

THE HIGH COURT OF AUSTRALIA: A STUDY IN THE ABUSE OF POWER

GREG CRAVEN*

I. INTRODUCTION

I am delighted to have been invited to deliver the Alfred Deakin Lecture for at least two reasons. First, I remember as a law student at this University attending (or intending to attend) a number of Deakin lectures. All the speakers were improbably eminent, and it is a comfort to discern in my own invitation to deliver this lecture a recognition on the part of the trustees that the distinction-challenged no longer may be ignored. More seriously, I always have laboured under a genuine devotion to Alfred Deakin. Deakin was a man not only of brilliance but of varied brilliance, shining as lawyer, journalist, Constitution-maker and politician. Touchingly, he also was a man of considerable humility. Indeed, I often think of Deakin when contemporary politicians loudly dismiss the Founding Fathers as so many colonial incompetents. It seems to me that if such modern political braggarts had the slightest conception of the relative talents of men like Deakin, Isaacs and Griffith, they readily would come to share Deakin's humility, if not to join him in genius.

It is obvious from the title of this lecture that its subject is the High Court of Australia, and that its tone will be highly critical of that court. Given that my last kind public word for the High Court was uttered in the remotest past, and this by accident, it must have been obvious to those who invited me to give this lecture that I would come not to praise the High Court, but to bury it: if so subtle a beast could ever be imagined as yielding to anything so straight forward as a shovel.

Before moving to my task, however, I do wish to make some general remarks concerning the notion of criticising the High Court. There is a strong view abroad in today's polite intellectual circles that criticism of the Court is decidedly 'non-U'. This convenient taboo is seen as applying with added

* Foundation Dean and Professor of Law, University of Notre Dame, Australia. This speech was delivered at the University of Melbourne on 9 October 1997 as the Thirty-First Alfred Deakin Lecture.

strength to lawyers as the High Court's particular vassals, and most especially to academic lawyers, perhaps more as the High Court's traditional court jesters. The idea seems to be that once the Court has delivered a constitutional decision, all are bound not merely to accept it as comprising an authoritative statement of the law of the land, but also immediately to accord it intellectual obeisance, and to undertake not to dissent publicly from that ruling no matter how implausible or even improper it may seem. If a lawyer, whether attorney-general or university professor, does publicly challenge a decision of the Court, then that Court and its supporters can be guaranteed to regard them with all the horrified disapproval of a dowager duchess who has just had a polecat introduced into her farthingale. This icy judicial stare will be mirrored in the eyes of assorted legal pressure groups around the country.

Let me make it clear at once that I view such an attitude not only as being foolish but also as downright pernicious and, indeed, as comprising a perversion of any real sense of constitutional propriety. The functioning of the High Court is a matter of fundamental importance within the Australian constitutional polity. If a lawyer, a member of the academy, or even a politician genuinely believes that the Court has strayed from the path of constitutional rectitude, then not only is it the right of that person publicly to say so, but it becomes their solemn duty so to do. Thus, if one concludes that the High Court is wilfully distorting the Constitution, and deliberately ignoring the intentions both of those who wrote it and those who adopted it, then one is intellectually obliged to state that fact, particularly if one is a lawyer pledged to uphold the law, or an academic ethically compelled to witness to the truth within one's own field of intellectual endeavour. This is not a breach of some top caste standard of public decency: it is the highest discharge of one's professional duty.

It must be admitted, however, that the performance of this duty imposes certain unwelcome burdens, at least upon a constitutional academic. Gone are the days when one pens polite, scholarly articles in search of a flattering citation in a decision of the Court, or with a view to being metaphorically patted on the head by one's favourite High Court Justice at some lawyerly conference. Instead, one tends to take on the unkempt persona of the constitutional politician, writing and speaking more in the accusatory tones of Zola than the hushed legalisms of Dixon, and running the risk of being consigned to that ignominiously noxious category, the feral academic. Nevertheless, if one chooses perversely to believe that the course of our country's highest constitutional Court is fundamentally illegitimate, then this is the only possible reputable stance, disreputable as it may be.

Generally speaking, Australia's academic community has proved itself admirably reluctant to embrace this form of professional quasi-martyrdom. Consequently, there is little in Australia that could answer the description of intellectual constitutional debate, as compared to the United States, where warring camps of academic lawyers regularly contest every sentence of the Supreme Court's judgments. In Australia, the tendency of academics rather has been to adapt themselves enthusiastically to whatever the High Court might come to say, even if that which is said today is precisely the opposite of what

was said yesterday. To most Australian constitutional commentators, the Vicar of Bray has proved an inspiring model, and even the most remarkable change of direction in the jurisprudence of the High Court is more likely to be met with the sound of quiet applause, than cries concerning the precise location of the emperor's new clothes. Humour aside, this tendency is deeply disturbing for the constitutional health of our country, as it is one of the few objectively useful roles of the constitutional academic to exact intellectual accountability from the High Court, to probe its decisions, and to call them for precisely what they are worth. Only where this occurs is it possible to speak realistically of a constitutional intelligentsia. Thus far, however, no such class of legal academic *Cassandras* has emerged in Australia.

Thus, as this introduction all too clearly reveals, this lecture is indeed based on the proposition that the High Court of Australia is betraying its own constitutional role, and this proposition will be expounded with a frankness which, I trust, will border on the brutal. In terms of outline, the lecture first will seek to sketch a frame of reference within which we should seek to understand the constitutional performance of the High Court. I note at this point that the frame of reference offered will be very different to the usual intensely legal framework utilised in most constitutional commentary. Secondly, the lecture will outline the role intended for the High Court by the Founding Fathers, and then go on to illustrate the manner in which the Court has failed to fulfil that role. Both of these matters form an inevitable part of any conventional treatment of the direction of the Court, and will be dealt with here as briefly as an intelligent discussion of the subject matter will permit.

Indeed, it is with these two matters that most critical analysis of the Court's performance tends to cease. However, it is one of the chief objects of this lecture to go further and to attempt two things which too rarely are undertaken within the present debate. The first of these is to posit the chief justifications offered by the High Court and its supporters for its most controversial positions, and to subject those justifications to critical analysis. All too often, these unimpressive excuses for constitutional banditry are accepted as uncritically as if they had been handed down graven on tablets of stone at Mount Sinai. Secondly, and perhaps even more unusually, an effort will be made to isolate the motivations that underlie the current directions of the High Court. Such an attempt is, in fact, deeply revealing of what amounts to the moral and intellectual bankruptcy of these directions, notwithstanding the fact that such matters usually are considered in relation to the High Court only in the most flattering and sycophantic of terms. Finally, as beloved by all constitutional commentators, a brief nod will be made in the direction of predicting the future course of the Court's decisions, an undertaking less productive of pessimism than of chronic depression.

II. A FRAMEWORK: JUDICIAL POWER, NOT CONSTITUTIONAL PRINCIPLE

The usual framework within which we analyse the actions of the High Court is a legal one. This is not surprising; the Court is, after all, fundamentally a legal body. However, viewing the performance of the High Court as a quintessentially legal phenomenon has profound and limiting implications for the way in which we assess both the Court and its activities. That is, we tend automatically to visualise the actions of the Court as being legal in character, and the questions that we ask concerning them similarly follow a legal pattern: that is, do the Court's decisions conform to legal precedent, ordinary norms of legal reasoning, and established constitutional principle. Moreover, consistent with this approach, we invariably examine the motivation for and legitimacy of the High Court's actions through a legal prism, and rarely ask questions about such matters that are not framed from within a narrow legal paradigm.

It is perhaps the chief point of this lecture to argue that the law is now the wrong paradigm within which to view the High Court as an institution, and particularly within which to view its recent constitutional performance. In reality, the Court's constitutional direction over the past decade is not comprehensible in terms of a legal analysis, but rather is best understood through an analysis explicitly couched in terms of the exercise of power. Thus, the theme of this lecture is that the latest trends in constitutional decision-making on the part of the High Court are not primarily, or even substantially, about changes to the law. Instead, they are best comprehended as attempts by the High Court to acquire and exercise power over certain fundamental aspects of society.

Approached in this way, the constitutional course of the Court is far more readily comprehensible than if any attempt is made to understand it as taking place within a genuinely legal discourse. Thus, once the pretence that the High Court's decisions represent an essentially legal process is abandoned, one is not faced with the cruel necessity of attempting to seriously analyse constitutional propositions which are logically humorous, or to synthesise whole planes of constitutional decisions which are utterly irreconcilable. Rather, the entire process may straightforwardly be understood as one involving simply a bid for power over certain desirable topics by one of the great organs of state.

Of course, if one takes this subversive, and perhaps even quasi-Marxist approach, the questions which one must ask about the High Court's decisions will be fundamentally different from the polite legal queries posited above. Such questions will not be about precedent or logic, neither of which will be particularly relevant, but about legitimacy, suitability and efficiency, none of which are the High Court's preferred topics of discussion. Just as critically, the context in which these questions will be asked also will be altered. They will be uttered, not *sotto voce* in a dusty atmosphere of legal deference and purported judicial impartiality, but loudly and insistently within a wide ranging political debate focussed upon the attempt by an organ of state to assert a range of powers to which it is, at best, dubiously entitled. In other, blunter words, the chief element of judicial subterfuge and cant are removed from the picture.

This, then, is the theme of this lecture: that we should see the actions of the High Court for what they are, and analyse them accordingly. That is, we should not even enter the debate of euphemisms involved in pretending that the Court genuinely is engaged in interpreting the Constitution. Rather, the only realistic manner in which the recent performance of the High Court may be viewed is as comprising a relatively uncomplicated and essentially extra-legal play for power over certain fundamental issues within society, classically those concerning the basic rights of citizens. It is, of course, the resolution of precisely these issues that ultimately will define the nature of the society in which we live. In summary, therefore, the actions of the present High Court are best understood as the calculated acts of a creature of power, not as the principled acts of a creature of law, and it is through this prism that the remainder of this lecture will view Australia's highest court.

III. THE INTENDED ROLE OF THE HIGH COURT

The starting point here must be to note that the concept of 'intention' is, oddly enough, one of the most disreputable in contemporary Australian constitutional theory. While it is perfectly acceptable to talk of the intention behind statutes, and even contracts, eyes will be raised in the best legal circles if any such analysis is applied to the Constitution. I should make it clear from the very outset that, contrary to this bizarre view, I believe the notion of intention to be as fundamental to the interpretation of the Constitution as to the interpretation of any other legal document. Consequently, I will utilise it with a truly depraved lack of shame throughout the remainder of this lecture.

The first question, of course, must be: whose intention? The answer to this in an Australian constitutional context is utterly clear. The operative intention behind the Australian Constitution is the intention of those who wrote it, the delegates to the Great Constitutional Conventions of the 1890s, who collectively are known to history (or ought to be known to history) as the Founding Fathers. It was these delegates who conceptualised, wrote and substantially implemented the Constitution, and thus it is their intentions that are relevant in its interpretation. It need hardly be noted that Alfred Deakin was one of the greatest of this collection of great men.

The next question is as to why the intentions of the Founders should matter. There is a broad debate over this issue, to which I will return later, but the essence of the argument against according their intentions any special constitutional significance is that the Founders comprised a group of mercifully deceased, white, male Anglo-Saxons, whose racist, sexist and dietarily unacceptable assumptions should have no controlling force over the Constitution.

However, the conclusive answer to such essays in anachronistic constitutional correctness lies in the democratic origins of the Constitution and the processes by which it was adopted. Put simply, from 1897, the delegates to the Conventions (except for those from Western Australia) were popularly elected.

They framed their Constitution pursuant to mandates from the peoples of their respective colonies, under intense public scrutiny and surrounded by community debate. That document, which was in every sense the embodiment of their collective intentions, was in turn voted upon in a series of popular referenda and ratified. This is a formidable, indeed an unbeatable, democratic pedigree for the Australian Constitution, and a pedigree that is unmatched by the constitutions of comparable democracies such as the United Kingdom, the United States and Canada, none of which ever enjoyed the luxury of popular adoption. Consequently, the intentions of those who wrote this democratic Constitution are to be accorded vast weight in its interpretation as comprising the very meaning that it seeks to convey, and certainly must receive infinitely more consideration than the opinions of their (mercifully) unelected contemporary critics.

Turning specifically to the intended role of the High Court, it may be observed first that while not all the constitutional intentions of the Founders possess the clarity of a bright morning, those regarding the High Court are almost painfully crisp. The intended position of the Court may best be understood as involving both a positive and a negative aspect, in the sense that there were certain functions which the Court was to exercise, and certain functions from which it decidedly was to be precluded.

The positive and fundamental role of the High Court was to protect federalism. In this connection, it goes without saying that the Constitution itself breathes federalism, not merely implicitly, but expressly in its very terms. If one had to pick the 'great theme' of the Constitution, it could only be federalism, upon the broad stage of which all other concepts play their crucial but undeniably supporting roles. The critical function of the Court in relation to federalism was to maintain the Commonwealth and the States within their respective spheres, and in particular to ensure that the Commonwealth kept within the ambit of its powers and did not invade the realms of the States. For this reason, the Founders bestowed upon the High Court the gracious (but historically thoroughly undeserved) accolade of "keystone of the federal arch".

It must be stressed that this perception of the Court's intended role is not a matter of historical speculation. On the contrary, we know it as a matter of absolute historic truth, for the simple reason that the Founders asserted it with almost irritating regularity. We also know that the balance of power that the Founders envisaged the High Court as enforcing within this role was one that was to operate decidedly in favour of the States. As a matter of simple historical record, the Founders had no truck with 'co-operative', let alone with coercive federalism: their's was to be a highly decentralised federation, and the Court was to be the custodian of this co-ordinately federal vision.

The negative, precluded role of the High Court is equally clear. Fundamentally, there were two things that the Court was not intended to do. Generically, it was not to be the role of the Court to 'update' the Constitution in light of the passage of time. Secondly, and more specifically, the Court was not intended to operate as a court of human rights, enforcing abstract constitutional guarantees of civic liberties.

As regards the question of the Court revising the Constitution, this phenomenon is perhaps best referred to as 'progressivism'. It is pellucidly clear that the Founders saw no role for the High Court in relation to this judicial form of constitutional amendment. On the contrary, they went to infinite pains to construct the s 128 amending procedure, with its carefully crafted democratic and federal elements, and there is not the slightest suggestion in the historical record that this painstakingly drafted provision was conveniently to be bypassed by judicial decree. Indeed, hopeful trawls through the Convention Debates in an attempt to find material supportive of such judicial usurpation has produced so pathetically thin a crop of scattered and off the point utterances that the effort has to be accepted with the good humoured hilarity that it deserves.

As for a role for the Court in relation to human rights, with certain very limited exceptions, the Founders chose not to include such rights in their Constitution and there thus could be no occasion for the High Court to enforce them. This omission was no accident. The Founders, rightly or wrongly, believed wholeheartedly in that mythical beast the 'British Constitutional Genius', operating via a concept of parliamentary and responsible government, as the very best means by which to protect (and indeed to define) human rights. Consequently, such rights were to be protected by the elected Parliaments and not by the courts. Again, no element of speculation is involved in reaching this conclusion. On the contrary, we know it to be true beyond a shadow of a doubt as a matter of clear historic record. Indeed, not until the last half dozen years could the proposition seriously have been put forward that the Australian Constitution contained any such judicially enforceable rights beyond those few that were specifically enumerated. Of course, Mr Justice Lionel Murphy tendentiously did put forward such a proposition, but we are dwelling at this point in the realms of the serious.

IV. THE FAILURE OF THE HIGH COURT TO DISCHARGE ITS INTENDED ROLE

It is a common place in Australian constitutional commentary that the High Court has failed utterly to discharge its contemplated roles. This depressing analysis has been performed many times before and I will pursue it only briefly here.

As regards the Court's function as protector of federalism, no-one now could advance such a role for the High Court other than in a spirit of somewhat malicious jollity. Since the decision in the *Engineers'* case in the 1920s, the High Court has been strongly, institutionally anti-federal. Thus, its constitutional jurisprudence of federalism consists largely of a list of catastrophes for the States, in much the same way as a list of battle honours on a British regimental standard marks the chief disasters of the French army: the *Engineers'* case itself; the *Uniform Tax* case; the *Tasmanian Dams* case, and so forth. Most recently, we have the decision of the Court on the meaning of excise in s 90 in *Hammond v New South Wales*, a profoundly unconvincing

constitutional outing that has devastated an already blasted State tax base. No leading modern commentator seriously doubts that the High Court has pursued a conscious policy of centralism in direct opposition to the intentions of the Founders. The only real argument is as to the desirability of the change thus illegitimately achieved.

Now is not the time to probe the technique by which this centralist revolution has been achieved (basically, through a literalistic interpretation of the Constitution which ignores its federal basis), or the motivations which underlie it (a complex range of matters, ranging from the integrationist sweep of Australian history to the simple fact that High Court Judges are appointed by the Commonwealth). But we may note for present purposes that the centralism of the High Court is at heart merely a particularly potent example of the general phenomenon of progressivism: that is, the High Court believes that the Australian Constitution should be more centralised to deal with complex issues of modern society, and has acted to judicially amend the Constitution so as to achieve just that result.

As regards the High Court's second, negative role, its failure has been equally resounding. The Court now has a long record of consciously 'interpreting' the Constitution in a manner contrary to the intentions of the Founders, with a view to achieving this or that supposedly desirable social result. The most outstanding contemporary example of this illicit judicial progressivism undoubtedly is comprised in the Court's recent series of implied rights decisions.

As we have seen, the Founders had no intention of creating a range of abstract, judicially enforceable human rights and, indeed, were entirely opposed to such a course. Problematically for our constitutional progenitors, however, this disinclination to entrust the judiciary with the moral fate of the nation runs starkly counter to modern trends favouring just such guarantees. As a result, the Court simply has begun the process of inventing appropriate rights, and purporting to 'imply' them from the Constitution. The plausibility of these 'implications' will be considered fully when discussing the possible justifications for the Court's actions, but we may note for present purposes that the rights thus created by the Court owe nothing to any genuine process of implication, nor indeed to any general process of interpretation, properly understood. Instead, they have as their true basis merely the belief of the Court that they should be part of the Constitution, rather than any interpretative conviction that they indeed are. This is the very essence of progressivism.

We also may note at this stage the curious paradox of much of contemporary Australian constitutional debate, that the vast majority of commentators who publicly support the Court's stance on implied rights readily agree in private that the Constitution, properly understood, provides no succour for such rights. Behind the closed doors of academic common rooms, the debate turns not on the constitutional plausibility of the mooted rights, but almost exclusively upon their social desirability. Formal defences of the constitutional methodology of the Court are reserved for suitably public occasions. My favourite reminiscence in this connection is of a particularly eminent legal academic, who privately describes the implied rights as "utter nonsense", but expresses her intention to

defend them doggedly, so long as grants for their study continue to flow from the Australian Research Council.

Thus far, we have considered briefly the intended constitutional roles of the High Court and its failure within these roles. What I now propose to do is to critically examine in some detail, first, the justifications commonly offered for the High Court's course of decisions; and secondly, the wider motivations underlying these decisions.

V. JUSTIFICATIONS FOR THE COURSE OF THE HIGH COURT

By way of preliminary, it should be noted here that I am not concerned with centralism and its elaborate judicial apologies. Rather, I will confine myself to analysing the wider justifications offered for the High Court's general progressivism, and particularly to those arguments put forward as justifying that aspect of progressivism which has produced the so-called implied rights. The consequence is that the majority of comments here will most specifically be directed to the line of cases purporting to discern within the Australian Constitution an implied freedom of political communication, from *Australian Capital Television*, through *Nationwide News* and *Theophanous*, to *Lange* and *Levy*.

Generally speaking, two broad categories of justification have been advanced to support both progressivism and its rights oriented variation. The first category comprises those arguments that are based, at least to some extent, on law and principle. The second category is composed of arguments overtly based on pragmatic and political considerations. These are arguments that do not pretend in any real sense to a legal or principled foundation, but rather defend the decisions of the Court on the basis of their social or other utility. I will deal with each category of argument in turn, but recalling this lecture's previous identification of the High Court as a creature of power rather than law, it can come as no surprise that it is the latter class of arguments that form the fundament of the Court's position.

A. Arguments of Law and Principle

The first, and probably least plausible argument, is that the Founders actually intended the High Court to be progressivist in character, and that in the case of the Court's identified rights, these rights were indeed intended to form part of the Constitution. As regards the general phenomenon of progressivism, there is no suggestion whatsoever in the contemporary materials, particularly the Convention Debates, that the Founding Fathers harboured any such thought. Moreover, as already has been pointed out, if they did harbour a guilty hope that the High Court should be the chief agent of constitutional reform, it is exceedingly difficult to understand the intensity of their labours over s 128 and the careful amendment process which it contains. In short, therefore, the argument is historically ludicrous.

The same may be said of the view that the Founders actually did propose, in defiance of all we know of their opinions, that the Constitution should contain a crypto-Bill of Rights. Against this fond and foolish hope must be ranged all of the explicit statements of the Founders that they intended no such thing. Indeed, the argument advanced by some High Court Judges that a lack of reference to rights in the Constitution merely reveals how deeply their presence was taken for granted must be regarded as disturbingly disingenuous. Applying a similar standard of proof to space science, the utter absence of small green men in Collins Street must be taken as strikingly proving the existence of extra-terrestrial life.

A second, variant argument in the specific context of rights, is that the Founders would have intended that such rights should have been recognised in the Constitution, if only they had been alive today. The kindest thing which may be said of this position is that it does not relate to constitutional interpretation, but rather to one of the more cock-eyed reaches of metaphysics. It in fact has nothing to do with the intentions of the Founders, as while it often will be possible to identify the past intentions of dead men, it simply is impossible to isolate their contingent, unformed and indeed non-existent intellectual positions. The only relevant question in terms of intention must be what the Founders intended when they wrote the Constitution, not what they might have intended had they been alive today. Of course, if we do not like their views from the turn of the century, we are free to amend the Constitution by referendum to obliterate them, but until we achieve this worthy end, nothing is to be gained by the intellectual equivalent of a constitutional seance.

A third, and slightly more sophisticated argument, turns upon a highly implausible proposition concerning the nature of the Constitution which the Founders intended to ordain. This proposition is that the Constitution was never meant to operate as a closely ordered manual of constitutional instruction, but rather as a broad guide for development by the courts. Regrettably, this would have been news to the Founding Fathers. Quite obviously, the Constitution is couched in terms broader than those of a *Dog Act* and should be interpreted accordingly. But this is in no way to deny the fact that the Constitution is highly instructional, extremely detailed, and was fully intended to be obeyed, like any other law. Indeed, in this context, it must be remembered that the Constitution is not merely a law but *the* law, and that the Founders went to infinite pains over its myriad provisions precisely to ensure that Australia's constitutional dispositions did indeed reflect their intentions. It is amusing to try and imagine the furore which would ensue were this free-wheeling vision of the process of law-making and interpretation to be applied to almost any other legal instrument, and (for example) the long suffering taxpayer to be informed that his or her liability was founded not upon the provisions of the *Income Tax Assessment Act*, but upon a court's belief as to the directions in which these provisions should be 'developed'.

The next argument abandons all pretence of reliance upon the intentions of the Founders, and maintains that general progressivism (including its rights application) is justified on the basis that, whatever the intentions of the

Founders, they are beside the point and may freely be ignored. This is an argument the existence of which was adverted to earlier in this lecture, and which in essence proceeds on the basis that the Founding Fathers constituted so democratically repugnant an assembly that their views should not be constitutionally privileged. The most usual counts appearing on this charge against the Founders are that they were racist, sexist, and denied the vote to Aborigines, Asians and most Australian women; but further atrocities may be added according to individual taste.

The fatal flaw in this argument is that, even conceding all the above, there remains what might be called the crucial factor of 'comparative democracy'. What I mean by this is that the relevant question in determining the constitutional status of the intentions of the Founders is not whether the delegates to the Conventions were the embodiment of unadulterated democracy – which clearly they were not – but rather whether there exists any modern day constitutional will which is comparatively more democratic, and hence supervening. Thus, in the absence of some superior expression of democratic legitimacy, the deficiencies of the Founding Fathers, while lamentable, will be beside the point.

It is here that the difficulties of the apologists for the High Court's progressivism become excruciating, for it is immediately obvious that no matter how woefully inadequate the Founders may have been as the distilled essence of popular democracy, the High Court, quite frankly, is worse. This conclusion follows inexorably from the fact that the vast majority of the Founding Fathers were at least elected (however deficient the franchise), and the Constitution that represented the outcome of their deliberations and intentions was popularly ratified. Once one reaches this uncomfortable point, such rhetorical questions as "Who did you vote for in the last High Court election?" could be expected to send any High Court Justice with even a modest sense of shame cringing for cover. After all, the simple fact is that the Founding Fathers' failure to include guarantees of individual rights in the Constitution was the subject of popular referenda. No such thing can be claimed for the High Court's subsequent invention of implied rights.

Of course, there is one process that clearly will produce a superior democratic will to those which originally underlay the formulation and adoption of the Constitution, and that is an amendment of the Constitution under s 128. This, however, is the last thing proposed by the supporters of High Court progressivism, who regard the electorate almost with less enthusiasm than they feel for the Founders, a matter that will be returned to presently.

A further argument is more in the nature of a technical quibble. It sometimes is said that the High Court should be free to adapt the Constitution beyond the intentions of the Founders simply on the basis that it is impossible effectively to find those intentions. However, the accurate translation of this argument almost invariably is that the person making it does not wish to find the relevant intentions, rather than that they are having any real difficulty in locating them. One may note in passing that the identification of constitutional intent is far easier in Australia than in the United States, given the existence of some

thousands pages of Convention Debates, recording verbatim the public deliberations of the Founders. In any event, the key point must be that on most controversial issues, it is relatively easy to identify the relevant intent. Thus, for example, in the case of individual rights we know beyond all question that their inclusion in the Constitution as judicially enforceable guarantees was not intended, with much the same degree of certainty that we know a tortoise cannot fly. Again, in the case of federalism, there quite literally is no doubt that the Founding Fathers intended to establish a strongly decentralised Australian federation. Doubtless, on particular issues there will be a paucity of clear intentional evidence, but this cannot justify a refusal to implement those intentions that are abundantly clear.

Perhaps the narrowest argument specifically advanced to support the existence of the High Court's implied rights thrust is that these rights genuinely are the outcome of a legitimate process of implication from the Constitution. However, this argument suffers from a fatal defect, flowing from the very nature of implications.

Thus, if one says that something is implied from a document, one inevitably means that the suggested implication represents the real but unexpressed intention of the author. Thus, for example, were there to be a sign in this room saying that all women should be seated, the implication would be that all men should stand, and this implication would represent the supposed intent of the author of the sign as discerned by the members of this audience. This approach, whereby implications necessarily flow from intention, is utterly consistent with that adopted in the case of the interpretation of statutes (where implications are derived from parliamentary intent), and with the approach followed in relation to other constitutional implications in Australia (for example, those implications concerning federalism and the separation of powers) which likewise conceptually are derived from Founders' intent. The insuperable difficulty in the context of the 'implied' rights, however, is that, as has been shown, there exists absolutely no supporting intention. On the contrary, we know as a matter of historical fact that the intention of the Founders was directly opposed to the existence of any such rights. It follows inexorably from this that any attempt to found such rights as the freedom of political communication upon a process of constitutional implication is utterly bogus, on the simple basis that no implication is involved.

However, a further attempt sometimes is made to justify these rights on the impressive sounding basis that they represent "structural implications" from the Constitution. Such implications apparently do not arise from the intent of the Founders, but in some quasi-mystical manner from the 'structure' or 'basis' of the Constitution as a whole. However, as we have seen, the essence of an implication is that it is based on intention, so there can be no genuine implication that is not intentional in character. Consequently, how are we to understand the true nature of these proffered "structural implications"? The answer is that these bastard creatures of constitutional expediency are not implications at all, but rather examples of what might be called the 'literary construction' theory of constitutional interpretation. That is, they depend upon the notion that one

should read the Constitution like a book or poem, where the pertinent question is not what the author intended, but rather the response of the reader: that is, how one 'feels' about what one is reading.

There are two basic problems with this view as applied to the interpretation of the Australian Constitution. The first, is that it is utterly subjective and inherently unreliable. Each Judge quite plausibly could say that the Constitution was, to him or her, about different things ranging (according to taste) from the protection of private property through representative democracy to radical social equality. To describe such a process of interpretation as unprincipled is to flatter it. Secondly, the argument utterly misconceives the nature of the Constitution. The Australian Constitution is not and never was intended primarily to be about evoking judicial response in much the same way as a line of Shakespeare is set out for the delectation of English students as the subject of an examination essay at the end of year 12. Rather, the Constitution's essential purpose is to set out determinate structures to achieve particular constitutional results. In this process, purely subjective judicial response, save as an incidental, regrettable and unavoidable ancillary, is quite beside the point.

A final argument with at least some roots into the subsoil of principle maintains that the opponents of progressivism have misunderstood the nature of the judicial process. Thus, it is argued, judges have always made law, so what is wrong with them doing so in a specifically constitutional context? To this vastly overrated argument, there are a number of answers, none of them particularly polite. The first is to observe that no one today denies the truism that judges make and always have made law: the real questions are, in what context and how much? Thus, in the case of the common law, few would deny the judges a role in developing that corpus of law, at least if this were done in conformity with the traditional methodology of the common law: that is, cautiously, slowly, and with great weight being accorded to precedent. This is why much of the criticism of such essentially common law decisions as *Mabo* and *Wik* is misplaced: these decisions may well be vulnerable as exercises in common law technique, or in terms of their policy outcome, but they are unexceptionable as a matter of constitutional principle. The courts decide the common law, subject always to the possibility of statutory displacement. This is precisely what occurred in *Mabo* and *Wik*.

However, in relation to the interpretation of statutes, different considerations apply. As the judges do not make statutes, which instead are ordained by democratically elected parliaments, it is (more or less) universally accepted that the judges have no legitimate role in their amendment. In the case of the Constitution, of course, we are dealing with a document beyond the realms of an ordinary statute. All the democratic considerations that apply to protect statute law from judicial amendment operate at a vastly greater level of intensity to deny to the judges any such role in the case of the Constitution. That document, having regard to its terms and genesis, is amendable only by the people acting under s 128. Thus, whatever the High Court legitimately may do in such contexts as the common law, nothing flowing from this would serve to justify any judicial amendment of the Constitution.

These, then, are the arguments seeking to justify progressivism and its rights outcomes that could be said to have some conceivable basis in law or principle. All are uniformly untenable, to the point of being negligible except as bolsters to some already favoured constitutional outcome. It is thus clear that any serious justification for the High Court's programme of judicial amendment to the Constitution must be found, if at all, in the realms of pragmatism and politics rather than law.

B. Arguments of Pragmatism and Politics

The first argument of constitutional pragmatics in this context has already been encountered in a principled guise. The argument that progressivism is justified because judges have always made law is sometimes boldly put, not as reflecting the proper role of the judiciary, but as embodying a sort of judicial *Realpolitik*, against which it is futile to complain. Thus, it is argued that progressivism is justified, not in point of principle, but at least by long established usage. Putting aside the responses based upon notions of constitutional rectitude which were canvassed above, the kindest response which may be made to this surprisingly common, but essentially silly argument, is that it applies with equal force to the time honoured customs of armed robbery, piracy and genocide, none of which have ever been regarded as proper modes of behaviour simply on the basis of long usage.

Perhaps the argument most commonly put as justifying progressivism, and in particular as justifying the progressivism of rights so beloved by the present High Court, is the assertion that the introduction of such rights into the Constitution is critically necessary to save us from the deprivations of constitutionally degenerate parliaments. This argument can be put on a number of levels.

The most dramatic, and the most common version, is that without judicially enforceable human rights, parliament will commit such epic atrocities as the passage of a law ordaining the slaughter of blue-eyed babies. The weary answer to this argument in an Australian context is that no such thing has ever happened and is most unlikely ever to happen in the future. The reason for this hopeful prognosis, contrary to the self-congratulatory imaginings of some lawyers, has little to do with the courts. The real reason that such atrocities will not ensue is quite simply because the political and constitutional culture of our society (of which our legal culture undoubtedly is a part) is such as to preclude their occurrence. Here, one is talking not merely of the checks and balances inherent within a system of democratic, parliamentary government; nor the operation of the constitutional value of the separation of powers; nor the chilling effect of an independent judiciary and a responsible executive. Rather, one fundamentally is speaking of the constitutional psychology shared by all significant components of the greater political mechanism: parliamentarians, judges, political operatives, journalists, lawyers, academics and community leaders alike. It is this consensus of the faithful, as mediated by our formal constitutional and political structures, that is the ultimate safeguard against atrocities of the type so fervently imagined by supporters of the High Court. In essence, it operates not to dissuade

governments from slaughtering blue-eyed babies, but pervasively to ensure that it would never even occur to a government to contemplate such a thing. Moreover, if ever our system broke down to the extent that such atrocities were remotely conceivable, self-created judicial guarantees of individual rights would not save us. The body politic would already be sick beyond any feeble judicial remedy.

The result is that, in the utter absence of such satisfying major atrocities, the true justification for the High Court's invention of rights must lie (if at all) in our alleged need to be protected against altogether smaller and less dramatic parliamentary incursions. Thus, far from the Court's decided implied rights cases being ones which deal with mass slaughter and the infliction of cruel and inhuman punishment, most centre upon such faintly pathetic persecutions as those involving the prohibition of political advertisements, and precluding people from protesting at duck hunts, neither of which reek of the Gulag. Even the most dramatic of implied rights arguments to come before the Court, the pitiful tale of the stolen Aboriginal generation in *Kruger*, on no analysis fell within the oeuvre of mass slaughter and torture traditionally relied upon to justify the progressivism of rights. Moreover, it always must be remembered that whereas the Court was prepared to deploy its implied rights in defence of the embattled media magnates in *Australian Capital Television* and *Theophanous*, the same rights proved worthless to the applicants in *Kruger*. Thus, there is nothing in the course of the High Court's jurisprudence of implied rights that furnishes even a remotely convincing case for the dismantling of democratic parliamentary supremacy in favour of a judicial nanny state.

In light of this embarrassingly thin case for the Court assuming the lurid mantle of a general rights superhero, a second and much narrower argument turning upon the deficiencies of parliament often is put specifically in favour of the implied freedom of political communication. This argument runs that a certain degree of invention of rights by the High Court is necessary, not so much to displace parliamentary supremacy, as to ensure that it is exercised in accordance with its own democratic underpinnings. Thus, the Court pays lip-service to parliament's democratic authority, but asserts its title to erect such rights as are necessary to preserve the democratic nature of parliament itself. So, the argument goes, the Court is entitled to create a right of political free speech, because without such a right, the very democratic system that engenders a true parliament cannot operate effectively.

The problem with this argument is that it not so much puts the cart before the horse, as the wheelbarrow before the elephant. Put bluntly, the unelected High Court cannot protect constitutional democracy by itself trampling on democratic principle through inventing a right that never was intended to subsist within the democratically ratified Constitution. In the final analysis, what is more obnoxious in point of democratic principle: a law which inhibits political advertising in an inappropriate way, or which unnecessarily restricts the activities of protesters at duck hunts; or a fundamental and unauthorised amendment to the Constitution by a group of unelected, unaccountable judicial

officials? In the most basic of terms, it is not possible for the High Court to preserve democracy by acting in defiance of that very concept.

Naturally, suffering as it does from this severe democracy deficit, the High Court and its supporters have become quite impatient of appeals to that inconvenient concept. Consequently, there has been some attempt to redefine democracy in terms more favourable to the Court. It is argued, for example, that the concept of democracy is wide enough to comprehend the operations of a judiciary that progressively develops the Constitution. There is a thin element of truth in this argument, at least to the extent that democracy does not necessarily involve a ruthless application of unfettered popular government: hence the established democratic credentials of both federalism and bicameralism.

However, democracy is a broad but finite spectrum, and the central point must be that just because this or that constitutional feature can subsist within a democracy without spelling its actual demise, it does not follow that the feature in question either is supportive of democracy, or can be justified by reference to that concept. Thus, while the usurpation of the high function of constitutional amendment by seven unelected judges may not be enough to kill Australian constitutional democracy outright, that hardly proves that such action is conducive to Australia's democratic health. The reality is that nothing could be less consistent with any vision of popular control over the fundamental constitutional features of the state than the unauthorised amendment of the Constitution by appointed judicial officials. Indeed, the cheerful willingness of the Court and its supporters to promote a 'democracy' within which a tiny legal elite may unilaterally alter the basic conditions of citizenship strikingly illustrates the profoundly undemocratic and anti-popular sympathies of that group.

Attempts also are made to downplay the impact of the implied rights jurisprudence of the Court. Thus, it is argued that the long term effect of the Court's recent decisions will be strictly limited, confined as they are to the single implied freedom of political communication. But this is far from convincing. Already, this implied freedom has had attached to it associated subsidiary rights of movement and association. More importantly, however, once one admits of the abstract possibility of vaguely implied rights emerging unbidden from the text of the Australian Constitution, there is no logical limit to the range of rights that may present themselves. This is because that range is determined merely by the personal preferences of the judge interpreting the Constitution. A perfect example in this respect is the utterly implausible proto-right of equality discerned in the Constitution by Mr Justice Deane (among others) in *Leeth*. Moreover, nothing would be simpler to imagine than subsequent judges resuscitating this stillborn right and drawing it gradually beyond the field of process towards an entitlement of substantive equality in such areas as health or education. Indeed, if one consults any of the popular human rights documents of North America or Europe, the slightest imagination will reveal multiple avenues by which the unpromising corpus of the Australian Constitution could be made to bear fruit in the form of hitherto unsuspected implied rights. The limitation of the range of such rights that might be extracted progressively from the

Constitution would be determined not by law or logic, as is suggested by supporters of progressivism, but merely by judicial whim.

A somewhat associated argument is that there is nothing to fear from the High Court's constitutional activism, given that it is strictly circumscribed in its capacity to develop the law by being limited to deciding the particular cases that come before it. But this argument is a relic of a bygone age. Today, the High Court increasingly is free to pick and choose among the cases before it with a view to moulding its own jurisprudence. Even more importantly, once the Court holds itself out as a willing forum of human rights, suitable litigants inevitably will respond, presenting the Court with a plethora of cases from which to mine its preferred constitutional propositions.

Perhaps the most popular pragmatic argument favouring judicial progressivism is that such a course is necessary to avoid the constitutional paralysis said to be imposed by the s 128 referendum process. The argument is, in essence, that the High Court will save us from democracy. Thus, to some Judges of the Court and many of its supporters, the Australian people have shown themselves to be strangely unworthy of constitutional democracy by voting inexplicably against the favoured projects of the constitutional elite. These projects have included, most noticeably, massive increases in central power (proposals for which have a truly appalling record at referendum) and suggested inclusions of constitutional guarantees of human rights, last voted down by record margins at referendum in 1988.

The implications of this argument, that the Court must step in to change the Constitution because the people have chosen not to do so, are truly horrifying on any vision of democratic theory. If constitutional democracy really does mean nothing more than the right to give the right answer, then it would seem that the dwindling democrats among us have less to fear from rapacious politicians than we do from a triumphalist judiciary. Perhaps the most surprising thing about this argument is that it is put so often, and with such an utter lack of awareness that it strikes at the very heart of popular democracy. Indeed, its ready acceptance among High Court and their academic devotees is a striking illustration of the oligarchic, essentially anti-popular sympathies of the supporters of judicial activism.

Probably the most attractive packaging given to this argument centres on an appeal to that grisly spectre, the 'dead hand of the past'. The line here is that the practically unalterable dispositions of the Founding Fathers have placed Australia in a constitutional straight jacket, from which only the High Court can extract it. This, however, is constitutional subterfuge of the first order. The real obstacle to the achievement of the constitutional 'reforms' so beloved of the Court and its adherents is not the dead hand of the past, but the live hand of the present. Thus, the proximate reason that progressivists cannot change the Constitution is not that the doughty ghosts of the Founders prevent them, but because the very much living people vote "No" at referendum: the difficulty is not dead Founders, but live voters. Moreover, it must be remembered in this context that the overwhelming majority of failed referenda have foundered, not upon the rock that the consent of a majority of States be obtained, but rather

upon the absolutely basic failure to obtain the agreement of a simple majority of the electors overall, surely the minimum democratic requirement for constitutional change. Accordingly, the dead hand of the past must be regarded in the same light as all bogeymen, something to frighten the callow, but not to be taken seriously by the intellectually mature.

To some extent, implicit in the argument that the High Court must take responsibility for altering the Constitution *tant mieux*, is the notion that its Judges collectively form a truly exceptional group of people, possessed of the necessary, multifaceted wisdom to mould Australia's fundamental constitutional dispositions. Recently, this argument has been more overtly expressed as an independent justification for progressivism, positing that the experience, character and personality of the Judges of the Court uniquely fit them to perform the role of interring the Founders' vision in favour of a new, contemporary constitutional settlement.

The fact that this argument is even put with no sign of humour or shame again is deeply revealing of the anti-popular, anti-democratic basis of progressivism. As regards the special qualities allegedly shared among the High Court Judges, and which would suit them to the role of constitutional renovators, chief among these is said to be the fact that the Judges are not party political creatures, but 'independent'; that they do not feel themselves bound to please the populace, but merely to make the 'right decision'; and that they have the sterling personal qualities of intelligence, maturity, experience and wisdom. There are a number of responses which may be made to this less than blushing litany.

First, and most obvious, is that no amount of sterling personal qualities may make up for a fundamental democratic deficit. The fact that a dictator is a Nobel prize winner does not make him or her any less a dictator, and the fact that a judge is clever does not entitle him or her to tear up the Constitution. However, taking the argument head on, it is difficult to see why the supporters of the High Court are so sure that their darlings possess the qualities of constitutional superheroes, except on the grounds that they happen to share the same views: always the ultimate determinant of wisdom. The High Court, after all, is composed merely of lawyers. Why are we to imagine that lawyers are particularly good at solving fundamental questions of policy which, after all, is what issues of constitutional design are?

Thus, if one is to consider legal analysis, at which lawyers (and particularly High Court Judges) are very good indeed, it normally is confined to the relatively narrow analysis of legal points; is argued from a rigorously defined legal viewpoint; is artificially controlled by such constraints as the laws of evidence; is articulated within court cases by barristers (from whom will be drawn future judges) arguing exclusively for one position or the other, rather than dispassionately considering all sides of the question; and typically, is undertaken with no exposure whatsoever to such issues as economics, politics, policy and administration.

By way of contrast, the issues raised by questions of constitutional change are fundamentally different. They typically are broad and indeterminate in character; are polycentric, in the sense that they involve multiple, interlocking

issues; are not subject to such artificial constraints as the laws of evidence or procedure, which serve to constrain and facilitate the management of legal problems; are not easily contained within any one intellectual discourse, such as law, economics or political theory; and quite literally are full of the type of economic, social and policy considerations as it will rarely have been the lot of a senior barrister to encounter, at least outside of the pages of his or her favourite newspaper. On any realistic assessment, therefore, the inevitable conclusion must be that it would be difficult to think of anyone less fitted to decide such complex and intensely worldly matters as those which inevitably comprise important issues of constitutional design than a small group of middle-aged men and women whose sole qualification for appointment was eminence within the narrow cloisters of the law.

Finally, one must consider carefully where this rhetoric of allegedly superior ability leads. I vividly recall being told of a lecture delivered by a colleague at this University where the argument was advanced that the High Court should be free to mould the Constitution on the grounds that it is apolitical; can take a long-term view of difficult problems; is dispassionate in outlook; and is composed of exceptionally distinguished persons who are far cleverer than politicians. The question that must be asked of such arguments is whether we really have reached the point where the title to effect constitutional change derives purely from personal quality, rather than from democratic legitimacy? If we have – and this thought came to me in a mixture of horror and humour when the contents of my colleague's lecture were recounted to me – we must be greatly in sympathy with those Latin-American nations who traditionally have, on very similar reasoning, conferred a privileged place in constitutional affairs upon their armed forces. After all, to bring the analogy home, could it not be said of the Australian Army that it was dispassionate; apolitical; highly skilled; composed of distinguished men and women; capable of taking a long-term view; and, generally speaking, far more attractive as a corps of potential decision-makers than many of our parliaments? Indeed, one would imagine that the army might well have rather wider experience in the resolution of complex policy and practical problems than the High Court. The point, of course, is not to propose an Australian junta, but rather to indicate the absurdity of confusing the two lines of democratic legitimacy and personal quality, whether in a judicial, military or any other context.

In summarising the pragmatic justifications for progressivism, it is utterly clear that they owe nothing to any valid concept of legitimacy or democratic theory. They are all, in essence, arguments centring upon the simple desirability of the High Court possessing a pervasive power to make changes to the Constitution. Moreover, all characteristically are justifications which might be expected to be raised in connection with an organ that is vitally concerned with the pragmatic exercise of power, rather than one which is dedicated to the principled application of the law. Indeed, given the earlier conclusion of this lecture that no legally principled argument exists in the favour of progressivism, there is little doubt that it is within these realms of pragmatism that the real debate over that phenomenon lies. Nevertheless, as the foregoing analysis

shows, the exercise of constitutional power by the judiciary is hopelessly unjustifiable, even on its own pragmatic and unprincipled terms. What I propose to do now is to consider precisely what is prompting Australian judges to assert this illicit right of constitutional progressivism.

VI. WHY THE HIGH COURT HAS ADOPTED PROGRESSIVISM

This is a question, or range of questions, that is all too rarely considered. Most of the current debate centres improbably upon the blindingly obvious question of whether the High Court is progressivist or not. Nevertheless, the reluctance of commentators to carry their analysis further into the field of motivation is not difficult to understand: the deeper explanations for the Court's stance are partly political, even psychological; almost completely inarticulate; and for all these reasons, extremely difficult to probe. The following analysis does not attempt to explain the specific phenomenon of progressivist centralism: this is a field in itself, which has been considered elsewhere. What this lecture does propose to address is the conversion of the High Court to the general phenomenon of progressivism, and most specifically, to the progressivism embodied in its line of decisions dealing with implied rights. What follows does not purport to be a comprehensive analysis, but an attempt to isolate a number of factors which appear to underpin the High Court's progressivism.

The most commonly mooted explanation for the new constitutional activism of the High Court lies in the alleged decline of parliament as a protector of human rights. Parliament being dominated to the point of supineness by the executive, so the argument goes, it has been inevitable that the courts would feel impelled to step into its shoes as pre-eminent protector of the liberties of the subject. It may be noted at this point that this explanation of progressivism is a highly flattering one to the High Court, presenting the Court less as a usurper of the power of parliament, than as its altruistic rescuer. But there are a number of reasons why such an explanation of progressivism should be rejected out of hand.

The first is that the alleged decline of parliament, while part of popular constitutional myth, is by no means as compelling in reality as it is in rhetoric. Parliament has always been subject to a significant degree of executive domination, and there is no clear evidence that it is markedly less effective today in protecting human rights than it was in bygone eras. Indeed, the numerous pieces of legislation enacted by parliaments over the past twenty years dealing with such subjects as equal opportunity and other rights based issues suggest that, if anything, parliaments recently have been rather more interested in protecting rights than previously had been the case. The second reason for rejecting this convenient foundation for progressivism is simply that many more compelling explanations exist. Any of these, and certainly all of them in combination, provide a far more plausible rationale for the intrusion of the High Court into the field of constitutional amendment, and in particular, into the field of creating constitutional rights.

One of the most profound of these has been the influence on the Australian judiciary over the past two decades of United States legal culture. Prior to this, Australian judges looked more readily to the United Kingdom for their inspiration. There they beheld a judiciary, essentially subservient to parliament, and profoundly cautious in its general approach to constitutional relations. By way of contrast, the United States presents the prospect of a frenetically activist judiciary, backed by and backing a Bill of Rights containing broad guarantees of individual liberties which can be moulded by the courts to support almost any conceivable position. Moreover, American legal culture emphasises almost to the point of obsession the 'inevitable reality' of judges making both law and policy.

Far more than any possible decline in the independence of parliament, the Australian judiciary's increasing admiration for this free-wheeling American constitutional culture lies at the heart of its conversion to progressivism. Not only does the High Court refer to the judgments of the United States Supreme Court with increasing frequency, but in their burgeoning extra-curial utterances, Judges of the Court readily acknowledge the influence and attractions of the American constitutional paradigm. At the same time as this shift in judicial culture has taken place, a similar transformation has occurred in the Australian law schools, with constitutional academics increasingly falling under the influence of the Bill of Rights dominated United States constitutional culture. All of this has combined to produce an intellectual legal atmosphere strongly favourable to a High Court which wished to begin the process of inserting much neglected human rights into the unco-operative text of the Australian Constitution. It may be noted that with this American constitutional influence came many of the themes familiar to anyone who has been exposed to the literature of American progressivism: a contempt for elected politicians; an obsessive suspicion with majoritarian democracy; and the lauding of the Courts as the founts of all dispassionate wisdom. Once again, there is little of this that is susceptible to classic legal analysis. Rather, the essential picture is of a Court overwhelmingly eager to exert power in the manner of its overseas inspiration.

Running closely alongside such influences have been certain political realities of the last decade. Since the 1960s, governments have devoted an increasing proportion of their resources to the legal system, including the courts themselves, as well as to such related items as legal aid. Since the crash of the eighties, the general strategy of governments has been to initiate cut backs in virtually every public programme, including those programmes relating to the legal system, and not excluding the courts. Suddenly, issues concerning the legal system (notably including legal aid) were made to take their competitive place with schools and hospitals where, inevitably, they would lose. The same, sorry fate met attempts to maintain and augment judicial salaries, pensions and conditions. This economic process had the predictable effect of stirring enormous judicial resentment towards both the executive and the parliament, which between them had so violated judicial inviolability. Inevitably, this resentment, which had a great deal to do with both financial self-interest and personal privilege, tended to

be clothed in the constitutional rhetoric of 'judicial independence' and 'separation of powers'.

Ironically, an exacerbating factor in this context was that lawyers and courts of the 1960s had succeeded in making many aspects of the legal system, such as legal aid and court delays, into political issues. The advantage of this was that government, in order to resolve such issues, was impelled to devote extra funds to the legal system. The disadvantage was that, especially under the new managerialism common among governments in the 1990s, politicians also felt impelled to manage the legal system as just one of their many responsibilities. The chief consequence of this was that governments increasingly intruded into aspects of the legal system in a manner that irritated, and sometimes outraged the courts.

Thus, the financial stringencies of the last decade, coupled with the new found imperative of government to 'manage' the legal system, has had the inevitable effect of bringing both governments and parliament into direct conflict with the professional and personal interests of judges, including Judges of the High Court. This has in turn created enormous judicial hostility, which occasionally has spilled over into the popular press. It clearly is the case that the bid by the High Court to wrest the constitutional agenda from parliaments and governments, and the suspicion and mistrust upon which this attempt has been based, has been fuelled at least as much by this type of irritation as by any constitutionally generated imperative. Once again, the analysis is one of power, whereby a privileged elite has perceived itself to have been threatened, and has reacted in a predictable way.

A further profound factor influencing the direction of High Court decision-making has been 'internationalism'. In a constitutional context, the outstanding feature of internationalism has been the increasing prevalence of international covenants and treaties directed towards the protection of human rights. The inevitable consequence of the centrality of such agreements in much modern legal thinking, including academic writing and politico-legal discourse, has been to prompt the High Court towards the insertion of similar guarantees into the depressingly silent Australian Constitution. Put in this way, one might think that this is one impetus that stands apart from the relatively raw power analysis which has been applied to the Court throughout the rest of this lecture. However, by far the greatest significance of internationalism to the High Court over recent years has been as an immensely powerful rhetorical and moral weapon with which to justify judicial incursions into the content of the Constitution by way of the creation of individual rights. To this end, the Court and its allies have placed great reliance on the argument that, unless the Australian Constitution is brought into line with international rights fashion, it will stand convicted as a legal pariah before some notional international legal community. Reliance on such reasoning is particularly common in academic circles, but also is increasingly obvious in the Court's own dotting references to international human rights law, and serves as a handy and diversionary justification for judicial imperialism in a constitutional context.

Another important consideration underlying recent High Court activism in the direction of human rights undoubtedly has been the attempt by the Australian legal profession over the past two decades to reinvent itself in the face of mounting public criticism. Here, it must be remembered that the High Court essentially is merely a tiny subset of the wider legal profession, and will tend to react to threats to that profession in much the same way as other lawyers.

The difficulty for the legal profession is that, at least from the 1970s, it has been widely perceived as constituting a selfish power elite, far more concerned with the generation of wealth than with community service or even with the application of professional values. This stinging criticism, much of which is grossly unfair, found its target within a profession notable for its capacity to accrue and wield power, with the result that from the mid 1980s there has been a perceptible attempt by substantial parts of the legal profession in Australia to re-position itself in a manner more likely to provoke a positive public response. One of the most successful aspects of this re-positioning has been the effort by lawyers, and particularly by some of their peak representative bodies, to present themselves as the tireless guardians of human rights against inevitably unpopular governments. In seeking to discharge this role, lawyers have placed particular reliance upon the comfortable moral padding comprised in such instruments as United Nations covenants, and overseas bills of rights. The result has been that, while lawyers remain popular whipping boys for many societal ills, they nevertheless enjoy brief periods of public sunshine when they emerge as the opponents of the only other institution more despised than themselves, the elected government. While the entire process is not entirely cynical in its origin, it undoubtedly is substantially explained as involving the actions of a highly intelligent power elite in deflecting criticism aimed at its pursuit of its own economic and professional interests, by the stratagem of championing the cause of human rights against the very governments which would be most likely to regulate its activities by reference to the public interest.

In this sense, the High Court's new-found enthusiasm for human rights is at least partly explicable as a facet of this self-interested adaptation of lawyers to a new, more critical age. Like the remainder of the legal profession, the Court is attempting to identify a new higher ground as the coastlines of politico-legal debate change around it. Moreover, there are two related ancillary points that need to be noted here. The first, is that ever since the High Court clearly demonstrated its disinclination for federalism as a controlling constitutional concept, it was to some extent in need of a new *raison d'être*: once the High Court was out of the federalism business, it inevitably stood to lose much of its significance as a constitutional court of review, unless some other jurisprudential touchstone could be developed. The doctrine of implied rights stands to fill this void nicely.

The second point relates to the manner in which the implied rights cases have amounted to a form of personal judicial expiation for past legal careers. What is referred to here is the tendency of judges who have pursued a relatively dry and spectacularly lucrative career at the private bar, suddenly to discover a hitherto unsuspected and financially non-threatening joy in the metaphysics of

constitutional rights upon appointment to the High Court bench. This element of expiation, whereby a Judge atones for a career at the bar which was driven by the twin gods of legal positivism and fiscal security by transmogrifying into a judicial champion of the poor and oppressed when elevated to judicial office, is observable in the careers of a number of recent High Court Judges.

A truly fundamental factor in the emergence of the High Court as a judicially active exponent of individual rights has been the existence of what might be termed 'the constitutional circle'. By this is meant a broad combination of persons, pressure groups and institutions, loudly and privilegedly insistent in favour of basic constitutional change. Indeed, it would not be too unfair to say of Australia's constitutional circle that it is in favour of any constitutional change, any time, anywhere, for any reason. The circle includes a limited number of politicians, but predominantly is made up of academics, lawyers, and members of the media. The crucial point to understand about the constitutional circle is that, over the course of many years, it has been utterly thwarted in its hopes for democratic change to the Constitution. Deeply centralist, it has seen the vast majority of centrally inspired referenda fail; while, profoundly attached to concepts of human rights, it was horrified to see proposals for the recognition of such rights capsize at the 1988 referendum. The result of these disappointments has been that the constitutional circle clearly and accurately recognises that its only chance of imprinting its constitutional vision upon the shrinking flesh of the Australian people is by means of the High Court.

Consequently, the circle keeps up a barrage of encouragement to the Court to mould the Constitution in its favoured directions and, most obviously, to amend the Constitution by the insertion of guarantees of fundamental human rights. Moreover, the circle stands ready to applaud vigorously any move made in that direction by the Court, and is equally eager to vilify all opponents of judicial activism as constitutional troglodytes. There is little doubt that the existence of this supportive Greek chorus of constitutional aficionadi has been a large factor in the High Court's activism. Particularly in the case of the Mason court, there often was a strongly discernible element of the Court playing to its favoured gallery, and vying with itself to produce decisions which would be regarded as 'far-seeing', 'progressive' and 'historic', all of which adjectives seemed at one point to have been copyrighted by Sir Anthony Mason. Indeed, it surely is no coincidence that the first of the implied rights cases, and the only constitutional freedom so far fully articulated, was highly protective of the position of the mass media, and thus could be expected to (and did) earn rave reviews for a bashful High Court.

The notion of a circle is a good metaphor for this extended pressure group, because it is a group both closed and strong, in its membership as in its views. Thus, it routinely expresses a profound contempt for elected parliaments and, at least in the privacy of cocktail parties, for the electorate as a whole. It sees itself quite consciously as a constitutional elite, aware and informed of issues of which the mass of humanity are at best dimly sentient, surrounding in the manner of courtiers a High Court composed of philosopher kings. The existence of this psychological support group cannot be underestimated as a reinforcing factor in

the Court's constitutional activism. The role of constitutional academics and the law schools which they inhabit have been particularly important in this regard, providing as they do, not only direct intellectual support for the position of the Court, but also waves of graduates who have been inculcated in the view that there is no way in which the High Court properly may behave other than as a super-legislator.

Finally, we should consider the personality of the High Court Judges themselves. In a sense, this is a very obvious point, but it is one that rarely is addressed. Overwhelmingly, High Court Judges are middle-aged, extremely successful, very intelligent lawyers, who are used to deference in every aspect of their lives. Their natural habit, therefore, is to command. In purely abstract terms, it would not be surprising were such Judges to be prepared to mould the Constitution in their own image: indeed, all things being equal, one might imagine that this would be the most likely position.

Historically, though, all things have not been equal. The reason that High Court Judges have not followed more closely what might be thought to be their natural tendency towards constitutional dominance is that they have been artificially restrained by a theory of judging which anathemised progressivism, and stressed British-style judicial separation of powers and restraint. However, once these restraining factors are removed and replaced with a judicial psychology based on the example of the United States Bill of Rights and the notion that judges routinely make law, the inevitable result must be that the natural tendency of eminent lawyers to back their judgment against all others, regardless of any democratic deficit that may be involved, will out. This tendency is indeed natural enough, given that High Court Judges are powerful and powerfully opinionated people with a strong belief that they know what is best in a constitutional context, and possessed of a strong desire to enforce that perception.

It is perhaps significant to recall at this point that, in devising and enforcing human rights, High Court Judges will be exhibiting a form of 'radicalism' that is not in the least dangerous to their own personal interests. The creation of a human right by the High Court does not impose (or obviously impose) higher taxes or charges, or in any way threaten the rights and privileges of the socio-economic elites to which lawyers and judges belong. On the contrary, such radicalism can in no way (except positively) affect those who practise it, as opposed to such dangerously radical pastimes as the redistribution of wealth or massively increased social welfare. In this sense, therefore, the human rights activism of the High Court may at least partly be understood as comprising an example of that 'low cost radicalism' which the Australian middle class finds so agreeable as being both morally uplifting yet financially harmless, and which for so many years has done much to fuel debates in such areas as the environment and public education.

The overall conclusion must be that, when one combines the factors outlined above, it is not difficult to see why the High Court has moved to a position of progressivism in relation to human rights. That position has relatively little to do with any decline in the efficacy of parliament, although such considerations

probably have been a factor. Overwhelmingly, however, the Court's recent activism is explicable in terms of a desire on the part of Judges to exert power over a particular constitutional agenda. This desire is in turn chiefly explicable by the personal and professional background of the Judges; the interaction between government and judiciary in recent years; and perhaps most of all the powerful new legal intellectual influences that are at work in Australia. In whatever way one analyses these factors, one perceives the workings of power and the desire for power, not the operation of legal principle.

VII. CONCLUSION: PROGRESSIVISM IN THE FUTURE

I should say at once that I have an outstanding record as a constitutional prophet, if only because I am resolutely gloomy and pessimistic. This invariably has held me in good stead when considering the likely future directions of the High Court. My prediction in relation to the progressivism of individual rights, therefore, is that this process will continue and expand over the course of time. I accept that the onward march of progressivism has been slowed temporarily by the High Court's recent decisions in *Lange* and *Levy*, where the Court effectively confined the freedom of political communication within its existing boundaries, while steadfastly refusing to renounce it altogether. As it happens, there is no doubt that a major factor in this slowing of the advance of the Court's jurisprudence of individual rights was the intensely hostile and very public reaction to cases like *Theophanous* and *Stephens* on the part of both conservative politicians and conservative constitutionalists. Indeed, it would appear from the public utterances of some of its Judges that the Court was somewhat nonplussed by the intensity of this reaction, and had counted upon its usual circle of admirers to carry the public debate without serious discomfort to itself.

However, I have little doubt that, like a train delayed at a station, implied rights eventually will move off once more. The important point to recall here is that, once the Court has accepted the legitimacy of one vague, bogus implied right (in this case, the freedom of political communication), then most of the constitutional damage has been done. It will be relatively easy in the future for an even more adventurous Court to take up the cudgels again, and to stretch the reasoning that has been used to support the existence of this right to found further constitutional guarantees. In this sense, the wisdom of such judicial conservatives as Sir Daryl Dawson in joining in the joint judgment in *Lange* and accepting the existence of the implied freedom is open to question. Already, we have the implied freedom of political communication and its associated rights of movement and association: there is little doubt that by 2010 we will be the proud possessors of a number of other implied rights, like it or not.

Another relatively obvious prediction is that Australian constitutional federalism is in something very close to a terminal decline at the hands of the High Court. This is graphically illustrated, if further illustration were required, by the recent decision of the High Court concerning the meaning of "excise" in s 90 of the Constitution, the effect of which already has been noted. It would

seem reasonable to take the view that one effect of the intense debate over constitutional rights in recent years is that attention has been devoted to this area at the expense of federalism. Thus, those constitutional conservatives who previously had concentrated their efforts on preserving the States against a marauding High Court largely abandoned these ramparts to meet the new thrust of implied rights. It therefore comes as no surprise that the Court, in the very hour in which it has grudgingly stayed its hand on rights, has struck a new blow against federalism. The reality is that federalism in Australia has now been consigned to a constitutional issue of the second rank, and there it is likely to remain.

One highly likely and deeply troubling outcome of the High Court's progressivism is that of an eventual, massive confrontation with government. There is little doubt that if the Court continues sufficiently far along a politically intrusive path of rights jurisprudence, there eventually will come a point at which the executive (doubtless enthusiastically supported by the Court's beloved parliament) will no longer be able to tolerate its pretensions. At this point, there will be a clash between judiciary and executive over that most fundamentally political of issues, namely, which branch of government is to have the final say as to the configuration of society according to basic questions of rights. The possibility of such a clash is extremely concerning, both from the point of view of the maintenance of judicial independence, and the preservation of constitutional stability. The fear here is that the courts generally have hitherto shown themselves to be profoundly politically naive, and apparently have not grasped the simple historical truth that in a serious political fight on essentially political issues between a judge and a politician, the politician inevitably must win.

A final comment to be made concerning a relatively undiscussed aspect of the Court's judicial activism, is that the Court itself undoubtedly is in the midst of an appalling decline in its own intellectual ethics. It is beyond question that, regardless of one's constitutional politics, one now reads High Court cases not to ascertain whether their reasoning is compelling, but merely to determine whether one agrees with the substantive result. In other words, we have reached the point in constitutional cases where the reasoning in a decision essentially does not matter, so long as the conclusion is 'correct'. What this means is that we now assume the willingness and the enthusiasm of the High Court for intellectual dishonesty in a constitutional context, and care only whether that dishonesty is put to good use. The ethical implications for the entire field of law of the highest court of the land gleefully propounding a constitutional jurisprudence that consists of disingenuous justifications for recognisably political results are profound and disturbing. They illustrate, above all, that we live in an era where the operations of the High Court are a function of power and not principle. It is a matter of fundamental regret that the High Court of Australia, as an essentially political creature, believes not in the rule of law, but in the rule of a small number of lawyers.