 Id at 59.
9 Zines, L, *The High Court and the Constitution* (3rd edn, 1992) at 333.

manacles, making it impossible for citizens ever confidently to look to the Commonwealth constitution as that guide. It is the dead end of the old constitutional law.

The second transforming case is *Davis v The Commonwealth*,[10] where the issue was of the validity of a Commonwealth law which by licensing the use of certain words restricted adverse comment on the 1988 bicentenary celebrations. If, under the old constitutional law, the court had simply looked to the question whether the restriction of speech was incidental to the power to run the bicentenary the answer could hardly have been in doubt — of course it is incidental to (instrumental in) the construction of a bicentenary *celebration* to exclude adverse comment. But the court did not look just to the matter of the power. Brennan J said: "It is of the essence of a free and mature nation that minorities are entitled to equality in the enjoyment of human rights. Minorities are thus entitled to freedom in the peaceful expression of dissident views".[11]

And Mason CJ, Deane and Gaudron JJ expressed a similar characterisation of the law — it was, they said, "an extraordinary intrusion into freedom of expression".[12] The law was held invalid, but there was not much fanfare in the way the decision was expressed. It reads as though it were a fairly ordinary decision on the incidental power — the extraordinary intrusion was "not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power".[13] But in retrospect, from the vantage point of the 1992 freedom of speech cases, *Nationwide News Pty Ltd v Wills*[14] and *Australian Capital Television Pty Ltd v The Commonwealth*,[15] it can be seen as a transformation in the matters hitherto regarded as relevant to constitutional adjudication. The decision could not logically have been justified under the old constitutional law as a decision about the extent of validity under the incidental power (for reasons which I expound in *The Australian Commonwealth*).[16] Some reason for positive *invalidity* must have been introduced. What that reason was these later cases show.

These two most recent freedom of speech cases we discuss later. It is in *Leeth* that the new constitutional law becomes generalised. The issue in that case concerned the validity of a Commonwealth law which provided that the terms of non-parole, and remission conditions, applicable to persons convicted of federal offences were to vary in correspondence to the laws of the states in which they were convicted (which laws varied considerably). The point was that federal convicts in the ordinary course served their terms in state prisons (under section 120 of the constitution); and it was judged desirable that they not constitute a special class of prisoner serving their terms in a different parole regime from their fellow (state) convicts. Hence the necessity of Commonwealth variation. At first glance this looks like a federal issue of a reasonably common sort where the court is required to sort out the details of a

---

10 (1988) 63 ALJR 35 (hereinafter *Davis*).
11 Id at 48–9.
12 Id at 41.
13 Ibid.
14 (1922) ALJR 658 (hereinafter *Nationwide News*).
15 (1992) 66 ALJR 214 (hereinafter *Australian Capital TV*).
16 Detmold, M J, *The Australian Commonwealth* (1986) at 178–98.

constitutionally authorised federal/state cooperation (section 120); rather like the conferring of federal jurisdiction on state courts where the received wisdom is that the Commonwealth must take the state courts as it finds them (that is, with a certain variety). But the argument was made that there was an individual right of equality between Commonwealth citizens, either on the ground that it was implicit in the Constitution or that it was implicit in the exercise of the judicial power involved in the sentencing. This argument was accepted by a majority of the court on one or other or both of these grounds. The actual decision was in favour of the validity of the law — this was because Brennan J, of the majority in the matter of the existence of the principle of equality, disagreed with the others (Deane, Toohey and Gaudron JJ) on the issue of whether the actual legislation infringed the principle. On the principle of the case — the existence of an implied right of equality — the majority lies with Brennan, Deane, Toohey and Gaudron JJ.

This principle of equality, now one of the foundations of the new constitutional law, is that all persons subject to law must be treated equally unless there is a rational ground for discriminating between them. On the question of that rational ground in the legislation of the actual case all that need be said here is that it was arguable either way, and that the rationality of requiring prisoners in the same gaol to exist in the same parole regime, thus justifying discrimination (which the majority supported), was quite a formidable one. But the question of the status of rationality in constitutional law (and of proportionality and reasonableness — all three terms are now used fairly interchangeably) is one that requires attention.

Constitutional law is the law of the structure of communities. When a law distinguishes two citizens on rational grounds (reasonably proportionate, reasonably arguable grounds) it does not construct a separation of community between them. They are still bound together by the posited community of rationality. But when it distinguishes them without rational justification it cuts them off from community. This is not to contemplate the absurdity that citizens have to agree about laws if there is to be community between them. Either citizen might still reject the distinction. But as long as it is capable of rational explanation to them, they are, *though they reject the argument*, not cut out of the communal discourse. Equally, the court itself might not be persuaded by the explanation. That does not mean it must (or does) reject it — the issue is simply whether the explanation is a reasonably arguable one, one that keeps within the community of rationality, does not cut people out of it, does not fail, therefore, to show them due respect. All laws discriminate but irrational discrimination cuts people off.

Or it keeps them out — irrational discrimination is, therefore, discrimination in the protectionist sense. Now, I have not so far mentioned the new constitutional law of section 92. But readers will have noticed that with the idea of discrimination in the protectionist sense we come to the new test of when a law infringes section 92. It is important to see that the new conception of section 92 is not a discrete thing — with *Cole v Whitfield*,[17] we do not have the

17 (1988) 62 ALJR 303 (hereinafter *Cole*).

new section 92, but rather, section 92 in the new constitutional law. All irrationally discriminatory laws are discriminatory in the protectionist sense.

In *Castlemaine Tooheys v South Australia*,[18] South Australia had an irrational legislative regime concerning beer bottles which had the effect of excluding an interstate competitor. This regime was held to be discriminatory in the protectionist sense and therefore invalid. In the leading judgment the point is put shortly:

> It follows that neither the need to protect the environment from the litter problem nor the need to conserve energy resources offers an acceptable explanation or justification for the differential treatment given to the products of the Bond brewing companies. Accordingly, in our view, that treatment amounted to discrimination in a protectionist sense in relation to their interstate trade.[19]

An "acceptable explanation or justification" is the same thing as a rational explanation or justification. Gaudron and McHugh JJ were more explicit:

> A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, it treats equally things that are unequal.[20]

The problem encountered in the case is one that is quite familiar to students of individual rights. The law itself applied to all trade, interstate and intrastate alike. It did not itself discriminate. But the facts in which it operated did. It was therefore like: Any person who gets pregnant ... . When the law itself discriminates the question is whether there is a lawful or rational justification for it doing so (*Leeth*). When the law itself does not discriminate, but the facts do (the law's operation in the facts), then the question is much wider and more contentious — it is whether there is *for the law itself* a lawful or rational justification. The court held in *Castlemaine Tooheys* that there was not. This creates difficulties. If the law is invalidated only for interstate traders it is left to apply to intrastate traders, who may thereby be disadvantaged and discriminated against. The problem is an aspect of the larger problem of reverse discrimination — where there are historical discriminations (as there were with the colonial borders of 1900) those then advantaged might expect some countering disadvantage.

It is important to emphasise that the movement that section 92 protects is an ordinary thing — not a special thing. Communities are nothing but movement — movement of the thought, word and deed of humans in relation to one another. So the speech that is protected in *Davis* is one part of Australian communal movement, the trade in *Castlemaine Tooheys* another. And the idea of discrimination in the new constitutional law is simply the idea of the invalidity

---

18 (1990) 64 ALJR 145 (hereinafter *Castlemaine Tooheys*).
19 Id at 154–5 per Mason CJ, Brennan, Deane, Dawson, Toohey JJ.
20 Id at 155.

of laws which construct barriers to those communal movements. Laws, that is, which keep people out. Stepping forward in the argument for a moment we can see that *terra nullius* is discrimination in the protectionist sense: the settlers kept the indigenous inhabitants out of the community of legal discourse (or said that theirs — the settlers — was the only legal community, which amounts to the same thing).

It will not I think in the end matter whether the general discrimination (equality) principle is based in the constitutional unity of the Australian people (as, in *Leeth*, it is for Brennan, Deane and Toohey JJ), and thereby becomes an immediate principle of constitutional validity, or whether it is seen as a necessary incident of judicial power (as it is for Gaudron J). The latter is still a principle of validity, though a mediate one. To be valid any law must be enforceable in the courts, and ultimately in the High Court. So validity is always mediated by the exercise of judicial power. They are tied together. And this is the case for state legislation as well. Even if we were to adhere to the curious idea that the protection of judicial power relates only to federal courts it would still follow that State discriminatory legislation was invalid. This is the consequence of the place of the High Court as the ultimate appeal court in our legal system. The validity of any State law is ultimately always referable to an exercise of federal judicial power, namely that by the High Court. It would follow that because the High Court was obliged by the integrity of its judicial power to ignore certain discriminatory State legislation, State courts inferior to it were obliged as well.

Much of the language used by the judges in *Leeth* is the language of locality. This is obviously partly due to the fact that the relevant discrimination was one of locality. But more fundamentally, the fact that the localities discriminated corresponded to the territories of the States gave the flavour of the old federal constitutional law to the issue. My point can be seen clearly in the critical passage in Brennan J's judgment.

> It would be offensive to the constitutional unity of the Australian people "in one indissoluble Federal Commonwealth", recited in the first preamble to the Commonwealth of Australia Constitution Act 1900, to expose offenders against the same law of the Commonwealth to different maximum penalties dependent on the locality of the court by which the offender is convicted and sentenced.[21]

Would it be similarly irrational and invalid if these maximum penalties varied according to non-state localities? The answer is surely yes, even more irrational — it was after all the state connexion which made the discrimination of the actual law in the case rational (and valid) for Brennan J. So we may think in this matter simply of the constitutional unity of the Australian people and regard the words following ("in one indissoluble Federal Commonwealth") as an important quality but not the essence of that unity; and therefore conclude that any irrational discrimination by locality is invalid under Brennan J's conception of the principle. But what of discrimination on grounds other than locality? What, say, of discrimination on the ground of skin colour? Suppose the law provided that penalties were to be doubled for persons with black

---

21 Above n6 at 537.

skin. I have no doubt at all that the irrationality of racial discrimination (an almost perfect irrationality; for it is accompanied by an attitude of superiority which positively forbids explanation) is such as to come within Brennan J's conception of constitutional unity (and thus within the conception of the majority in *Leeth* — that which the case is authority for). However, even if it doesn't, even if the principle were to turn on locality as an extension of the old constitutional law's concern with a federation of localities, it can be shown that locality leads inexorably to individual. If A is prevented from speaking to B two localities are created with a barrier (border) between them. And in the example just given, racial discrimination, the border between the races is equally obvious. Border is a fundamental concept. We pursue this issue in part 4.

It is not as surprising as it might first seem that our constitutional law should have turned to the rights of citizens. The old constitutional law was the most rigorous, relentless pursuit of the constitutional relations between political entities in the whole common law tradition — the Americans, for example, never took the judicial exposition of the legal relations of federalism as seriously as we did. In such a discipline the fundamental relations between things will in the end come out. And the thing that has come out is the fact that political entity and citizen are logical correlatives. You do not have a political entity except as a relation of citizens (so you do not have a constitution except as a thing held by citizens). For anyone who takes the legitimacy of constitutional law seriously this point is obvious enough — where you have slaves rather than citizens you have in correlation an entity of power rather than polis (legitimate political entity); a thing holding subjects as the means (slaves) of its existence, rather than vice versa. In a legitimate relation citizens are ends in self, and hold their constitution and its power as a means to their end. So the illegitimacy that the critics find in the new constitutional law can more plausibly be thought to attach to the old (I should not want to call it illegitimate: it is rather law moving to full legitimacy).

Even for theories in which legitimacy is a gratuitous (excessive) value judgment the correlation between power and citizen holds. In the Austinian theory, for example, the sovereign is constituted by the habit of obedience of subjects — without them and their concerns there is no sovereign. So no wonder that a discipline that has got near to exhausting the analysis of the federal relation of sovereignties should turn from sovereign to that which constitutes it, subject (keeping for the moment to Austin's terms); and in so turning should look to the real concerns of subjects and find by the simple act of taking those concerns seriously that subjects are in fact citizens. The step from subject to citizen is just that — the moment you look to what the relation is of a people to a constitution (look, for example to the covering clause "Whereas the people ... have agreed to unite ...") then we the people are citizens not subjects. And this step is the step from the old to the new constitutional law.

Such a step is creative. It is a creative act of imagination (of the sort we discussed earlier) to turn the sovereign/subject question around, to ask what the subject is rather than the sovereign. But it has no resemblance at all to legislative creativity. In fact it could not be legislated. Suppose a sovereign legislated the reversal of the question. Then it would be the sovereign's legislation which was the ultimate determinant of the matter; and the question would remain

fundamentally unturned. It is legislatively unturnable. That is the reason why the rights of citizens is essentially a common law matter.

So we grant the premise. As citizens we have the constitution rather than the sovereign has us. But in what sense do we have it? How equally? I would say, just like we have a contract. Fundamentally, the new constitutional law is no more or less creative than the law of contract.

Suppose you and I have a contract to exchange motor cars. You deliver yours to me expeditiously. But I hold on to mine, saying that I shall let you have it in a year or two. Now, the contract is in writing, but there is nothing in the writing about the time of delivery. No one has any difficulty in this case in implying a rough equality in delivery times. But this equality is not an implication of the terms. It is an implication of the equality of the parties to the contract (their equality in the having of the contract). Perhaps readers are here thinking of typical terms in such a contract, and of the reasons that they have for interpreting the delivery requirements as reciprocal. But the question is, what is it that leads to this interpretation? And my answer is that it is the fundamental equality of the parties in a contract. It is this that determines the terms; not vice versa. Now, the critics will ask, these are fine ideas but where do they come from? Are they just invented?

They are not. They are creative understandings of contract itself, not inventions. The equality of the parties to a contract is the absolute essence of the thing. *There is no law of contract without it.* If the parties are not equal, the stronger imposes upon the other. To the extent that that obtains in a case there is simply no contract. Far from being invented, if this principle were not fundamental there would be no law of contract at all.

Further, if the critics persist, the will for the enforcement of the (equal) contract comes not from the judges, but from the parties themselves.[22] In a perfect instantiation of contract law, no judicial creativity (let alone, legislative creativity) is required at all.

Now, not all constitutions are contracts. Many are the administrative dictates of tyrants (sovereigns). Ours was such when it was seriously monarchical, and when it was imperial. But when it became an Australian Constitution it became the equivalent of a contract. Of course, it is a very large, dispersed and multi-textured contract. But it has terms, and it is a voluntary binding of our wills. We are sometimes misled here by a too simple idea of a discrete contract, perhaps between just two people. But that is not an appropriate paradigm — even for contract strictly conceived; for contracts themselves are more often than not concrete rather than discrete — dispersed, inter-related and multi-textured.[23]

And if it be said that judges lack the authority to effect such a transformation of constitutional law the question is: whose authority do they lack? Certainly they lack the sovereign's authority. That is rather the point of the transformation. But do they lack our (citizens') authority? But openness to us and our authority is the point, too. This shows the necessity of one further

---

22 See Detmold, M J, "Law and Difference" (1993) 15 *Syd LR* 159 at 165.
23 See Macneil, I R, *The New Social Contract* (1980).

qualification on the simple contractual idea. We are becoming citizens. We are coming into voluntary constitutional relation. We are not fully citizens, and the Constitution fully a voluntary relation of citizens, until the new constitutional law is fully established. *Mabo*[24] is a perfect illustration of this point.

Take a variation of the car exchange. Suppose you are Aboriginal. You are *terra nullius*, I say, I may deliver my car when I choose. Or in a stronger version of *terra nullius*, I just take yours (it being unowned, you being *terra nullius*). Again it is the equality of the parties in their relationship which determines the matter. *Terra nullius* is discrimination in the protectionist sense — you are kept out of the community of contract and law.

A person *terra nullius*? But *Mabo* is not understood if it is taken as simply a decision about land. The land was unowned (terra nullius) because the indigenous inhabitants were nullius; by which I mean they didn't exist as juridical persons; as equal parties to a new relationship; as citizens. Mabo is their citizenship. *Terra nullius* is the type of all tyranny: the other doesn't exist except as an obstacle to the tyrant's end.[25] Or they exist as a possible obstacle — thus are to be kept out because their presence will embarrass or frustrate those ends (the cultural competition that the indigenous inhabitants might have provided to the European settlers is the equivalent of the commercial competition that pre-section 92 protectionism sought to avoid: the settlers' inability to comprehend the cultural possibilities is the equivalent of an incompetent trader's inability to compete).

The reference to *Mabo* is intended to show that we shall not understand the new constitutional law except as a whole. This point includes more than just the cases fairly obviously concerned with what are called rights. It includes the cases on communities as well. The comparison that we have made with section 92 is fundamental to our understanding. Rights (human freedoms) do not exist in the abstract, but are functions of relations with others (of which communities are large cases). Sometimes this matter is obscured by a romantic idea of right which is conceived as something holding against some much larger power; under this idea discrimination is something that a big person does to a little. Thus when, say, Victoria adopts a protectionist trading policy against, say New South Wales, this is not thought the stuff of romantic rights. But size is arbitrarily conceived. The policy operates not just on large New South Wales, but also upon some small New South Welsh trader (in this very reflection we see the old constitutional law becoming the new; and that it is not so very new, that its roots stretch back to Fred James). And, anyway, discrimination if it is allowed at any point in a community creates its own size.

The movement from sovereign to citizen is also a movement from states to citizens' relations. This shows that the integration of the section 92 cases into the new constitutional law is only one part of the whole movement. The states in Australian constitutional law are (were) cases of (minor) sovereignties. With the movement of that law from sovereignty to the rights of citizens the states become communities of citizens. And there is a virtual infinity of these:

---

24 *Mabo v The State of Queensland* (No 2) (1992) 66 ALJR 408.
25 Above n22 at 161–2.

there is a virtual infinity of combinations of discriminatory power. We examine a particularly problematical combination in the next section.

3. *A Movable Apartheid*

The problem that *Leeth* raised of discrimination between localities has its most significant manifestation in the issue of the status of the states in conflicts of laws — it is perhaps this issue which presents the greatest difficulty in the transformation from the old constitutional law to the new. A discriminatory law (one without rational justification) cuts certain citizens out of the relevant community of law. As *Metwally* held, the effect is the same if the citizen is given law at the time of their relevant actions, but has it taken away at the time of adjudication. And it was precisely this that occurred in interstate conflicts of laws under the old constitutional conceptions. A citizen could act lawfully according to the law of one State but be sued in the courts of another *precisely because* the second state's *lex fori* denied them the law by which they acted. This had the effect of cutting them out from their community of law. The law by which they acted was taken from them by the subsequent stipulation of the *lex fori*. And it cut them out entirely: the *lex fori* could not serve as the citizen's law because there was no way of knowing in advance which forum would be chosen. There is no difference in substance between a case where a court cuts a person out of law because of their skin colour and a case where this is done because they are New South Welsh, the *lex fori* being, say, Victorian. Perhaps this point is not understood because under the old conceptions it was taken for granted that the *lex fori* must be applied; and it is therefore not so much the exclusion of New South Wales law as the inevitable application (by Victorian courts) of Victorian law. But racial discrimination is usually the same — it is taken for granted that the white man's law applies. And there is no difference between cutting a person out of law and cutting them out of community. Communities are constituted (and deconstituted) by law. The *lex fori*, say, of Victoria is a community (or anti-community, a thing deconstituting community, as I am arguing).

The answer in the new constitutional law (the only possible answer to the problem) is to say that for substantive law there is one lawful solution to any Australian legal issue in whichever forum a case is brought; and then in the matter of the community of law there is one Australian citizenship — no one is cut out. The High Court's rejection of the old idea of interstate conflicts of laws under which the States were for conflicts purposes as foreign nations to each other[26] is capable of being expressed in terms of the old constitutional law — no longer foreign nations but still political entities of certain relations. And much of the reasoning in *Breavington* exhibits a tension between the fact of Australian citizenship (necessarily denying that the States are foreign nations) and a concern to say just what the States are in the federation. This tension has continued in *McKain v R W Miller & Co*,[27] where the idea is raised of the states as distinct "law areas". In that case the majority wrote:

---

26 *Breavington v Godleman* (1988) 62 ALJR 447 (hereinafter *Breavington*).
27 (1991) 66 ALJR 186 (hereinafter *McKain*).

> To describe the States as Windeyer J once described them ... as "separate countries in private international law" may sound anachronistic. Yet it is the nature of the federation created by the constitution that the States be distinct law areas whose laws may govern any subject matter subject to constitutional restrictions and qualifications. The laws of the States, though recognised throughout Australia, are therefore capable of creating disparities in the legal consequences attached in the respective States to the same set of facts ... .[28]

Now, Australian citizenship is not incompatible with diversity. In fact, diversity is the essence of the Australian common market, the free communal movement of trade that section 92 of the constitution has established (more fundamentally, the essence of community; as I argued in "Law and Difference").[29] If I want bananas I go to Queensland. If I want wine, South Australia. And so on. But what about forum shopping? Why not shop for differences? Here it is necessary to distinguish substantive and adjectival laws. For adjectival laws there is no difficulty with the common market idea of shopping for difference. Perhaps one state offers a certain sort of litigation, another a different one (the one perhaps a traditional sort of dispute resolution, the other an alternative one; the one prepared to keep their courts open to claims for a long limitation period (this was the issue in *McKain*), the other preferring not to deal in stale claims); and it is entirely in order that we not insist that litigation in the federal common market is different from bananas and wine (except in one fact — the relevant choice is that of plaintiff *and* defendant). But the forum shopper for substantive laws is a wholly different creature; is in fact a tyrant.

A plaintiff's subsequent choice of substantive law (even a plaintiff's and defendant's agreed subsequent choice) is not a choice of law; it is a choice against law; it is a choice that denies the right to have attachment to a community of law. It is as fundamental a breach of the community of lawful rationality as any apartheid regime. In fact in one way the old constitutional regime which allowed a substantive *lex fori* is actually worse. If the citizen knows that their case will be brought, say, in Victoria they can act rationally with regard to that *lex fori*. But they cannot do this, for they have no access to the decision that the substantive forum shopper will make about the case. They don't know where the case will be brought, and so have no rational basis at all to act according to law. This is the most pervasive breach of the community of rationality that it is possible to imagine. It is an apartheid in constant movement. Even an apartheid regime is not necessarily arbitrary — it is often possible to know what law to conform to. The forum shopper for substantive laws is not just a tyrant, but an arbitrary tyrant.

The limitation of action law actually in issue in *McKain* was an adjectival one (and the decision in the case is entirely consistent with Australian citizenship). But some of the reasoning in the case is not quite so clear — the two laws joined as examples in the following passage are fundamentally different:

> [A] constitutional imperative that the courts of a State should apply only the law of another part of the Commonwealth in determining a claim for damages

---

28 Id at 196–7.
29 Above n22.

> for a tort occurring outside the State but within Australia would deny the forum State an important legislative power. If there were such a constitutional imperative, a State law which prohibits the bringing of an action of a particular kind (for example an action for damages for personal injury where the injury is not serious) or which creates a particular defence (say, in defamation) would be applied by the courts of the State to claims arising from intra-jurisdictional torts but would be constitutionally ineffective in respect of claims arising outside the state but within Australia.[30]

This passage is immediately preceded by the following: "The power of a State to enact laws governing the procedure of its courts is unquestioned, but ... ".[31]

The contrast that the court is drawing is one between substantive laws and procedural laws. But the important distinction is between laws which primarily govern the actions of citizens (substantive laws) and those which govern the actions of courts (adjectival laws). Rights are things that attach to citizens, not courts. On this (further) distinction the two laws joined as examples of the procedural in the quoted passage are quite different. The law prohibiting the entertainment of claims for small personal injury has an immediate application to courts. But not to the actions of citizens — it would be a very strange conception of law that thought that such a law authorised citizens to go out and about inflicting small injuries. The implication of that law for the actions of citizens is indirect and slight. It therefore occasions no breach of the citizen's community of law, and if, say, the courts of New South Wales are instructed to entertain small injury claims but the courts of Victoria not to, the constitutional relations are well enough in order — the people of New South Wales evidently willing to pay for more judges than Victoria, even willing to offer them to out-of-state plaintiffs. But the defamation law is quite different. Defamation law's control of the conduct of citizens is immediate and substantial; to publish or not is one of the most significantly regulated decisions in Australia today. A *lex fori* discrimination in a law that concerns immediately the actions of citizens, such as the defamation law under consideration, bespeaks constitutional relations that are quite out of order.

Suppose for a certain type of statement there is a defence in New South Wales but not in Victoria. Then the law requires that such a statement not be published in Victoria but as far as the law in New South Wales is concerned the citizen is free to publish. Now, there may be no conflict of law problem here at all; insofar as publication is discrete to States the citizen's decision can be, to publish in New South Wales but not in Victoria. But *McKain* was a conflicts case and we may take it that in the passage quoted the judges were considering conflicts problems; further, it is the case that discrete publication is often an unrealistic possibility (for example, the citizen may be thinking of publishing on the Australian Broadcasting Corporation). So I will take it that the laws in question both concern the conduct of citizens and postulate a conflicts problem; they therefore necessarily raise a *single* problem of conduct, publish or not.

Let us suppose our citizen tries to work their way through the issue (perhaps with a lawyer). New South Wales law says you may publish, Victorian

---

30 Above n27 at 196.
31 Ibid.

law you may not; and the citizen asks: which law should I obey? Now, the High Court once said in the matter of a similar conflict between Commonwealth and State laws: obey both. But this answer is really a sham and was soon rejected.[32] The reason is quite apparent. Obey both laws means do nothing, and that means obey one of them; for instance in our defamation problem it means obey Victorian law (do not publish). The citizen wishes to act lawfully under Australian law (including Victorian law) but is forced to act (in this case not act) under Victorian law. Put another way, the citizen wishes to live in Australia but is forced to live in Victoria. And in yet another way, the citizen wishes to trade in Australia but is forced to trade (in this case not trade) in Victoria. Now, I do not want to spend time considering whether the envisaged state of affairs does actually infringe section 92 (though I think it does) — my point is to draw a variety of constitutional issues together, and my third expression of the present point, the one in section 92 terms, is intended to do no more than that.

Though the actual decision of *McKain* is non-discriminatory, there are in its reasonings some theoretical hiccups. The High Court majority were concerned that a single solution to Australian conflicts of laws problems would "deny the forum State an important legislative power". We have already noted that *McKain* itself concerned an adjectival law. But if the quoted comment refers to substantive laws in our further sense, as well as to adjectival laws, then it is the old constitutional law speaking. *And it is speaking to no effect.* If the forum State is Victoria and we resolve the conflicts problem against Victoria we certainly deny it a legislative power; but if we say "obey both laws; do not publish" *we deny the self-same power to New South Wales.* To refuse to see the issue as a conflicts problem with a single answer preserves no more State legislative power than a conflict resolution would do. In *Breavington* Northern Territory law was chosen against the *lex fori* (Victoria). This denied power to Victoria only in a limited, entirely short-sighted sense, for in the opposite case Victoria would gain power against a Northern Territory *lex fori*. There is a Procrustean sense in which more legislative power is preserved: to allow the substantive laws of both forums to operate so that each is applied depending on where the suit is brought does in a sense preserve both. The problem is with the citizen in the middle — alternately stretched and lopped. For judges the problem of substantive law is not immediately apparent. They may sit in their courts applying this law and that to the citizens (defendants) brought before them. And they may do this in a way that is consistent for themselves. But in doing this they abstract themselves (and they abstract law) from their community. What a strange idea of the institution of law it would be that held that we had citizens for the purposes of judges (citizen fodder for Procrustes J), rather than judges for the purposes of citizens! Judges are the servants of citizens' rights; not vice versa. The community of law is a community of citizens, and judges are secondary to this.

It was the great strength of *University of Wollongong v Metwally* that it saw this last point. We saw earlier that section 109 of the Constitution had invalidated a New South Wales law for inconsistency with a Commonwealth law,

---

32 *Clyde Engineering Ltd v Cowburn* (1926) 37 CLR 466.

but the Commonwealth had retrospectively amended its own law to remove the conflict. The issue of whether the amendment was retrospectively effective is precisely the issue of whether law is for citizens or judges. For judges themselves there is no problem with retrospective laws; they can sit in their courts and apply whatever it is that is on the statute-book at the time of their decision; and there is no problem for them if a statute be retrospective. But for the citizen the issue is critical. The issue in *Metwally* was: were the citizens involved, when they considered their actions prior to the retrospective amendment, entitled to rely on the Constitution's invalidation of the relevant State law or not? The majority held that they were; and this is one of the most important of all constitutional cases in its holding that law is not abstracted from the community but has a real operation in it.

Now let us return to our prospective publisher. The citizen in *Metwally* was entitled to rely on section 109 of the Constitution; what is our publisher entitled to rely on? What constitutes their community of law? Well, what but their Constitution? What, anyway, is the constitutional basis for their being bound by any State law at all? The answer is quite complex, but whatever it is it is an answer. I will take it that the answer is section 107 of the Constitution: "Every power of the Parliament of a Colony which has become ... a State, shall ... continue as at the establishment of the Commonwealth ...".

But whatever the answer, it is a single answer, and it will refer to something at least the constitutional equivalent of section 107. Perhaps it will be a combination of sections. For my argument it doesn't matter. What I am going to say of section 107 will apply equally to that different or more complex answer if such be required.

The case we are considering is a case of conflict between a prohibition and a permission. Let us for the moment take a stronger case than that one, a case of conflict between two prohibitions, and ask what section 107 has to say of that conflict. Suppose New South Wales law prohibits X and Victorian law requires it (prohibits not-X). Being a conflicts case both laws purport to apply to the same set of facts. Could section 107 be interpreted as validating both? The answer is forced by logic: the validation is the assertion of contradiction, and the assertion of contradiction is a nullity, nothing at all. So the most we can say in the matter of the validation of both laws is that section 107 says nothing. But if it says nothing it says nothing on the validity of either, and we have no basis for the validity of either law (no basis in section 107 or in any more complex equivalent). We have no basis, therefore, for *any* constitutional power in the states. If it be thought that section 107 speaks sequentially (first validating the legislative power of one State then the next, and the next ...) that is a return to the idea that law does not speak to citizens; in particular does not speak to Commonwealth citizens, who may be defined as those with a single problem between two or more State jurisdictions or laws (or a problem beyond state laws entirely). We may take it that it is not the case that neither law is valid; take it, therefore, that section 107 validates, in the circumstances of our case, one and not the other. Of course, section 107 does not itself say which; but it is an entirely reasonable interpretation of it to regard it as incorporating all common law conflicts rules as are consistent with its function, which may be taken to be all rules except those pointing to the *lex fori* as such. There is no objection to section 107 requiring, say, a Victorian court to choose a Victorian law (its *lex fori*) — courts from other States would

be required in that case to choose the Victorian law, too — it is the choice for substantive laws of the *lex fori as such* which is objectionable in a Commonwealth constitution. And that this conclusion applies not just to conflicts between two prohibitions but to a conflict between a prohibition and a permission follows, as we have shown, from *Clyde Engineering*.

We may take it that *Metwally* did not turn on the fact that there was a single section of the Constitution (section 109) for citizens to look to. It must have been the same if there had been no section 109 and Commonwealth supremacy had rested merely upon an implication of the Constitution. Thus it does not matter for my argument whether the validity of state laws comes from the single section (107) or from some more complex constitutional judgement. Nor can it matter that section 109 gives a simple answer to conflicts, where section 107 gives a complex answer, and by implication. In fact section 109 does not often give a clear and simple answer — the initial conflict between Commonwealth and state law in *Metwally* was a very difficult one to resolve. What matters is the community of law; that there be a lawful solution to all issues of citizens' conduct. Only then can it be said that the citizen has a right to law, is not cut out of their community of law by an irrational discrimination.

4. *Borders and States*

If it were neccessary to personalise the tyranny of the old conflicts of laws it would be in terms of the substantive forum shopper. The forum shopper is an arbitrary tyrant. Also a mobile tyrant. Where does a forum shopper live? We shall limit our question to Australia. The answer that suggests itself is: everywhere, wherever they choose, in all states and territories wherever a suitable court is to be found. But everywhere is somewhere — the forum shopper is a real tyrant. Contrast now a more modest citizen whose resources and style of life limit them to living in just one state or another. We may allow that this citizen undertakes the odd holiday interstate, but their access to the courts (limited enough, anyway) is strictly to those of their own state, which, we shall say, is Victoria. Our second citizen living in Victoria, where does our first forum shopping one live? What shall we answer? Where were they last seen? The answer as it is relevant to our discussion is that they live in the state of forum shopping. Now, I imagine that the reader is quite happy at this point to indulge my little fancy — after all I said that our first citizen lives in the state of forum shopping, not in the State of Forum Shopping. But I do mean the State of Forum Shopping, for reasons which I shall now explain. At the basis of these reasons is the concept of a border. All the freedoms are freedoms against borders. And when borders are constitutionally systematic they constitute the equivalent of States.

In *Fox v Robbins*,[33] Western Australian legislation sought to establish two regimes of law in the matter of licensing the selling of wine; one regime for Western Australians and another more onerous one for the citizens of other states (the licence fee to sell wine made from out-of-state grapes was 25 times that for local wine). This was struck down under section 92, and despite the

33 (1908–9) 8 CLR 115.

fact that it was the first section 92 case is the only one of the many pre-*Cole* cases certain to be now decided the same way. Now, nothing turns on the fact that the regime in that case concerned the selling of wine. The decision would be the same if it concerned litigation; if, say, out-of-state litigants had to pay 25 times as much to issue a writ in Western Australia as Western Australians, or could only get a twenty-fifth the damages; or if Western Australian, but not out-of-state, litigants could choose from anywhere in Australia the law upon which they wished to base their case. I pass over for the moment the question whether these examples of burdens upon interstate litigation do not stretch the meaning of "trade and commerce" if not "intercourse" in section 92 beyond its proper construction — I want to get immediately to the point about the citizen from Forum Shopping, and I have to do it by way of a recent case on duties of excise.

Capital Duplicators v ACT,[34] raised what looked like a nice point but is in fact a very fundamental one. When section 90 declares the Commonwealth's customs and excise power exclusive, does it mean exclusive of all other law including that of the internal territories or just exclusive of state laws? A majority of the High Court decided that it meant the former, and that an ACT excise was therefore invalid. Right at the end of her judgment Gaudron J (who was one of the majority) wrote:

> Some of the cases concerned with section 90 contain statements to the effect that that provision was concerned to effect a division of legislative power between the Commonwealth and the States ... . As Brennan, Deane and Toohey JJ observe in this case [the] statements are correct, "but as a matter of history not of construction"[they with Gaudron J constituted the majority in the case].[35]

The meaning of this is that the principle underlying section 90 was the establishment of a free-trade area throughout the Commonwealth and that that principle (which construction finds) is not to be confused with its historical manifestation as an exclusion of the States in either the judges' interpretations or in particular provisions of the Constitution itself. In *Leeth* Deane and Toohey JJ made this point quite clear:

> [S]pecific provisions of the Constitution which reflect or implement some underlying doctrine or principle are properly to be seen as a manifestation of it and not as a basis for denying its existence by invoking the inappropriate rule of expressio unius.[36]

This is the very essence of legal reasoning — in fact it might be said to be the fundamental method of the common law not to confuse underlying principle with actual historical manifestations (the facts of the cases that have actually (historically) arisen). But putting that general reflection aside, it is obvious enough that the point applies to section 92 itself. The underlying principle is the establishment of the free trade area of the Commonwealth (that which excludes an ACT excise no matter what was historically thought), and it is not a limiting fact that the dominant historical manifestation of the problem was of

---

34 (1992) 66 ALJR 794.
35 Id at 809.
36 Above n6 at 541.

inter-State protection. Section 92 abolished certain historically prominent borders. But it makes no sense to think that the Constitution did this only to allow the construction of a new set of borders and states; the protection of the anti-states, as I put it in "Australian Law: Federal Movement"[37] referring to the pointlessness of breaking the protection of intrastate trade only to substitute the protection of interstate trade. I put aside for the moment the problem of protecting the anti-states as an exercise in reverse discrimination. Any protectionism of an equivalent nature to State protectionism is therefore excluded — *including protection of the State of Forum Shopping* and its (wealthy) citizens. Indeed, the anti-states were actually the trading equivalents of the regime of the forum shopper — large trading concerns able to range from state to state taking advantage in any state of any weakness of an intrastate trader brought about by a law which might be impugned under section 92, and which therefore, ex hypothesi, remains to weaken the competitive power of the intrastate but not interstate trader.

Section 92 could have been regarded as creating a whole non-protective Australian community.[38] But *Cole*, carrying with it a certain historical baggage, adopted a more limited interpretation. Now with the new freedoms, the ones announced in *Nationwide News*,[39] and in *Australian Capital TV*,[40] the way is clear for a complete theory of the constitutional freedoms to constitute the Australian Commonwealth. To pursue this theory we must first think of borders and states.

Any restriction on communication creates a border and if it is a valid (constitutionally supported) system of restrictions it creates a State. The old constitutionally supported *lex fori* rule in Australian conflicts of laws was the systematic creation of the State of Forum Shopping. Many such States are possible. Consider now the restriction in *Nationwide News*. Commonwealth legislation prohibited speech calculated to bring a member of the Industrial Relations Commission into disrepute; and this provision the court held to be invalid. Suppose the restriction on comment relating to the Industrial Relations Commission were greater and more systematic than it was. The state of affairs would then obtain whereby one could go into the regime of the Commission solely on its terms. This going in might be a bodily one or it might just be by words. It might be a going in by trade — for example, a citizen might be seeking to offer a competitive (private) conciliation service, which, let us say is prohibited by the regime of the commission (prohibited, that is, by legislation — the regime is a complex of supporting power including the statutes setting it up). The regime is a State, assuming it is constitutionally supported, that is, the legislation is valid, and there is no important difference between my seeking to enter it and my seeking, say, to enter Victoria. In each case I may do so on terms dictated by the State itself. In each case some terms of restriction will be valid and some not; in the one case valid or invalid by reference to the constitutional implication that the High Court noticed in *Nationwide News* and in the other by reference to section 92. And many of the

37 Detmold, M J, "Australian Law: Federal Movement" (1991) 13 *Syd LR* 31 at 45–53.
38 Above n16 at 32–45.
39 Above n14.
40 Above n15.

restrictions on entry into the Industrial Relations Commission will be protectionist fully within the notion as it was conceived in *Cole* — the restriction on a competing conciliation service is an example here. Take another case. Suppose the Commonwealth attempted to establish by legislation and executive action a regime of racial discrimination in Australia, or that a State did it within its field of power. Does this create a border? Of course it does. Any racial discrimination is precisely a border or barrier between the people involved. This would be obvious if the discrimination were geographically arranged like the old South African apartheid regime; and it would infringe the formal provisions of our constitution relating to the construction of new States (the old constitutional law). But nothing turns on this once it is recognised that geographical restriction is just one of a large number of ways of closing off relations between people (protection in section 92 parlance).

Of course, the regime of racial discrimination would if it were constituted by State legislation be invalid on the ground of inconsistency with the Commonwealth's *Racial Discrimination Act* (1975). And if it were established by Commonwealth legislation there would be questions of priority between the two Acts. But the *Racial Discrimination Act* is irrelevant in the new constitutional law, for the Constitution itself establishes the relevant right of equality (anti-discrimination), and therefore Commonwealth as well as State legislation falls. This, we have seen, follows from *Leeth*, which is now perhaps the lynch pin of our constitutional relations.

Any restriction at all on human movement creates a border. By human movement I mean any of the ways, physical or mental, by which humans relate to each other. Now, the constitutional word for this human movement is "intercourse". And there is a very puzzling passage in Cole concerned with this word:

> [I]t is clear that some forms of intercourse are so immune from legislative or executive interference that, if a like immunity were accorded to trade and commerce, anarchy would result. However it has always been accepted that s92 does not guarantee freedom in this sense, that is, in the sense of anarchy.[41]

Section 92 refers indifferently to trade, commerce and intercourse. Why make the distinction? There have been two cases specifically on "intercourse" in section 92: *R v Smithers; Ex parte Benson*,[42] and *Gratwick v Johnson*.[43] Both resolve themselves in perfect analogy to trade and commerce. The restriction in *Smithers* was against the entry into New South Wales of persons convicted of felony in other states; and this is quite precisely the intercourse equivalent of *Cole* protectionism. The restriction in *Gratwick* is not quite so clear vis-a-vis *Cole*. But that is because it concerned a Commonwealth law; and how Commonwealth laws relate to *Cole* is not completely clear. What can clearly be said about *Gratwick* is that if you translate the intercourse law in question — "no person shall without a permit travel from one state to another" — into trade and commerce (travel, say, for trade) it fares the same way under *Cole*. And this is so for any restriction on intercourse that I can think of. It is simply not clear what the forms of intercourse are whose analogical protection

---

41 Above n17 at 311.
42 (1912) 16 CLR 99.
43 (1945) 70 CLR 1.

in the field of trade and commerce would lead to anarchy. Take the most extreme restriction — "no person shall move from one state to another in body or word" — and translate it. "No person shall trade from one state to another" is a simple example of a law that is invalid under *Cole*, but also one whose invalidation in no sense constitutes anarchy. It is possible that the Court had in mind its subsequent protection of freedom of speech in *Nationwide News* and *Australian Capital Television*; and contemplated it as wider than a trade and commerce analogy because anarchy in speech is acceptable where anarchy in trade is not. It is perhaps "anarchy" that is the troublesome word in the reasoning.

Anarchy is not an extreme of freedom; anarchy is not freedom at all. The major shift in the moral and political philosophy of the last century and a half has been against the Cartesian idea of the free self as an isolated mental entity radically separated both from the world and from others. In that idea it is certainly true that the extreme of freedom is the extreme of separation — the extreme, therefore, of anarchy. But we now know that the self only has identity in relation to others. And that this applies to freedom itself. All freedom is the freedom of selves. Thus all freedom attaches to that which makes the identity of the self — the relation to another. In short, all freedom is relational, and the opposite of anarchy.

It is because freedom is relational that movement and its restriction, border, are the basic things. At bottom this is the reason why it is necessary to see the new constitutional law in close relation to the old (the new constitutional law of freedom as a natural progression, though one mediated by judicial creativity, from the old constitutional law of federal relations and State borders); to see that there is no sharp distinction between protectionism in the Industrial Relations Commission and protectionism in a State; to see that when section 92 sets about constructing the Australian community it is at the same time, and in the most philosophically precise sense, constructing its part of Australian freedom.

The new constitutional law is the law of the freedom of human movement in body and mind throughout the Australian Commonwealth. We have ranged widely in this essay over many possible constitutional relations. But there are no limits here. Every aspect of our lives that involves a relation to another is a movement of thought, word or deed. Suppose a law inhibits the expression of a certain sexuality. It creates a border through which the proscribed sexual expression shall not pass. And if it is systematic and constitutionally supported it creates (and protects) the State of Proper Sexuality. Every right is like this. Every human right is a guaranteed freedom of movement over a proposed border. Of course, as we said in the earlier discussion of *Leeth*, not every inhibition of movement constitutes a border. If there is a rational ground for the discrimination between sexualities (the *Leeth* test), the matter is different. Where there is a rational ground for the distinction between A and B there is a community of rationality between them, and therefore in the most fundamental sense there is no division of community, no border in the strict sense.

The main problem here, and the main ground of rational restriction, is in the proscription of acts that themselves inhibit freedom. It is not easy to see how that rational justification can ever be offered for a restriction on someone's sexuality. But take a more obvious case. Suppose you threaten to assault me. The law will validly restrain you (restrain your freedom). How can freedom justify restraint of freedom? But there is no problem here once it is seen

that freedom is relational. The law's restraining you is not at the expense of a *relational* freedom. On the contrary, your assaulting me is the constitution of a border, a restriction on the movement of my life in your direction.

When all these relations are clarified that little word "intercourse" in section 92 will no longer trouble us.

5. *A Common Law Bill of Rights*

We now have a tremendous advantage over the United States. The First Amendment to the United States constitution guarantees freedom of speech. But speech is only one of the ways humans move in relation to each other: and there is an enormous amount of useless effort in United States constitutional law devoted to the question of the limits of speech. We in Australia are in the fortunate position of not having our freedom constricted by a word or set of words such as is found in a Bill of Rights. Instead, the matter being one of implication in the Constitution (more precisely, we have shown, implication in the having of a constitution), it is consigned to the common law; and the argument about the limits of the constitutional guarantee will go where it will in the case by case way of the common law. So any human movement at all in thought, word and deed is the broad issue, and any distinctions within that category or limitations of it will arise by virtue of principled common law argument from the new cases.

We now have everything that a written Bill of Rights could give us. We do not have the detailed answers to the many large issues that will arise under the new freedoms. But Bills of Rights never deal in detail, either. And it is true that *Leeth* rationality will involve the controversial balancing of values; but that also does not distinguish our case from, say, the Canadian Bill (where the balancing is explicit) or the American (where it is implicit, worked through in the cases). And we have the incalculable advantage that our freedom is a common law freedom to be worked through from case to case, mediated always by rigorous argument, that is to say with a proper legalism.

As there has been such a degree of criticism of the current High Court in the matter of its supposed departure from the canons of legalism I wish to close this essay on that issue as I opened it. What is legalism? We can see by referring to the words of our greatest legalist, that is to say our greatest lawyer, Sir Owen Dixon, in the *State Banking* case:[44]

> In the many years of debate over [inter-governmental immunities] it has often been said that political rather than legal considerations provide the ground .... The constitution is a political instrument. It deals with government and government powers. The statement is, therefore, easy to make though it has a specious plausibility. But it is really meaningless. It is not a question whether the considerations are political for nearly every consideration arising from the constitution can be so described, but whether they are compelling.[45]

---

44 *The Lord Mayor, Councillors and Citizens of the City of Melbourne v The Commonwealth* (1947) 74 CLR 31.

45 Id at 82.

Dixon was a classical scholar, for whom the word "political" meant concerning the polis. The new constitutional law, no less than the old, is a development (a creative, imaginative development) of that tradition of moral and political thought which began in Athens two and a half thousand years ago; and Dixon's words are no less apposite to the new. Communal movement and communal freedom mean political movement and political freedom — movement and freedom in the Australian polis.

Those preparing a new constitution for us in 2001 have now, I think, a considerably shortened agenda. In the new constitutional law we already have a republic in the only important sense; for it is a constitutional law of the relations of citizens, rather than (the old) relations of sovereign power. Republic means exactly that. And in having a constitutional common law of the relations of citizens we already have a protection of human rights. Moreover, since it is a common law protection rather than a legislated Bill it is one that is true to the complexity (ultimately, the particularity) of humans. Whatever the constitutional chatterers do, they ought not to overlook or mistake the imaginative and powerful jurisprudence of the current High Court. No common law community has been as well served by its constitutional court as ours has.