

## CONTINUITY AND JUDICIAL CREATIVITY - SOME OBSERVATIONS\*

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### I. INTRODUCTION

#### A. The Current Debate

The end of the Mason era in the High Court<sup>1</sup> has coincided with a vigorous debate about the limits of judicial creativity in Australia. The immediate occasion for the debate has been the Court's recognition of an implied constitutional freedom of communication. The Court has relied on this new constitutional implication, not only to invalidate Commonwealth legislation,<sup>2</sup> but to curtail the operation of State defamation laws.<sup>3</sup> The Court's apparently bold intervention, not unexpectedly, has prompted much scholarly discussion of

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1 Sir Anthony Mason retired as Chief Justice on 20 April 1995.

2 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

3 *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211. Each of the cases was decided by a 4-3 majority.

whether it has departed from its legitimate role and has strayed too far into law-making.<sup>4</sup>

The current debate has not, however, been confined to the legal profession or to academic commentators. Daily newspapers have participated in the controversy, by way of both editorial comment<sup>5</sup> and news reports. The decision of the Commonwealth to intervene in the reopening of *Theophanous v The Herald & Weekly Times Ltd* before the High Court, for example, received front page coverage.<sup>6</sup>

Doubtless the interest of the media in the implied freedom of communication is not entirely altruistic. Nor are these the first constitutional cases of great social and political significance to attract public debate. Even so, there is something both novel and striking about Australian newspapers giving prominence to the controversy about whether the unelected judges of the High Court are warranted in locating hitherto undetected implied rights in the Constitution.

The controversy clearly reflects the reputation earned by the Mason Court, especially during the latter part of the former Chief Justice's tenure,<sup>7</sup> as a court of final jurisdiction giving effect to a conscious philosophy of judicial activism. It is also fair to say that the aura attaching to the High Court has influenced public attitudes towards the judiciary as a whole. Few lawyers would dispute that the functions and techniques of the High Court are very different from those of trial courts and even of intermediate appellate courts. But decisions of lower courts can also have considerable political and community ramifications,<sup>8</sup> encouraging a perception that judges in general now exercise more extensive law making functions than has ever previously been the case.

## B. Recent Judicial Activism

A threshold question is whether Australian courts, and the High Court in particular, have in fact adopted a new and qualitatively different approach to judicial decision-making. In other words, have the courts consciously adopted a

4 See for example L Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Syd LR* 166 at 175 ff; TD Campbell, "Democracy, Human Rights and Positive Law" (1994) 16 *Syd LR* 195; JJ Doyle, "Common Law Rights and Democratic Rights" in PD Finn (ed), *Essays on Law and Government: Principles and Values* (1995) at 144.

5 See for example the editorial, "Free Speech and Democracy", *The Australian*, 1 October 1996, p 12, supporting the decision in *Theophanous*.

6 "Government Reversal of Free Speech", *Sydney Morning Herald*, 2 October 1996, p 1. The two cases challenging *Theophanous* are *Levy v State of Victoria*, No M42 of 1995, and *Lange v Australian Broadcasting Commission*, No S109 of 1996. The challenge to the correctness of *Theophanous* follows the retirement of Sir Anthony Mason as Chief Justice and the subsequent retirement of Sir William Deane to take up his office as Governor-General of Australia. Both were members of the majorities in *Theophanous* and *Stephens* and the earlier cases on the implied freedom of communication. Their replacements were, respectively, Gummow J, formerly of the Federal Court of Australia, and Kirby J, formerly President of the New South Wales Court of Appeal.

7 Sir Anthony Mason succeeded Sir Harry Gibbs as Chief Justice in 1987. See generally C Saunders (ed), *Courts of Final Jurisdiction - The Mason Court in Australia*, Federation Press (1996).

8 A random example is *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516 (the *Woodchips* case).

creative law-making role that transcends the historic functions of an independent judiciary? At first glance, the answer seems to be yes. Even a cursory examination of some of the prominent decisions of the recent era brings home the significance of the High Court's recent contribution to the Australian legal, political and social structure.

The implied freedom of communication cases represent only the most recent examples of a reinterpretation of constitutional doctrine. The construction of the cryptic command in s 92 of the Constitution, that "trade, commerce and intercourse among the States...shall be absolutely free", provides another example. Following the decision in *Cole v Whitfield*,<sup>9</sup> s 92 is no longer to be a source of individual rights and freedoms for interstate traders. Rather, it is to be seen as a measure designed to eliminate protectionism, by preventing discrimination against interstate trade.

*Cole v Whitfield* represents a contraction of the scope of judicial review, since it discarded the individual rights theory underlying the earlier law. Other constitutional decisions, by contrast, have expanded the scope for exercise of the power of judicial review. For example, in *Street v Queensland Bar Association*,<sup>10</sup> the Court breathed new life into s 117 of the Constitution, which prohibits a State discriminating against a "subject of the Queen, resident in another State". The Court overruled earlier authorities that had rendered the constitutional prohibition largely meaningless.<sup>11</sup> The Court has applied a test of reasonable proportionality to determine whether Commonwealth legislation is within a head of constitutional power, thereby allowing the judges to make a value judgment about the validity of the means adopted by Parliament to achieve its goals.<sup>12</sup>

At another level, few Australians can be unaware of the decision in the *Mabo v Queensland [No 2]*<sup>13</sup> and its legislative aftermath.<sup>14</sup> The linchpin of the decision was what the present Chief Justice described as the "unjust and discriminatory" refusal of the previous law to "recognise the rights and interests in land of the indigenous inhabitants of settled colonies".<sup>15</sup> In recognising native title and discarding the legal fiction that Australia was uninhabited at the time of European settlement, the Court overturned a body of seemingly entrenched legal doctrine. Justice Brennan, with whom Mason CJ and McHugh J agreed, supported the rejection of what was characterised as an unjust doctrine by reference to both the "expectations of the international community", embodied in the International Covenant on Civil and Political Rights, and to "the contemporary values of the Australian people".<sup>16</sup> For those accustomed to continued adherence to established legal doctrine, the decision itself represented an abrupt and fundamental reshaping of the legal landscape. This perception is

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9 (1988) 165 CLR 360.

10 (1989) 168 CLR 461.

11 See also *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463.

12 *Davis v The Commonwealth* (1989) 166 CLR 79 at 99-100; *Nationwide News* note 2 *supra* at 29-31, 100-1. Compare *State of Victoria v The Commonwealth* (1996) 138 ALR 129 at 146-8.

13 (1992) 175 CLR 1.

14 *Native Title Act 1993* (Cth), upheld as valid in *Western Australia v Commonwealth* (1995) 183 CLR 373.

15 Note 13 *supra* at 42, per Brennan J.

16 *Ibid.*

sharpened by the Court's explicit acceptance of international norms as an important influence on Australian domestic law, particularly in relation to human rights issues.<sup>17</sup>

*Mabo* is far from the only example of recent judicial reform of substantive and procedural legal principles. Familiar examples of recent judicial reforms of the substantive law include: the rejection of the distinction between a mistake of fact and a mistake of law for the purposes of the law of restitution;<sup>18</sup> modification of the doctrine of privity of contract;<sup>19</sup> and the overturning of the venerable rule in *Rylands v Fletcher*.<sup>20</sup> Similar examples can be drawn from the procedural aspects of administrative and criminal law. The scope of the duty to afford procedural fairness to those affected by governmental action has expanded rapidly as the courts have recognised a greater range of interests, including reputation, as worthy of protection.<sup>21</sup> The associated, but relatively novel concept of legitimate expectations has itself been expanded by the ruling that Australia's international treaty obligations can give rise to legitimate expectations warranting procedural protection in Australian domestic law.<sup>22</sup>

The administration of the criminal law has been profoundly influenced by the High Court's acceptance of the proposition that the entitlement of an accused person to a fair trial may require, in serious cases, that he or she be provided with legal representation at public expense. In *Dietrich v The Queen*,<sup>23</sup> the Court balked at the contention that the common law recognised the entitlement of a person accused of a serious offence to legal representation at public expense. However, a majority supported the proposition that there are circumstances in which a Court should stay the trial of an accused person charged with a serious offence, if that person is unable to obtain legal representation through no fault of his or her own. Justice Deane justified such a far-reaching decision on the ground that there are rare cases in which the "staple processes of legal reasoning, namely, induction and deduction from earlier decisions and settled rules and practices" are inadequate in a developing area of the law. In those cases, the Court is:

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- 17 M Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 *UNSWLJ* 363; M Kirby, "The Impact of International Human Rights Norms: A Law Undergoing Evolution" (1995) 25 *UWALR* 30. See also *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, which held that the privilege against self-incrimination does not extend to corporations, relying in part upon the terms of the International Covenant on Civil and Political Rights.
- 18 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.
- 19 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.
- 20 (1868) LR 3 HL 330, overturned in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. I must confess to a certain fondness for *Rylands v Fletcher*, since it was the very first case I studied at Law School. Perhaps nothing in the law is now sacred.
- 21 See generally: *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
- 22 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
- 23 (1992) 177 CLR 292.

entitled and obliged to reassess some rule or practice in the context of current social conditions, standards and demands and to change or reverse the direction of the development of the law.<sup>24</sup>

Subsequent cases have resisted attempts to extend *Dietrich* to new areas or to apply the decision in a manner that allows the courts to control the remuneration to be provided to the accused's legal representatives.<sup>25</sup> Even so, the decision has had an important impact on the administration of the criminal justice system and on the priorities adopted by legal aid agencies in allocating scarce resources.<sup>26</sup>

## II. HISTORICAL CONTINUITY

### A. The Law-Making Function

It is tempting to see this apparently sustained burst of judicial creativity as demonstrating that Australian courts in general and the High Court in particular have chosen to carve out a new role for themselves. Whereas previous generations of judges were content to operate within the narrow confines of precedent, and to eschew policy analysis, the recent trend is for the courts to see themselves as free to reshape legal rules according to their own assessment of social values. This is so both in constitutional matters and in the development of the common law.

The position is, however, not quite so simple. The starting point for an evaluation of recent judicial developments is that there is nothing new in judges exercising a creative law-making function. It is simply not the case that judges have only recently begun to make new law; nor is it the case that they have only recently realised that they do make law. In an influential article published in 1988, McHugh J, then a member of the New South Wales Court of Appeal, argued that it was very difficult to see how judges ever believed that they did not make law, as distinct from "declaring" the law.<sup>27</sup> He suggested that judges make and have always made new law, by applying established rules to novel situations, and by altering the content of legal rules in accordance with changed economic and social circumstances. To this it might be added that the common law judges were perfectly capable of inventing new doctrines to give effect to their own perceptions of social values.<sup>28</sup>

In his dissenting judgment in *Dietrich*, Brennan J (as his Honour then was) specifically acknowledged that Australian courts and especially the High Court as the ultimate court of appeal, create new rules of the common law. This law-

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24 *Ibid* at 329.

25 *New South Wales v Canellis* (1994) 181 CLR 309; *Attorney-General for New South Wales v Milat* (1995) 37 NSWLR 370.

26 Access to Justice Advisory Committee, *Access to Justice - An Action Plan* (1994) at [9.42]-[9.43].

27 M McHugh, "The Law-Making Function of the Judicial Process - Part I" (1988) 62 *ALJ* 15 at 16.

28 For example the doctrine of common employment, which provided a defence to employers otherwise vicariously liable to employees for accidents caused by the negligence of another employee: *Priestley v Fowler* (1837) 3 M&W 1.

making role proceeds, albeit within limits, from an appreciation of “contemporary values”:

The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community. Even if the perception of contemporary values is coloured by the opinions of individual judges, judicial experience in the practical application of legal principles and the coincidence of judicial opinions in appellate courts provide some assurance that those values are correctly perceived. The responsibility for keeping the common law consonant with contemporary values does not mean that the courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values. Although the courts have a broad charter, there are limits imposed by the constitutional distribution of powers among the three branches of government and there are limits imposed by the authority of precedent not only on courts bound by the decisions of courts above them in the hierarchy but also on the superior courts which are bound to maintain the authority and predicability of the common law. Most significantly, there are limits inherent in the very technique by which the courts develop the common law.<sup>29</sup>

Justice Brennan pointed out that there must be constraints on the exercise of the power to change the common law, else the courts would cross “the Rubicon that divides the judicial and the legislative powers”.<sup>30</sup> In lower courts, the constraints are usually found in the doctrine of precedent (and, his Honour might have added, the brooding presence of an appellate court). In ultimate courts of appeal:

the chief constraints are found in the traditional methods of judicial reasoning which ensure that judicial developments remain consonant not only with contemporary values but also with... ‘the skeleton of principle which gives the body of our law its shape and internal consistency’.<sup>31</sup>

As McHugh J shows, eminent jurists in the common law world long anticipated Justice Brennan’s recognition in *Dietrich* of the judge’s law-making role. Lord Reid’s characterisation of the declaratory theory of law as a “fairy tale” was put forward only a quarter of a century ago,<sup>32</sup> but it reflects a long stream of critical legal analysis. Indeed, Murphy J, writing in 1978, made out a persuasive case that jurists as distant as Bracton, Sir Francis Bacon and Bentham had all recognised that English law grew through conscious judicial decision-making.<sup>33</sup> A stream of thought that has its origins in the thirteenth century hardly qualifies as a novel insight into the judicial process.

29 Note 23 *supra* at 319-320.

30 *Ibid* at 320, citing Lord Devlin, *The Judge* (1979) p 12. Lord Devlin used this language to express his disapproval of prospective overruling, a process he thought turned judges into “disguised legislators”.

31 *Ibid*.

32 Lord Reid, “The Judge as Lawmaker” (1972) 12 *JSPPL* 22 at 22.

33 *State Government Insurance Commission v Trigwell* (1974) 142 CLR 617 at 650-1. As Murphy J pointed out, in 1873 Austin characterised the theory as a “childish fiction”, thus anticipating Lord Reid by almost exactly a century.

## B. Community Perception and Judicial Technique

While the judges have always made law, one factor that has changed relatively recently is widespread community recognition that the judicial role includes adaptation of the law to community values. This does not mean that non-legal commentators have uniformly shared the traditional lawyer's commitment to the declaratory theory of law. But it does mean that the wider community abandoned the declaratory fairy tale at about the same time as it developed more questioning and less trusting attitudes towards all forms of government, including the courts. A more educated and informed community, accustomed to (if not necessarily fond of) rapid change, is less likely than once was the case to accept a mechanistic view of the legal process. More sceptical, if not cynical attitudes towards established institutions contribute to a greater willingness to criticise or endorse criticism of judicial decisions.<sup>34</sup> That in turn leads to more intensive scrutiny of the reasoning processes of judges and more strident criticism when those processes are unconvincing or seen to be out of step with community attitudes.

The perception that the courts have become more active law-makers is associated with an important change of judicial technique, in particular by appellate courts. Sir Anthony Mason has led the way in rejecting the supposed virtues of legalism. In a frequently cited lecture presented at the University of Virginia in 1985, he said this:<sup>35</sup>

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...

As judges who are unaware of the original underlying values subsequently apply that precedent in accordance with the doctrine of *stare decisis*, those hidden values are reproduced in the new judgment even though the community values may have changed.

It is this philosophy of more open decision-making which has held sway in recent times. It follows from this philosophy that values should be acknowledged openly and explicitly in judicial reasoning. It also follows that the values to be applied cannot be the personal beliefs of the judge, but (as Brennan J said in *Dietrich*), "the relatively permanent values of the Australian community".<sup>36</sup> As a perceptive observer has commented,<sup>37</sup> the emphasis on judicial openness leaves unresolved the question of *how* community values are to be discovered. It also leaves open how judges are to avoid simply projecting

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34 It is a common lament among judges that, as a group, they have fallen in the estimation of the community.

35 AF Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience" (1986) 16 *FL Rev* 1 at 5.

36 Note 23 *supra* at 319.

37 D Wood, "Adjudication and Community Values: Sir Anthony Mason's Recommendations" in MP Ellinghaus, AJ Bradbrook and AJ Duggan (eds), *The Emergence of Australian Law* (1989) Ch 5.

their own values on those of the community and how they are to deal with issues in which the community is (or appears to be) deeply divided.

Whatever difficulties remain unresolved, however, the abandonment of legalism has necessarily exposed the long-standing law-making role of the judges. The new transparency inevitably encourages criticism, especially from those who do not share the value judgments or policy objectives underlying the particular decisions. There is, of course, nothing wrong with increased opportunities for informed criticism of the judicial function. On the contrary, such criticism is at the very heart of our system of government.<sup>38</sup> But a more transparent judicial decision-making process necessarily increases the opportunities for close scrutiny of the manner in which courts exercise judicial power and, in particular, for criticism of what may be seen as attempts to trespass into the realm of the legislature, as the elected representative of the community.

### C. 'Judicialisation' of Society

None of this is to deny that the range and extent of judicial law-making have increased markedly in recent decades. However, the expansion of the judicial role has less to do with the particular reforming proclivities of Australian judges than with the far-reaching changes in Australian society and the structure of the legal system itself. The assumptions underlying the social welfare state of the 1960s and 1970s are under challenge from the new economic orthodoxy. Nonetheless, the social welfare state has left a legacy in the form of reliance on legislation as the means of regulation and a source of rights. It is trite to observe that legislation now tackles a vast range of social and economic issues. Legislation underpins many new legal specialties, such as consumer protection, trade practices, corporate regulation, environmental law and anti-discrimination law. Paradoxically perhaps, the greater the degree of legislative intervention, the more extensive the discretionary powers conferred on courts and the greater the range of politically sensitive decisions the courts are obliged to make.

What some may see as the 'judicialisation' of society has been spurred on by changes within the Australian legal system. It is often forgotten that publicly funded legal aid for civil litigation is a relatively recent phenomenon in this country.<sup>39</sup> One consequence of expanded legal aid services has been that groups and individuals whose grievances previously could have been resolved, outside the legal system if at all have gained access to the courts. Lawyers themselves have demonstrated considerable inventiveness in formulating novel questions in a manner suitable for legal argument, although their inventiveness is by no means confined to assisting legally aided clients. The apparent activism of the courts is in no small measure due to the fact that in the last quarter of a century a greater range of legal issues has been presented to the courts for resolution.

38 This is the point of *Nationwide News*, even though the legislation struck down in that case was not intended to protect a court, but rather the Australian Industrial Relations Commission.

39 See Australian Government Commission of Inquiry into Poverty, *Law and Poverty in Australia - Second Main Report* (1975) at Ch 2; compare *Access to Justice Report* note 26 *supra*, at Ch 9.



In this respect, it is difficult to overestimate the importance of the new administrative law, conceived by the Kerr Committee in 1971.<sup>40</sup> The availability of merits review in the Administrative Appeals Tribunal (notwithstanding that the Tribunal does not exercise judicial power of the Commonwealth), expanded grounds for judicial review of administrative decisions<sup>41</sup> and the requirement that administrative decision-makers give reasons for their decisions<sup>42</sup> has profoundly changed the balance between the executive and the citizen in this country. Few administrative decisions are immune from the possibility of challenge. Despite recent signs of restraint in the exercise of the power of judicial review of administrative action,<sup>43</sup> the new administrative law has inevitably increased the opportunities and occasion for judicial intervention in the decision-making processes of the Executive Government. Not surprisingly, intervention of this kind does not always generate approval by those whose decisions have been set aside. Disapproval sometimes manifests itself in legislative responses.<sup>44</sup>

All of this has coincided with the emergence of an indigenous legal culture. As Davies J of the Queensland Court of Appeal has pointed out extra-judicially, the Australian legal system, for practical purposes, has been severed from that of the United Kingdom.<sup>45</sup> Accordingly, the courts have freed themselves from the constraints inhibiting the development of a distinctive Australian common law, adapted where appropriate to local conditions. Partly in consequence, the High Court and intermediate appellate courts have moved away from a strict adherence to precedent, although in this respect they have largely followed the pattern of other common law countries.

Paradoxical as it may seem, the internationalisation of law has taken place at the same time as the emergence of an indigenous legal culture. International norms have had an important impact on the development of legal principles in Australia. Not all critics approve of the recourse to international treaties and other international norms as a force in the development of Australian law. Yet it is difficult to see how Australian courts, when exercising the choices open to them, could have remained insulated from standards generally accepted in the international community. Leaving aside treaties which have been implemented by domestic legislation, the principles of international law, particularly those relating to fundamental human rights, provide a crucial reference point when the common law is "uncertain and disputable".<sup>46</sup> Since the common law is so often

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40 Commonwealth Administrative Review Committee, *The Kerr Committee Report* (1971). See generally R Sackville, "The Boundaries of Administrative Law - The Next Phase" presented at the Australian National University, Seminar on the Kerr Vision of Australian Administrative Law, 30-31 August 1996.

41 *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5,6.

42 *Ibid*, s 13(1).

43 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 136 ALR 481.

44 For example, Part 8 of the *Migration Act 1958* (Cth), as amended from 1 September 1994, restricts the jurisdiction of the Federal Court to grant remedies in respect of certain migration decisions.

45 GL Davies, "The Judiciary - Maintaining the Balance" in PD Finn (ed) note 4 *supra* at 275.

46 *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 276, per Kirby P.

uncertain and disputable, reference by the courts to international norms will often be seen as further evidence of exercise of judicial creativity.<sup>47</sup>

#### D. Judicial Creativity and Ideology

The debate about the limits of judicial creativity in Australia owes something to the perceived ideological direction of a majority of the High Court. *Mabo* recognised land rights of the indigenous inhabitants of Australia, to the apparent detriment of other groups wishing to acquire or develop land subject to native title claims. *Dietrich* has the practical effect, unless the legislature chooses to intervene,<sup>48</sup> of requiring scarce legal aid funds to be committed to the defence of persons charged with, and often ultimately convicted of, serious criminal offences. Allocating funds to alleged criminals is not a notoriously popular cause, either among politicians or the public generally. Similarly, the requirements of procedural fairness and other grounds of judicial review of administrative action are frequently invoked on behalf of applicants for refugee or immigrant status or others whose aspirations may be viewed less than sympathetically by the wider community.<sup>49</sup>

I do not suggest that all critics of judicial activism are guided by ideological differences with the liberal philosophy underlying much of the High Court's work. Clearly, it is possible to share the substance of that philosophy, yet adopt a more restrained view of the judicial role. Indeed, this is the crux of the division within the High Court on the constitutional issue of an implied freedom of communication. For example, in *Australian Capital Television v Commonwealth*, in reply to arguments that had been put earlier by Murphy J in support of a broad concept of implied constitutional freedoms,<sup>50</sup> Dawson J said this:

Indeed, those responsible for the drafting of the Constitution saw constitutional guarantees of freedom as exhibiting a distrust of the democratic process. They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine. Not only that, but the heresy of importing into the Constitution, by way of implication, preconceptions having their origin outside the Constitution has been exposed and decisively rejected in the *Engineers'* case. The nature of the society or, more precisely and accurately, the nature of the federation which the Constitution established, is to be found within its four corners and not elsewhere. To say as much is not for one moment to express disagreement with the view expressed by Murphy J that freedom of movement and freedom of communication are indispensable to any free society. It is merely to differ as to the institutions in which the founding fathers placed their faith for the protection of those freedoms.<sup>51</sup>

47 See generally K Walker, "Treaties and the Internationalisation of Australian Law" in C Saunders (ed) note 7 *supra* at 204 ff.

48 Compare *Crimes Act 1958* (Vic), s 360A, inserted by *Crimes (Criminal Trials) Act 1993*, s 27.

49 See for example *Teoh* note 22 *supra*.

50 See for example *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 88; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 581-2.

51 Note 2 *supra* at 186.

While Justice Dawson's comments were made in a constitutional setting, they reflect a view that legal change should be entrusted to elected Parliaments, rather than unelected courts.

Sometimes, however, the argument that judges have gone too far in their law-making tends to assume that judicial creativity is the province of judges holding to a particular set of reforming values (although I do not attribute this argument to Dawson J). In fact, the most notorious example of constitutional judicial activism occurred as part of a sustained defence of *laissez-faire* capitalism. In the first third of this century, the Supreme Court of the United States invoked the doctrine of substantive due process to invalidate modest regulatory legislation.<sup>52</sup> The activism of the Warren Court in defence of civil rights in the 1950s and 1960s produced very different outcomes, but can hardly be said to have involved a greater degree of judicial law-making.

On the other hand, judges with reputations as reformers - even radical reformers - have been regarded as strict constructionists. Professor Ely describes Justice Hugo Black of the Supreme Court, the proponent of the "absolutist" construction of the First Amendment,<sup>53</sup> as the "quintessential interpretivist".<sup>54</sup> By contrast, the advent of a more conservative Supreme Court led the "liberal wing"<sup>55</sup> to caution restraint and urge adherence to the precedents set by such ground-breaking decisions as *Roe v Wade*<sup>56</sup> and *Miranda v Arizona*.<sup>57</sup> In Australia, it is more than a little ironic that the most substantial extension of Commonwealth power at the expense of the States since the *Engineers'* case has been achieved through a literal construction of the Constitution. Commonwealth legislation on a wide range of subjects has been upheld in consequence of a strict reading to the text of the Commonwealth's power to make laws with respect to external affairs.<sup>58</sup>

### E. A Modest Change

It follows that the scope and novelty of recent judicial activism are less than they seem at first glance. It is clear enough that the courts have become less inhibited in reshaping and developing the law. Yet this does not mean that judges now perform law-making functions that are qualitatively different from those they have historically performed. Nor does it mean that judges have uniformly adopted a particular political or social ideology that is being consciously implemented by changes to legal doctrine. Rather, the most important changes have been in the volume and nature of issues presented to courts for resolution and the greater transparency of the judicial process. These

52 See for example *Lochner v New York* 198 US 45 (1905); *Adkins v Children's Hospital* 261 US 525 (1923); *Carter v Carter Coal Co.* 298 US 238 (1936).

53 "Congress shall make no law...abridging the freedom of speech".

54 JH Ely, *Democracy and Distrust - A Theory of Judicial Review*, Harvard University Press (1980) p 2.

55 M McHugh, "The Law-Making Function of the Judicial Process" - Part II" (1988) 62 *ALJ* 116 at 126.

56 410 US 113 (1973).

57 384 US 436 (1966).

58 *Polyukhovich v The Commonwealth of Australia* (1991) 172 CLR 501 at 528-531, per Mason CJ; at 599-605, per Deane J; *State of Victoria v Commonwealth* note 12 *supra* 142-146.

account for much of what is seen as a more far-reaching judicial law-making role.

### III. THE COMMON LAW FUNCTIONS

#### A. A Critical Distinction

To conclude that the law-making role now discharged by judges is neither qualitatively different from their historic role, nor a reflection of a particular reforming ideology, does not answer the question of how far judges should go in changing the law. Clearly enough, judges differ among themselves in determining when it is permissible to formulate new doctrine or to give effect to values not specifically endorsed by legislation. I do not suggest that any ready answer to this question is available. A distinction should, however, be drawn between courts as exponents of the common law (including statutory construction) and courts as arbiters of the constitutional validity of legislation.

The key to the development of the common law is that democratically elected Parliaments have the power to overturn judicial decisions. They may do so, for example, when the decisions are thought to depart from community values or require a reordering of limited public resources. They may also do so because the decisions threaten immediate political objectives or because interest groups are able to persuade the Government of the day that some other solution is required to protect their concerns.

Given that Parliament has this power, there is less reason for courts consciously to refrain from exercising their law-making function on the ground that change is the province of the legislature. Especially is this the case when the courts are concerned with the protection of individual freedoms and human rights that are vulnerable to majoritarian control. It is precisely in the area of protecting civil liberties that the courts have long experience. In this area their decisions and reasoning carry considerable weight in the wider community. Values such as the right to a fair trial, freedoms from intrusive searches or surveillance, freedom of expression and thought, have long informed common law principles. They find their modern expression most consistently in principles of statutory construction. Here the courts act as a brake on the tendency of legislatures to sacrifice what can be fairly described as more permanent values on the altar of short term expediency or community pressure.<sup>59</sup>

In practice, it is not always easy for governments to overturn examples of judicial law-making. Judicial pronouncements, if they reflect the values that have underpinned the common law protection of human rights and are supported by cogent reasoning, have considerable moral and political force. The judges are not the sole repository of wisdom; nor are they the only decision-makers interested in preserving civil liberties and the other values implied in a free and democratic society. But those values inform the daily work of the courts, if only through the need to ensure that the parties to civil and criminal litigation receive

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<sup>59</sup> *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319; *Coco v The Queen* (1994) 179 CLR 427. See JJ Doyle note 4 *supra*, 158-60.

procedural fairness. It is therefore not surprising that the courts are sensitive to attempts to undercut or detract from principles that protect individuals and minority groups who carry little weight in the political decision-making process. Nor is it surprising that apparently inconvenient decisions usually survive proposals for legislative intervention.<sup>60</sup>

In the end, however, subject to constitutional constraints, Parliament remains supreme. If the people's representatives are determined to overturn principles or decisions enshrined by the judges, they have the authority to do so. Their intervention in these circumstances does not undercut the legitimacy of the law-making function of the judges; on the contrary, the intervention emphasises the legitimacy of that function.

## B. Limitations on the Judicial Process

To argue in support of the law-making functions of judges is not to grant the courts unbridled licence to reshape the law. As many commentators have pointed out, there are limitations on the judicial process that distinguish it from the legislative process. Most constraints are procedural in character.<sup>61</sup> Courts do not control matters presented to them for decision, other than by the High Court's power to select cases through grants of special leave or to signal (as it occasionally does) its willingness to revise the law if a suitable case is put forward. Even the High Court cannot control its own agenda.<sup>62</sup> Once the matter is before the court, it must afford litigants procedural fairness and must decide the controversy presented for determination. The necessity for reasons not only provides the opportunity for appellate review of decisions of all courts other than the High Court, but ensures that all decisions and supporting reasoning are exposed to criticism. For these reasons, the law develops incrementally and by "reference to established concepts and principles",<sup>63</sup> rather than abruptly.

The requirements to give reasons for decisions imposes additional practical constraints on the scope of the courts' law-making functions. Because the decision must be integrated into the "skeleton of principle", judicial law reform tends not to be unheralded. Cases such as *Dietrich* and *Mabo*, however controversial they may be, do not appear like a bolt of lightning from a cloudless sky.<sup>64</sup> They build on principles articulated in other cases or in other sources from which legal principles are derived. To the extent that judges give effect to

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60 An example is (or at least appears to be) the *Administrative Decisions (Effect of International Instruments) Bill* 1995 (Cth), which was designed to overturn the decision in *Teoh* note 22 *supra*. The Bill lapsed when Parliament was prorogued prior to the Federal election of March 1996, and has not been re-introduced.

61 GL Davies note 45 *supra* at 276-278.

62 The point is nicely illustrated by *Superclinics (Australia) Pty Ltd v CES*. The High Court granted special leave to appeal from the New South Wales Court of Appeal in a case said to raise the question of the circumstances in which abortion is unlawful: *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47. The Court granted leave to appear as *amici curiae* to the Australian Episcopal Conference of the Catholic Church and the Australian Healthcare Association. Before the appeal could be heard the case was settled.

63 M McHugh note 27 *supra* at 117.

64 Lord Devlin dismissed the retroactive objection to judicial law-making, on the ground that a "judge-made change in the law rarely comes out of a blue sky. Rumbblings from Olympus in the form of obiter dicta will give warning of unsettled weather": Note 30 *supra* at 11.

policy considerations and social values, the demise of legalism means that the reasoning process should articulate the considerations that have carried the day. A failure to do so lessens the likelihood that the decision will secure general acceptance.

These points can be illustrated by *Mabo*. On any view, the case raised fundamental questions concerning the foundations of the Australian legal system. It is also undeniable that the case recognised (or, perhaps more accurately, created) substantive entitlements not previously acknowledged as part of Australian law. Yet, as Sir Anthony Mason has observed, what *Mabo* did for the indigenous inhabitants of Australia had already been done by the Courts of the United States, New Zealand and Canada for their indigenous peoples.<sup>65</sup>

Moreover, it was open to democratically elected Parliaments to endorse or reject the principles underlying the decision of the High Court. It is true that in practice any attempt to overturn completely the doctrine of native title, whether by the States or the Commonwealth, would encounter formidable obstacles.<sup>66</sup> Nonetheless, the course was, and for that matter, still is, available to Australian legislatures. In the event, of course, the national Parliament enacted legislation endorsing, albeit in modified form, the concept of native land title. It did so, at least in part, because the values underlying the decision were stated explicitly and persuasively by the ultimate court of appeal in the country.

It is of some significance that the leading judgment in *Mabo* was written by Brennan J, as he then was, who has dissented in a number of important recent cases.<sup>67</sup> Clearly, the present Chief Justice thought that the decision in *Mabo* was consistent with the “skeleton of principle” underlying the development of the general law. The majority judgments went to considerable pains to invoke authorities from common law jurisdictions, including decisions of the Privy Council, recognising and applying the doctrine of native land title. The conclusion that Australia should not be regarded, in effect, as unoccupied territory at the time of European settlement, was simply belated recognition of incontestable historical reality. In short, *Mabo*, for all its social and economic importance, can readily be accommodated within a framework of common law reasoning.

### C. Methodological Issues

Again, none of this is to suggest that judicial creativity in the development of the general law does not pose extremely difficult questions. Precisely because

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65 AF Mason, “A Reply” in C Saunders (ed) note 7 *supra* at 114. The development of the entitlement to a fair trial, which underlies the decision in *Dietrich*, is traced by M Weinberg, “Criminal Procedure and the Fair Trial Principle” in PD Finn (ed), *Essays on Law and Government - The Citizen and the State in the Courts* (1996) Ch 6.

66 It had been held in *Mabo v Queensland* (1988) 166 CLR 186, that the *Queensland Coast Islands Declaratory Act 1985* (Qld), which purported to extinguish traditional land rights, on the assumption that such rights existed, was inconsistent with the *Racial Discrimination Act 1975* (Cth) and therefore invalid to the extent of the inconsistency under s 109 of the Constitution. Commonwealth legislative action would also need to take account of s 51(xxxi) of the Constitution.

67 Justice Brennan has dissented in both constitutional and non-constitutional cases. For example in *Dietrich v The Queen* note 23 *supra*; *Australian Capital Television* note 2 *supra*; and *Theophanous* note 3 *supra*.

courts are required to resolve particular disputes, they do not have the means to undertake wide-ranging inquiries of the kind that often inform policy decisions by other bodies. For the most part, courts are limited to the evidence the parties choose, for their own forensic reasons, to adduce. In any given case, a judgment must be exercised as to whether the court has sufficient information to make the policy judgments said to justify a change in the law. Accordingly, judges are likely to continue to differ as to when they should take upon themselves the task of reshaping orthodox doctrine and when that task should be entrusted to the superior investigative and policy-making capabilities of Parliament.<sup>68</sup> However, the differences are likely to reflect not so much disagreement as to whether courts have a legitimate law-making function to perform, but more pragmatic considerations such as whether the courts are adequately equipped to make the necessary policy or value judgments.

It is true that judges sometimes state the limitations in more categorical terms. In a recent case<sup>69</sup> in which a unanimous High Court rejected a patient's claim to be entitled to access to medical records maintained by her doctor, Gaudron and McHugh JJ put the limitations in terms of constitutional competence:

Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the accepted body of accepted rules and principles.<sup>70</sup>

Yet the Canadian Supreme Court had found itself able to reach a contrary conclusion<sup>71</sup> on the same issue, as indeed had Kirby P in the New South Court of Appeal.<sup>72</sup> Justices Dawson and Toohey put the matter more modestly when they said that there was more than one view on the policy questions raised by the case and that the choice between the alternatives was more appropriately made by the legislature than by the Court.<sup>73</sup>

As courts grapple with the practical questions to which more open law-making gives rise, they will need to address important questions relating to judicial decision-making. For example, an argument often made against courts changing the law too readily is that judicial law-making, unlike legislation, operates retrospectively. A partial answer is, as Lord Devlin has suggested, that ultimate appellate courts rarely move without prior warning. But it is not a complete answer, since retroactive law-making is capable of causing injustice in individual cases, by disturbing settled expectations. It is for this reason that Australian courts have discussed the concept of prospective overruling.<sup>74</sup> While the concept presents its own difficulties,<sup>75</sup> something akin to prospective overruling has

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68 *State Government Insurance Commission v Trigwell* note 33 *supra* at 627, per Gibbs CJ; 633-4, per Mason J; cf at 649-52 per Murphy J.

69 *Breen v Williams* (1996) 138 ALR 259.

70 *Ibid* at 290.

71 *McInerney v McDonald* (1992) 93 DLR (4th) 415.

72 *Breen v Williams* (1994) 33 NSWLR 522.

73 Note 69 *supra* at 278.

74 K Mason, "Prospective Overruling" (1989) 63 ALJ 526.

75 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 15, per Mason CJ.

already been adopted by the High Court. In *Bropho v Western Australia*,<sup>76</sup> for example, the majority acknowledged that a new principle of statutory construction could apply differently to legislation, depending on whether it was passed before or after the date of publication of the Court's decision.<sup>77</sup>

Similarly, the more transparent law-making functions performed by courts imply that they should improve their procedures for gathering information on policy questions. In practice the High Court is relatively liberal about the information it is prepared to receive bearing on the issue it has to decide. Even so, the Court is largely dependent on the diligence, resourcefulness and imagination of the parties for the quality and scope of the material provided. Furthermore, as Doyle CJ of the Supreme Court of South Australia has pointed out, the High Court tends to receive the materials without the benefit of them having been digested and analysed by the lower courts.<sup>78</sup> Lower courts are even more reliant on the evidence and submissions of the parties themselves. Doubtless, much turns on whether the adversary system itself is to be substantially modified. Within the framework of that system, however, there are techniques available to courts that will lessen their dependence on the forensic contributions of parties to litigation. Courts could, for example, provide more encouragement to potential intervenors, invite the preparation of 'Brandeis briefs' or, within the limits of procedural fairness, undertake their own research and investigation of social issues.<sup>79</sup> Unless steps of this kind are taken, courts run the risk of engaging in uninformed law-making.<sup>80</sup>

#### D. A Question to be Addressed

An important methodological issue remains. It is the extent to which any court, but particularly the High Court, should explain why it has decided not merely that a change in the law is desirable, *but that it is appropriate for that change to be brought about by a judicial decision*. The present Chief Justice of South Australia, writing before his appointment, criticises several key decisions of the Mason Court on precisely this ground.<sup>81</sup> He points out that in *Mabo*, for example, the Court explained why the recognition of native title was just and desirable. However, the judgments did not address, other than by implication, why it was appropriate for the Court, rather than Parliament, to make a decision, having such significant social, political and economic consequences.

The same commentator makes much the same criticism of *Dietrich*. As he observes, the effect of that decision was that the Court asserted a new level of control over the executive in relation to the conduct of criminal proceedings.<sup>82</sup> Yet there was little consideration of the practical impact of the decision, not only on the administration of the criminal law, but on the budgets and priorities of

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76 (1990) 171 CLR 1.

77 *Ibid* at 23. See also *McKinney v The Queen* (1991) 171 CLR 468.

78 JJ Doyle, "Implications of Judicial Law-Making" in C Saunders note 7 *supra* at 97.

79 GL Davies note 45 *supra* at 283-4.

80 Note 77 *supra* at 87.

81 *Ibid* at 93-6.

82 *Ibid* at 96.



legal aid agencies (none of whom was represented before the Court). Chief Justice Mason and McHugh J supported their conclusion by referring to the failure of all but one of the States to intervene and to the absence of any argument that a right to the provision of counsel at public expense imposed an unsustainable financial burden on government.<sup>83</sup> But this is a somewhat slender thread to support a decision having obvious financial consequences for government, not to mention civil litigants from whom legal aid resources would have to be diverted. The judgments do not suggest that the Court decided the case with the benefit of detailed information concerning the likely consequences of the decision for the legal aid systems in operation throughout Australia.

As I have already said, any assessment of the judicial process leading to decisions such as *Mabo* and *Dietrich* must take account of the fact that legislatures can choose to overturn the judicial reforms. Nonetheless, it seems to me that Chief Justice Doyle's criticisms of the High Court's reasoning processes have considerable force. Openness in judicial law-making requires courts specifically to address why change should be brought about by the courts as opposed to leaving any reforms to the legislature. The fact that change is desirable is not necessarily enough of itself, given the limitations on the judicial process to which I have referred. I do not mean to imply that a convincing explanation could not have been provided in each of these cases (although the Court would have been in a much better position to support the decision in *Dietrich* if more information of the kind to which I have referred had been available). The point is that the courts must explore and explain the boundaries between permissible activism and deference to the legislature.

If the courts are to perform this function successfully, they should also address more openly the values underlying particular decisions. As I have indicated, appellate courts now explore more fully policy considerations influencing their decisions. But there is a discernible tendency for the High Court to take comfort from the "contemporary values" of Australian society<sup>84</sup> to support its law-making functions. In 1991, for example, the Court invoked contemporary societal norms when rejecting an argument that, under the common law, marriage constituted irrevocable consent by the wife to sexual intercourse with her husband.<sup>85</sup> A year earlier, in a case brought under the Queensland wrongful death statute, Deane J offered the observation that:

[c]ommonly, in a modern marital relationship in this country, the spouses share, to greater or lesser extent, the necessary domestic chores and responsibilities...<sup>86</sup>

This language is somewhat qualified but, as Brown J of the Family Court has pointed out, Justice Deane's comment does not sit altogether comfortably with the available empirical information.<sup>87</sup> As I have suggested earlier, it is highly debatable whether the wider community would share the enthusiasm reflected in

83 Note 23 *supra* at 312.

84 See text at note 29 *supra*.

85 *The Queen v L* (1991) 174 CLR 379.

86 *Nguyen v Nguyen* (1990) 169 CLR 245 at 256.

87 S Brown, "The Courts, Legal and Community Standards" in *Courts in a Representative Democracy*, AIIA (1994) p 87.

the majority judgments in *Dietrich* for requiring public funds to be allocated to the defence of persons charged with serious criminal offences.

The reality is that courts rarely attempt to divine contemporaneous attitudes to contentious social issues. Clearly enough, they do not have either the resources or expertise to do so on their own account. Even if they were to acquire the resources and expertise, the point of referring to community values is not simply to identify majority opinion on a particular issue. Rather, by invoking community values, the courts are often formulating policy objectives that they consider the community should preserve or adopt. There is nothing inappropriate about the courts performing such a role. There is, however, a great deal to be said for acknowledging it more openly.

The courts are not left at large to formulate or give effect to idiosyncratic values or notions of policy. They have available to them common law principles and the established sources of legal doctrine, including international norms, academic writing and decisions from Australia and other common law jurisdictions. It should also be remembered that the courts have long experience in articulating standards in certain areas, such as the requirements of procedural fairness and the content of judicial power.<sup>88</sup> If law-making power is to be exercised more openly, courts will need to go beyond the invocation of contemporary community standards. They should be prepared to recognise, in appropriate cases, that their role includes giving effect to important common law values, even if it is doubtful whether a clear majority of the community would immediately accept that those values should be applied in the particular case. Judges should also be prepared to explain, when their decisions effect a change in the law, why they consider the values they have identified are sufficiently important to warrant such a change. In non-constitutional cases, they have the comfort of knowing that if their explanation is unacceptable to the wider community, the legislature has the authority to implement a different view.

## IV THE CONSTITUTIONAL FUNCTIONS

### A. The Counter-Majoritarian Difficulty

Judicial creativity in the exercise of the constitutional function of judicial review creates more acute issues. This is because of what Alexander Bickel described as “the root difficulty...that judicial review is a counter-majoritarian force in our system”.<sup>89</sup> In Australia, judicial review has been regarded as

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88 Compare *Kable v Director of Public Prosecutions* (1996) 138 ALR 577; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220.

89 A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press (2nd ed, 1986) p 16. The first part of the title derives from Alexander Hamilton's observations in *Federalist* No 78, that “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution”.

axiomatic from the very beginning of federation.<sup>90</sup> The power of judicial review necessarily implies that unelected judges have the authority to overturn the wishes of the majority expressed in legislation. Plainly, as Professor Zines has said, majoritarian democracy must be adjusted to the demands of the federal state and, specifically, to the need to adjudicate on the distribution of powers between the Commonwealth and the States.<sup>91</sup> Even so, the 'anti-democratic' objection to judicial law-making is at its strongest when a court, exercising powers of judicial review of legislative action, strikes down the actions of a democratically elected Parliament. Particularly is this the case when the issue is not which legislature has power over a particular subject matter, but whether *any* Parliament has the power to enact the legislation in question.

## B. Constitutional Adjudication and Continuity

The debate over the limits of constitutional adjudication, like that relating to the common law role of the courts, must be placed in its historical context. Just as judicial reshaping of the common law is neither novel nor qualitatively different from the historic role played by judges, so there is nothing novel about the High Court discerning implications from the structure of the Constitution to override the will of the elected Parliament. Nor is there anything novel about the Court choosing to take a broad view of constitutional prohibitions, thereby thwarting the Parliamentary will on important and controversial issues.

The first point can be illustrated by a doctrine adopted by the High Court in its very earliest days. The Court, relying on implications from the structure of the Constitution, imported the doctrine of implied immunity of instrumentalities from the United States into Australian constitutional law.<sup>92</sup> The original Justices, all of whom were delegates to the Constitutional Conventions,<sup>93</sup> found greater support for the implication from the "celebrated case" of *McCulloch v Maryland*<sup>94</sup> than from the text of the Constitution itself.

The doctrine of immunity of instrumentalities was discarded in the *Engineers' Case*.<sup>95</sup> A critical element in the overthrow of the doctrine was the philosophy that the:

extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts.<sup>96</sup>

The Court thereby placed its faith firmly in the British tradition of the supremacy of Parliament and the political process to check abuse of power. But

90 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262-263, per Fullagar J. For a critique of the "great case" of *Marbury v Madison* (1803) 1 Cranch 137, see A Bickel note 89 *supra*, pp 2-14. See also Sir Owen Dixon, "Marshall and the Australian Constitution" (1955) 29 *ALJ* 420.

91 L Zines, "Courts Unmaking the Laws" note 87 *supra*, p 125.

92 *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin v Webb* (1904) 1 CLR 585. See generally R Sackville, "The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis" (1969) 7 *MULR* 15.

93 Chief Justice Griffith, Barton and O'Connor JJ.

94 (1819) 4 *Wheat* 316.

95 *Amalgamated Society of Engineers v The Adelaide Steamship Company Ltd* (1920) 28 CLR 129.

96 *Ibid* at 151.

as was pointed out in *Australian Capital Television*, this did not spell the death of constitutional implications.

The spearhead for the revival was Sir Owen Dixon. Despite his adherence to a legalistic approach to the task of judicial review, it is fair to suggest that Sir Owen acted in conformity with a particular theory of federalism.<sup>97</sup> While not all of the principles articulated by Sir Owen Dixon have been adopted in subsequent cases, the core elements of the implied constitutional prohibitions reflect the Dixonian philosophy. They were recently authoritatively identified as follows:<sup>98</sup>

The limitation consists of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities ('the limitation against discrimination') and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments.

More recently, the Court has noted three further matters with respect to the second element of the prohibition.<sup>99</sup> It precludes, first, the exercise of Commonwealth legislative or executive powers to control the States; second, laws which prevent a State from exercising its right to determine the number and identity of persons it wishes to employ or dismiss; and third, laws which prevent the States from determining the terms and conditions on which persons are employed "at the higher levels of government".

The implied prohibitions doctrine is well entrenched in Australian constitutional law, despite the absence of a specific textual foundation to support it. Indeed, the implied prohibition against discrimination does not sit well with the express prohibitions against discrimination contained in other provisions of the Constitution.<sup>100</sup> Moreover, the doctrine has survived despite the fact that the assumptions underlying it are by no means self-evident. For example, as Professor Crommelin has pointed out, the relationship between prohibition of discrimination and the survival of the States is tenuous at best.<sup>101</sup> It is also difficult to discern a clear rationale for the scope of the immunity against laws of universal application. Nonetheless, these difficulties have not deterred the Court, over a period of some 60 years, from accepting that the structure of the Constitution implies prohibitions on the exercise of Commonwealth legislative power.

The broad approach taken by the Court to constitutional prohibitions can be illustrated by the *Bank of New South Wales v The Commonwealth* (the *Bank Nationalisation Case*) decided 44 years before *Nationwide News v Wills*. There can scarcely be a more striking example of the Court overriding the judgment of the elected Parliament on a matter of great economic, social and political importance.<sup>102</sup> One of the grounds on which the Labor Party bank

97 L Zines, "Sir Owen Dixon's Theory of Federalism" (1965) 1 *FL Rev* 221 at 241.

98 *Re Australian Education Union; Ex parte Victoria*, (1995) 184 CLR 188 at 231. See also *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192.

99 *Victoria v The Commonwealth* note 12 *supra* at 156.

100 As in s 51(ii), (iii), (xiii), (xiv): M Crommelin, "Federalism" in PD Finn (ed) note 4 *supra* at 175.

101 *Ibid.*

102 Unless it was the *Communist Party Case* decided three years later: *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

nationalisation program was overturned was that Part VII of the *Banking Act* 1947 (Cth), which prohibited private banks from carrying on banking business, infringed the freedom of trade guaranteed by s 92 of the Constitution.

It is true that the Court found a textual justification in the broad language of s 92 for its conclusion. But as *Cole v Whitfield* has shown, there was nothing inevitable about drawing from the cryptic and ambiguous text a constitutional charter for private enterprise, let alone one conferring immunity on interstate traders from governmental regulation. The judgment of Dixon J, for example, offered no historical or policy justification for reading the language to achieve such a “counter-majoritarian” result. Nor was any policy justification put forward for rejecting as “erroneous” the substance of the very test accepted by the High Court as correct 40 years later.<sup>103</sup>

In *Theophanous*, Brennan J said that judicial development of the common law is a function different from judicial interpretation of the Constitution.<sup>104</sup> He suggested that in the development of the common law judicial policy has a role to perform, but in the interpretation of the Constitution judicial policy has no role to play:

The Court, owing its existence and its jurisdiction ultimately to the Constitution, can do no more than interpret and apply its text, uncovering implications where they exist.<sup>105</sup>

It follows from what I have said that, in my view, although it is appropriate to distinguish between the common law and constitutional functions of the courts, the distinction cannot soundly be based on the presence or absence of a policy-making role. Policy-making is and always has been present in the discharge of each set of judicial functions.

### C. Constitutional Implications: Two Approaches

At the risk of considerable oversimplification, it is possible to discern two general approaches taken by members of the High Court towards constitutional implications protecting individual rights and freedoms. The first adopts a broad, if not sweeping, view of the freedoms to be implied from the system of government established by the Constitution. Justice Murphy advocated this approach on the ground that the Constitution should be interpreted “against a background of responsible government and democratic principles generally”.<sup>106</sup> On his view, the Constitution simply assumes traditional conceptions, such as prohibitions on slavery or on persons being tried and convicted by non-judicial bodies. Moreover, the Constitution contains implied guarantees of freedom of speech and communication, since such freedoms:

are fundamental to a democratic society [and] are necessary for the proper operation of representative government at the judicial level.<sup>107</sup>

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103 (1948) 76 CLR 1 at 387.

104 Note 3 *supra* at 143.

105 *Ibid.*

106 *Miller v TCN Channel Nine* (1986) 161 CLR 556 at 581.

107 *Ibid* at 582.

More recently, at least two judges of the Court have been prepared to imply a principle of legal equality into the Constitution. In *Leeth v The Commonwealth*,<sup>108</sup> Deane and Toohey JJ said this in their dissenting judgment:

the essential or underlying theoretical equality of all persons under the law and before the courts is and has been a fundamental and generally beneficial doctrine of the common law and a basic prescript of the administration of justice under our system of government.<sup>109</sup>

In their view, the principle of equality is not infringed by a law which discriminates among people, provided that there are grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment.<sup>110</sup> However, they also held that Commonwealth legislation infringed the principle of equality, where it required a federal offender to serve a minimum sentence which varied according to the parole laws of the State or Territory in which the offender was sentenced. Justice Brennan ultimately upheld the legislation, but expressed the view that a Commonwealth law prescribing different *maximum* penalties for the same offence, depending on the locality of the court imposing the sentence, might offend the “constitutional unity of the Australian people”.<sup>111</sup>

The second general approach to constitutional implications is somewhat more limited. On this approach it is not open to imply constitutional protection of freedoms simply on the basis that the judge considers the particular freedoms to be fundamental to a democratic society or a reflection of a beneficial common law principle. Rather, the recognition of implied freedoms rests on more specific doctrines derived from the structure of the Constitution.

One such doctrine is the separation of powers. This doctrine has found recent expression in two important decisions of the Court. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,<sup>112</sup> the Court applied the principle that a judge appointed under Chapter III of the Constitution cannot be asked to perform non-judicial functions incompatible with his or her office. A majority found it incompatible with the exercise of the judicial power of the Commonwealth for a judge to be asked to prepare a report in circumstances where she was in substance an adviser to the Minister. In *Kable v Director of Public Prosecutions*,<sup>113</sup> a majority invalidated a law of New South Wales which purported to confer jurisdiction on the Supreme Court of New South Wales to make an order for the preventive detention of a named individual without the individual having been convicted of a criminal offence. The legislation was held to be inconsistent with Chapter III of the Constitution. This was because the

108 (1992) 174 CLR 455.

109 *Ibid* at 486. Compare the observations made by their Honours in *Nationwide News v Wills* note 2 *supra* at 69, that there are implications, “which flow from the fundamental rights and principles recognised by the Common Law at the time the Constitution was adopted as the compact of the Federation”.

110 *Ibid* at 488.

111 *Ibid* at 475. The joint judgment of Mason CJ, Dawson and McHugh JJ rejected (at 467-9) any implication from the Constitution that Commonwealth laws must operate uniformly throughout the Commonwealth. Justice Gaudron (at 501) did not need to resolve this point, holding the legislation invalid on other grounds.

112 (1996) 138 ALR 220.

113 (1996) 138 ALR 577.

powers conferred on the Court were not only non-judicial in character, but were incompatible with the exercise by the Court of the judicial power of the Commonwealth pursuant to Chapter III. In each of these cases the High Court emphasised the importance of preserving public confidence in the independence of the judiciary,<sup>114</sup> and the integrity of the judicial system established by Chapter III.

The second specific doctrine giving rise to implied freedoms is that of representative government. In *Nationwide News* and *Australian Capital Television*, a majority founded the implied freedom of communication on public affairs and political discussion on the principles of representative government. These principles were derived mainly from ss 7 and 24 of the Constitution, which provide for senators and members of the House of Representatives to be “directly chosen by the people”. As Brennan J explained in *Nationwide News*:

To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential: it would be a parody of democracy to confer on the people a power to choose their parliament but to deny the freedom of public discussion from which the people derive their political judgments.<sup>115</sup>

Chief Justice Mason in *Australian Capital Television* reasoned that, in the absence of a freedom of communication

representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.<sup>116</sup>

However, the then Chief Justice was at pains to reject the proposition that the Court should imply a constitutional protection of fundamental rights and freedoms generally. To do so, as his Honour pointed out, would run counter to the “prevailing sentiment” of the framers, that there was no need to incorporate a comprehensive Bill of Rights to protect the rights and freedoms of citizens.<sup>117</sup>

#### D. Significance of the Distinction

The distinction between the two approaches to implied constitutional freedoms is of great importance. Implied freedoms founded on general concepts of fundamental rights enables the Court to impose values formulated by its unelected members on the democratically elected Parliament *on a potentially unlimited range of issues*. For example, the insight that the Constitution is based on an unexpressed commitment to “legal equality” opens the way to judicial scrutiny of legislation on many topics. As Professor Zines has observed, to accept the principles propounded by Deane and Toohey JJ in *Leeth* would mean that we would have acquired by implication something similar to the equal

114 *Wilson v Minister* note 112 *supra* at 227; *Kable v DPP* note 113 *supra* at 606, 615, 622-3.

115 (1992) 177 CLR 1 at 47. His Honour joined in the Court’s decision in *Nationwide News*, but dissented in *Australian Capital Television*.

116 *Ibid* at 139.

117 *Ibid* at 136. See also at 182, per Dawson J; at 228-9, per McHugh J.

protection provision of the Fourteenth Amendment to the United States Constitution:<sup>118</sup>

More importantly, there will have occurred a great transfer of power from the Parliament to the judiciary. As all laws treat people in different ways, the court would potentially at any rate become a censor of all Federal legislation, including taxation, appropriation, criminal and regulatory laws. The judiciary would be called upon to determine whether the different treatment of different people in all these cases was just or fair or relevant to some important social interest.<sup>119</sup>

The role of counter-majoritarian judicial censor might be appropriate if the Constitution included a Bill of Rights framed (as is the United States Bill of Rights) in broad and open-ended language. But it is difficult to justify when the Constitution addresses the protection of individual rights only sporadically and in limited terms.

The freedom of communication cases have certainly involved the Court exercising a counter-majoritarian function, in the sense that legislation infringing the implied freedom has been declared invalid. But the decisions rest on the notion that representative government underlies Parliament's democratic character. On this approach, the Court's role is to preserve the integrity of the very *processes* by which democratic and representative government operates in Australia and from which it derives its legitimacy. The Court is not left at large to impose its collective values on Parliament. Rather, the Court scrutinises legislation to form a judgment about the impact of legislation in the "participational" goals<sup>120</sup> of a system of representative government. It is concerned with the integrity of the processes that must be observed if the Parliament is truly to be regarded as representative of the people.

It is not clear whether the concept of implied freedoms derived from a system of representative government will survive further scrutiny in the High Court. If it does, I do not suggest that the Court's role as guardian of the processes of representative government will allow it to avoid difficult and controversial value judgments, on which Parliament may have a quite different view. In *Australian Capital Television*, for example, Parliament legislated for a regime governing access to radio and television for the purposes of political campaigning and political discussion. It did so with the benefit of reports of two Parliamentary committees, which had examined the regulatory mechanisms in force in a number of other countries. The majority judgments did not dispute that the legislation, at least in part, was an attempt to grapple with the problem of the ever-increasing cost of political advertising. But they took the view that the statutory regime unfairly favoured established political parties, thereby severely limiting participation in the political process by new parties and by organisations wishing to put forward a point of view. The value judgments made by the majority clearly reflected an attempt to enhance the opportunities for community participation in the electoral and political processes. The fact that the majority were prepared to override the political assessment made by Parliament does not,

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118 L Zines note 4 *supra* at 182

119 *Ibid.*

120 JH Ely note 54 *supra* at 74.



of itself, provide a justification for the Court scrutinising Commonwealth or State legislation on grounds unrelated to the processes of representative government.

It is not my purpose either to argue for or against the retention of the implied freedom of communication, or to explore the limits of the doctrine should it survive. My point is that there is nothing illegitimate in a constitutional court relying on implications to preserve the integrity of the very process by which Parliament derives its own democratic credentials. Such a role is neither inconsistent with the traditional functions of the High Court, nor one that improperly usurps the functions of a democratically elected Parliament. It is consistent with the justification offered by Alexander Bickel for the doctrine of judicial review:

The search must be for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally shares Judge Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.<sup>121</sup>

## V. CONCLUSION

The debate about the limits of judicial creativity often wrongly assumes that recent judicial law-making is qualitatively different from the role historically performed by Australian courts. This is not so, either in relation to the development of the common law or to the exercise of the constitutional functions of judicial review. It is true that the occasions for judicial law-making have increased and that the reasoning processes employed by the courts to justify their decisions have changed. But the courts have always created new law and given effect to policy judgments in doing so. The more difficult question is how to determine the limits of the judicial law-making role. To this there is no easy answer, although there are significant procedural and practical constraints on judicial creativity.

In the development of the common law, the legitimacy of the courts' law-making function is enhanced by the power of democratically elected Parliaments to overturn judicial decisions. In constitutional cases the courts must be careful not to arrogate to themselves the counter-majoritarian function of supervising all legislation to ensure that it does not infringe fundamental values. But a role which includes preserving the integrity of the very democratic processes which confer legitimacy and authority on Parliament does not necessarily transcend the limits of proper constitutional adjudication.

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121 A Bickel note 89 *supra* at 24.