

**THE HIGH COURT ON CONSTITUTIONAL LAW:  
THE 2012 TERM**

**EXPLANATORY POWER AND THE MODALITIES OF  
CONSTITUTIONAL REASONING†**

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**I INTRODUCTION**

In a *Harvard Law Review* foreword published in 2000, and entitled ‘The Document and the Doctrine’, Professor Akhil Reed Amar argued –putting it bluntly – that the Constitution of the United States of America ‘has often proved more enlightened and enlightening than the case law glossing it’.<sup>1</sup> Professor Amar acknowledged, of course, that the Constitution has to be interpreted by the Supreme Court, but he pointed out that some modes of interpretation focus more directly on the Constitution than others. To make the point, Amar distinguished between two broad camps, which he said transcend the divide between liberals and conservatives. The first camp, the ‘documentarians’, he argued, ‘seek inspiration and discipline’ in the Constitution’s ‘specific words and word patterns, the historical experiences that birthed and rebirthed the text, and the conceptual schemas and structures organizing the document’.<sup>2</sup> The second camp, the ‘doctrinalists’, however, ‘rarely try to wring every drop of possible meaning from constitutional text, history, and structure’; instead, ‘they typically strive to synthesize what the Supreme Court has said and done, sometimes rather loosely, in the name of the Constitution. For them, the elaborated precedent often displaces the enacted text’.<sup>3</sup>

On this admittedly broad brush analysis, it is not as if the two camps are mutually exclusive. Documentarians have to acknowledge the place of doctrine,

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1 Akhil Reed Amar, ‘The Supreme Court, 1999 Term – Foreword: The Document and the Doctrine’ (2000) 114 *Harvard Law Review* 26, 26.

2 *Ibid.*

3 *Ibid* 26–7.

not least because the document itself envisages a role for judicial exposition;<sup>4</sup> and doctrinalists have to acknowledge the fundamental role that the document must play in judicial decision-making. Documentarians must accept that, even after close examination, the document is sometimes indeterminate, and gaps must be filled by judicial doctrine. But, Amar argues, doctrinalists also have to acknowledge that judicial doctrine all too often consists of arid formulas and outlandish lines of case law which are not necessarily any more ‘edifying, inspiring or sensible’ than what is immediately indicated by the document itself.<sup>5</sup>

Professor Amar’s remarks provide a useful starting point for what I would like to address in this article. His argument is that a documentarian approach – one in which textual analysis dovetails with the study of enactment history and constitutional structure – aims at uncovering what the people meant and did when they ratified and amended the Constitution.<sup>6</sup> Although I do not quite agree with Professor Amar’s construction of who ‘the people’ exactly are (his is a unitary interpretation which, despite its sophistication, does not quite do justice to the Constitution’s federal origins, structure and purpose),<sup>7</sup> I agree generally with the kind of documentarianism that he defends. It is a documentarianism in which considerations of text, structure and history, while fundamental and essential, do not exclude but rather allow (within limits) considerations of ethical principle and purpose to play an important role in constitutional adjudication. This is because the text, structure and history of the Constitution presuppose and imply certain ethical principles and purposes – not in a ‘free-standing’ manner abstracted from the document, but in a manner disciplined through careful textual, structural and historical analysis. Judicial doctrine also has an important and legitimate place precisely because the document itself anticipates a key role for the High Court in interpreting and applying the Constitution – again, not in a way that allows doctrine to lose its grounding in the document, but in a manner controlled by the Constitution’s text, structure and history. While Professor Amar’s argument rests principally on the moral superiority of the United States Constitution as a document, what I want to propose is a somewhat different reason for approaching our constitutions in this way. And I will endeavour to do so by using some of the High Court’s decisions in 2012 to illustrate my point.

It is perhaps easiest to get to the point by drawing attention to the common observation that judges characteristically resist aligning themselves with any particular interpretive method. Indeed, as the late Justice Bradley Selway pointed

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4 See generally Akhil Reed Amar, ‘On Text and Precedent’ (2008) 31 *Harvard Journal of Law and Public Policy* 961.

5 Amar, above n 1, 27.

6 Ibid 28–9.

7 I think this is the case in relation to both the American and Australian Constitutions. Compare Akhil Reed Amar, *America’s Constitution: A Biography* (Random House, 2005) and Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009). See also Akhil Reed Amar, ‘The Consent of the Governed: Constitutional Amendment Outside Article V’ (1994) 94 *Columbia Law Review* 457 with Henry Paul Monaghan, ‘We the People[s], Original Understanding, and Constitutional Amendment’ (1996) 96 *Columbia Law Review* 121.

out, it seems that there is no consensus as to which approach to constitutional interpretation should be adopted.<sup>8</sup> Justice Susan Kenny has observed that High Court judges seem to draw on considerations of text, structure, history, ethics, prudence and doctrine as and when these sources of constitutional law and modes of constitutional reasoning seem appropriate to the case at hand.<sup>9</sup> Even the Gleeson Court, despite its supposed ‘legalism’, made ample use not only of arguments from text, structure, history and doctrine, but also took into consideration contemporary developments and practical and political considerations, as former High Court Justice Michael McHugh has demonstrated.<sup>10</sup> It is tempting in this light to conclude that the judges are (and should be) simply pragmatic about the use of the various modalities of constitutional reasoning, as Professor Philip Bobbitt has argued.<sup>11</sup> What I want to propose, however, is a more disciplined approach: one which gives primacy to the document, but which nevertheless acknowledges the role that each modality legitimately may play in constitutional reasoning. The touchstone, I will suggest, is the *explanatory power* of our interpretations.

It is a widely acknowledged duty of judges that they ought to address, fairly and fully, all of the various considerations that are relevantly submitted for their consideration in any particular case. This means that they have to consider a whole host of arguments in constitutional cases, potentially across all of the modalities of argument. While our High Court justices evidently make every effort to do this, it has to be said that there are occasions when their judgments seem to be somewhat selective, avoiding acknowledgement of the force of particular considerations that militate against the conclusions at which they wish to arrive. This becomes especially evident when particular judicial opinions are compared. Not only are the results different, but the reasoning is different, one judge emphasising a particular set of considerations, another favouring an alternative line of reasoning. And I say this, with respect, about all of the judges, whatever their dispositions, values, inclinations or approaches to the task of constitutional adjudication. Plainly, the judges recognise that there are a wide variety of considerations that can bear on an issue, but they tend to marshal the modalities of argument in different cases in different ways, sometimes in very different ways.

To put the point differently: the practice of constitutional interpretation suggests that all judges recognise as a general proposition that arguments from text, structure, history, ethics, prudence and doctrine are, in principle, admissible modes of reasoning, and that it is the task of judgment to come to a conclusion

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8 Justice Bradley Selway, ‘Methodologies of Constitutional Interpretation in the High Court of Australia’ (2003) 14 *Public Law Review* 234, 250.

9 Justice Susan Kenny, ‘The High Court on Constitutional Law: The 2002 Term’ (2003) 26 *University of New South Wales Law Journal* 210.

10 Michael McHugh, ‘The Constitutional Jurisprudence of the High Court: 1989–2004’ (2008) 30 *Sydney Law Review* 5, 21–5.

11 Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982); Philip Bobbitt, *Constitutional Interpretation* (Blackwell, 1991).

that – as far as possible – does justice to all of the considerations relevantly raised in a case. As such, the judicial practice recognises that the goal is to arrive at the best interpretation possible, based on a careful assessment of all of the modalities of argument that legitimately arise. No doubt, the judges often differ about how this should be done and about the correct result in particular cases. But the need to provide a rational response to every relevant submission is widely recognised, and it must surely be acknowledged that the more thoroughly and conclusively such submissions are dealt with in a particular judgment the better. Perhaps the complexity and intractability of the constitutional issues that get to the High Court means that there will rarely if ever be agreement about the ‘one right answer’,<sup>12</sup> but the practice nonetheless seems to affirm that the goal is to arrive at the interpretation that best accounts for as many of the relevant factors as possible. To put it in the language of theorisation: the goal is to maximise the explanatory power of the interpretation in respect of the issue or issues that have to be determined in a particular case.

If this is admitted, the question that arises is whether this implies something about how the different modes of reasoning in constitutional adjudication are most coherently combined. I think that it does. As I have argued elsewhere,<sup>13</sup> when closely analysed, there is a special relationship between arguments based on text, structure and history that is not shared by ethical and prudential arguments when these are not adequately tethered to the Constitution considered as a document. When text, structure and history are meticulously examined the findings of each inquiry tend to reinforce the others. Insights acquired through careful investigation into the historical process by which a constitution came into being, for example, often shed light on otherwise unnoticed textual details and overlooked structural relationships. Underlying principles, motivating purposes and even prudential compromises which demonstrably shaped the document are also illuminated by textual–structural–historical inquiry, and a more thorough, detailed and informed understanding of the constitution emerges as a result. But, contrary to Ronald Dworkin’s approach, which settles for a preliminary analysis of text and structure (‘fit’) at a relatively high level of abstraction,<sup>14</sup> thus leaving room for substantive normative assessment (‘justification’) to do most of the decisive work,<sup>15</sup> the kind of documentarianism that I seek to defend seeks to *maximise* our understanding of text and structure, using historical inquiry to

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12 See John Finnis, ‘On Reason and Authority in Law’s Empire’ (1987) 6 *Law and Philosophy* 357, 370–6.

13 Nicholas Aroney, ‘Towards the “Best Explanation” of the Constitution: Text, Structure, History and Principle in *Roach v Electoral Commissioner*’ (2011) 30 *University of Queensland Law Journal* 145; Nicholas Aroney, ‘Explanatory Power, Theory Formation and Constitutional Interpretation: Some Preliminaries’ (2013) 38 *Australian Journal of Legal Philosophy* (forthcoming).

14 ‘Convictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all.’: Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986) 255.

15 See Michael McConnell, ‘The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution’ (1997) 65 *Fordham Law Review* 1269, 1270.

illuminate the document – as Professor Amar put it, ‘to wring every drop of possible meaning from constitutional text, history, and structure’.<sup>16</sup>

In what follows I will seek to show how some of the High Court’s constitutional decisions in 2012 illustrate, in varying ways, precisely this set of relationships between textual, structural, historical, ethical, prudential and doctrinal reasoning.

## II THE CASES

On my tally – and much depends on one’s definitions – there were some 16 constitutional cases decided by the High Court during the 2012 term – an unusually large number.<sup>17</sup> The cases concerned a wide range of issues. There were cases on the implied freedom of political communication,<sup>18</sup> the prohibition of religious tests for public office (under section 116)<sup>19</sup> and the extent of the Commonwealth’s executive power to contract and spend money (under section 61).<sup>20</sup> There were two cases on freedom of interstate trade and commerce (under section 92),<sup>21</sup> and two cases on the acquisition of property on just terms (under section 51(xxxi)).<sup>22</sup> In addition, there were five cases about the judicial power of the Commonwealth. These cases concerned the question whether a state law altering the conditions upon which a prisoner is eligible for release on parole is an unconstitutional interference with the judicial power of the Commonwealth exercised by a state Supreme Court in relation to ‘matters’ subject to appeal under section 73;<sup>23</sup> whether a Commonwealth law retrospectively validating the registration of an employee’s organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) was an impermissible usurpation of judicial power by effectively reversing orders previously made by the Full Court of the Federal Court;<sup>24</sup> whether the power to issue mandamus to inferior courts and tribunals is a defining feature of State Supreme Courts exercising the judicial power of the Commonwealth;<sup>25</sup> and whether new evidence can be admitted in a matter that

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16 Amar, above n 1, 26–7.

17 See Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2012 Statistics’ (2013) 36 *University of New South Wales Law Journal* 514. My tally differs slightly from theirs.

18 *Wotton v Queensland* (2012) 246 CLR 1.

19 *Williams v Commonwealth* (2012) 288 ALR 410 (‘Williams’).

20 *Ibid.*

21 *Betfair Pty Ltd v Racing New South Wales* (2012) 286 ALR 221; *Sportsbet Pty Ltd v New South Wales* (2012) 286 ALR 404.

22 *Phonographic Performance Co of Australia Ltd v Commonwealth* (2012) 246 CLR 561; *JT International SA v Commonwealth* (2012) 291 ALR 669.

23 *Crump v New South Wales* (2012) 247 CLR 1.

24 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117.

25 *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* (2012) 289 ALR 1.

arises out of the High Court's original jurisdiction under section 76(ii) in relation to appeals from the Supreme Court of Nauru.<sup>26</sup>

Several other cases were largely about other areas of law, but had a constitutional aspect or significance. These cases dealt with foreign state immunity and its intersection with the external affairs power (under section 51(xxix)),<sup>27</sup> the jurisdiction of the Family Court to make property settlement orders and its intersection with the Commonwealth's marriage and matrimonial causes power (under section 51(xxi) and (xxii)),<sup>28</sup> and the reception within Australia of the common law rule concerning whether a husband could be guilty of raping his wife.<sup>29</sup> There were also two administrative law cases that involved constitutional issues arising in connection with the *Migration Act 1958*.<sup>30</sup> One of them concerned the question whether the *Migration Regulations 1994* (Cth) ('*Migration Regulations*') were consistent with the Act;<sup>31</sup> the other concerned the discretion of the Minister for Immigration and Citizenship to intervene personally in relation to the granting of visas.<sup>32</sup>

Across this wide range of cases, arguments from text, structure, history, ethics, prudence and doctrine were addressed by all the judges in one way or other. But they were not always addressed in the same way by all of the judges in the same case, or in the same way by the same judge in all of the cases. In some of the judgments much turned on the significance accorded to a particular word or phrase; in others it did not.<sup>33</sup> In some cases it was a judge's interpretation of a structural feature<sup>34</sup> or an underlying principle or policy<sup>35</sup> that marked one judgment off from another. Sometimes the Constitution's enactment history was deemed significant.<sup>36</sup> At other times it was the application of an established doctrinal formula in accordance with the decided cases that was decisive.<sup>37</sup>

Two decisions from 2012 especially stood out for combining several different modes of reasoning in the one case. Not by coincidence, they were also the two

26 *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561.

27 *PT Garuda Indonesia Ltd v Australian Competition & Consumer Commission* (2012) 290 ALR 681.

28 *Stanford v Stanford* (2012) 247 CLR 108.

29 *PGA v The Queen* (2012) 245 CLR 355.

30 (Cth) ('*Migration Act*').

31 *Plaintiff M47/2012 v Director-General of Security* (2012) 292 ALR 243 ('M47').

32 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

33 *M47* (2012) 292 ALR 243, 271 [90] (Gummow J), 310–11 [264], 319 [283] (Heydon J); *JT International SA v Commonwealth* (2012) 291 ALR 669, 684–5 [42] (French CJ), 697–700 [109]–[118] (Gummow J), 709 [164] (Hayne and Bell JJ), 716 [194] (Heydon J), 735 [278] (Crennan J), 757 [355] (Kiefel J).

34 *Wotton v Queensland* (2012) 246 CLR 1, 23–4 [54] (Heydon J), 31 [80] (Kiefel J).

35 *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561, 571–2 [28]–[29] (French CJ, Gummow, Hayne and Bell JJ), 577–9 [52]–[55] (Heydon J); *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* (2012) 289 ALR 1, 17–18, [63]–[65] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 24–5 [86]–[88] (Heydon J).

36 *Williams* (2012) 288 ALR 410, 424–33 [40]–[61] (French CJ), 451 [125], 458 [157] (Gummow and Bell JJ), 467 [194] (Hayne J), 503–06 [346]–[354] (Heydon J), 554 [561], [563] (Kiefel J), 550 [541]–[542] (Crennan J); *Saraceni v Jones* (2012) 246 CLR 251, 256 [2] (Gummow, Hayne and Bell JJ).

37 Compare the judgments of Heydon J with those of the other judges in *Wotton v Queensland* (2012) 246 CLR 1; *Betfair Pty Ltd v Racing New South Wales* (2012) 286 ALR 221; *Sportsbet Pty Ltd v New South Wales* (2012) 286 ALR 404.

longest ones. In the first of them, *Plaintiff M47/2012 v Director General of Security* ('M47'), the central issue concerned an administrative law question about whether regulations made under the *Migration Act* were consistent with the Act. The second of the two cases, *Williams*, was more squarely concerned with constitutional issues, in particular the scope of the Commonwealth's power to enter contracts and spend money. Although M47 was not strictly a constitutional case, it bears some remarkable parallels with *Williams* in several important respects, essentially because both cases involved the problem of interpreting the relevant legal document (statute or constitution) in a manner that gave due consideration to its text, structure, history and purposes, as well as the relevant case law. M47 and *Williams* are each instructive examples about the way in which all of the modalities of constitutional argument are most coherently combined in one particular case.

In what follows I will seek to show how the High Court's reasoning in these two cases illustrates, in varying ways, how judges not only make use of textual, structural, historical, ethical, prudential and doctrinal arguments, but how these six modalities of argument are most coherently combined. I will argue that the touchstone is the explanatory power of the interpretation.

### III PLAINTIFF M47

The *Migration Act* provides that a person may be granted a protection visa if, among other things, the person is found to be a refugee within the meaning of the *Convention Relating to the Status of Refugees*.<sup>38</sup> The *Migration Regulations 1994*<sup>39</sup> impose an additional requirement, however, namely that the applicant not be the subject of an adverse Australian Security Intelligence Organisation ('ASIO') security assessment.<sup>40</sup> The plaintiff, a Sri Lankan national who had been a member of the Tamil Tigers, had been found to be a refugee in 2010 on the ground that he had a well-founded fear of persecution in Sri Lanka. However, he was also the subject of an adverse ASIO security assessment, and his application for a protection visa was refused on that basis.

In response, the plaintiff commenced proceedings in the original jurisdiction of the High Court. His initial goal, it seems, was to challenge his continued detention under the Act on the ground that he was entitled to refugee status under the *Refugees Convention* notwithstanding the adverse ASIO security assessment, that he had been denied procedural fairness, and that his continued detention for what would amount to an indefinite period under the Act was unconstitutional, notwithstanding the Court's decision in *Al Kateb v Godwin*.<sup>41</sup> During the course

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38 *Migration Act* ss 5, 36. *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1 ('*Refugees Convention*').

39 (Cth) ('*Migration Regulations*').

40 *Migration Regulations* sch 2 cl 866.225(a), sch 4 cl 4002.

41 (2004) 219 CLR 562.

of the proceedings the plaintiff added a further ground of challenge, which was that the regulations under which the ASIO assessment was made were inconsistent with the *Migration Act*. Ironically, it was on this additional ground alone that the plaintiff was legally successful, but not practically to his benefit, because his lack of success on the other grounds meant that his continuing detention was held by the majority to be lawful.

The question of whether the *Migration Regulations* were consistent with the Act, as Hayne J noted, bore some limited resemblance to questions of inconsistency between federal and state laws under section 109 of the Constitution.<sup>42</sup> Two sections in the *Migration Act* confer the power to make regulations. Section 31(3) of the Act provides that the regulations may ‘prescribe criteria’ for the issue of a visas, including protection visas, while section 504(1) further stipulates that regulations which are ‘required or permitted’ by the Act must not be ‘inconsistent’ with it. When the *Migration Regulations* were first made in 1994, they included national security assessment criteria, including the requirement that an applicant not be assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security.<sup>43</sup> In 2005, it was further specified that ASIO was the agency that would undertake the security assessment.<sup>44</sup> Was this additional criterion consistent with the *Migration Act*? There was no particular provision in the Act with which the ASIO security assessment was directly inconsistent. The question therefore was, as Hayne J put it, whether the regulation ‘altered, impaired or detracted from’ the provisions of the *Migration Act* in a broader sense.<sup>45</sup> In other words, the Court had to consider whether the *Migration Regulations* was consistent with the design of the *Migration Act* as a whole – a task which is not unlike that which the Court has to do when it is asked to interpret the Constitution in terms of its text, structure and overall purpose, particularly in section 109 cases.

The core of the argument for inconsistency was that the *Regulation* effectively shifted the power of assessing applications for protection visas from the Minister to ASIO, in circumstances where the Minister’s assessment of the applicant’s ‘character’ was to be made by reference to criteria in the *Refugees Convention*<sup>46</sup> and was subject to merits review on that basis,<sup>47</sup> whereas ASIO’s assessment was to be made on the ground of its own wider and more far-reaching criteria<sup>48</sup> without any opportunity for review of the substantive merits of the assessment.<sup>49</sup> It was argued that the additional criterion of an ASIO security

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42 *M47* (2012) 292 ALR 243, 280 [134] (Gummow J), 290 [174] (Hayne J); see also 327–8 [318] (Heydon J).

43 *Migration Regulations* sch 2 cl 866.225(a), sch 4 cl 4002.

44 *Migration Amendment Regulations 2005 (No 10)*, sch 3 Item [2].

45 *M47* (2012) 292 ALR 243, 290 [174] (Hayne J).

46 *Migration Act* s 501(1).

47 *Migration Act* s 500(1)(c)(i).

48 *Australian Security Intelligence Organisation Act 1979* (Cth) s 4 (definition of ‘security’); see also s 17(1)(c) (‘functions’) and s 37(1) (‘security assessments’).

49 For a succinct summary, see *M47* (2012) 292 ALR 243, 368 [484] (Bell J).



assessment was thus inconsistent with the scheme of the *Migration Act* as an interconnected whole.<sup>50</sup>

On this question, a majority of French CJ, Hayne, Crennan and Kiefel JJ held that the *Migration Regulations* were inconsistent with the *Act* and therefore invalid.<sup>51</sup> A minority of Gummow, Heydon and Bell JJ held that the *Migration Regulations* were not inconsistent,<sup>52</sup> and Gummow and Bell JJ further concluded that in the circumstances the plaintiff could not be kept in detention indefinitely (as appeared likely), notwithstanding the High Court's contrary decision in *Al-Kateb v Godwin*. Despite their different conclusions on these points, all of the justices in one way or another reasoned on the basis of the text, structure and purposes of the *Migration Act* and, in seeking to understand the scheme of the *Act*, drew extensively on its enactment history and the decided cases. This much, of course, is not very remarkable. But it is the *combination* of these arguments that I think is worth noticing.

### A The Majority

Because there was no direct inconsistency between a specific provision of the *Migration Act* and the *Migration Regulations*, it was incumbent on the plaintiff to show that they were inconsistent with the scheme of the *Act* as a whole. One has only to scan the *Migration Act*, however, to see that it is an immensely complex document, showing marks of numerous sets of amendments enacted in response to the ever shifting tides of government policy. How, then, is one to identify the 'scheme' of the *Act* in the first place? For French CJ and Crennan J, it was significant that the *Migration Act* had previously been described as providing for:

an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol.<sup>53</sup>

To summarise the *Migration Act* in this way is to draw together at least three distinct elements: an array of 'provisions', a conception of those provisions as an interconnected 'set', and an account of those provisions as being directed to an identifiable 'purpose'. The underlying assumption seems to be that the text, structure and purpose of the statute are best understood in mutually reinforcing terms. It is to suggest, in other words, that it is possible to make sense of the statute's most specific textual details, its broadest structural features and its motivating regulatory purposes only by reading them together as a coherent whole.

How are we to assess the rational persuasiveness of a claim like this? Firstly, it seems there is the *specificity* of the explanation. To what level of textual detail

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50 Ibid 246 [3] (French CJ); 278 [122] (Gummow J); 290 [175] (Hayne J), 323 [298] (Heydon J); 353–4 [421], 356 [434] (Kiefel J).

51 Ibid 267 [71] (French CJ), 301 [221] (Hayne J), 348 [399] (Crennan J), 361–2 [456]–[459] (Kiefel J).

52 Ibid 281 [138] (Gummow J), 330 [327] (Heydon J), 369 [490] (Bell J).

53 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 339 [27], cited in *M47* (2012) 292 ALR 243, 248–9 [12] (French CJ), 344 [381] (Crennan J).

is the interpretation capable of offering an explanation? How well can it explain particular sentences, phrases and words used in the statute? Secondly, there is the *generality* of the explanation. What range of structural relationships between provisions is it capable of explaining? How well can it account for the existence and interconnection between the various sections, divisions and parts of the statute as an operating whole? The purposes of a statute are meant to be secured by the combined operation of its many provisions. Those purposes are most coherently and effectively achieved when the operation of each section plays a practically coordinated role with all of the others. Correctly identifying the purpose or purposes of a statute can thus help to clarify the role meant to be played by each provision as well as the operation intended for all of the provisions operating as an interconnected whole.

Establishing the centrality of the *Refugees Convention* to the *Migration Act* was an important step in the plaintiff's argument. There was no question that one of the criteria for the grant of a protection visa under section 36(2) is that Australia has protection obligations to the applicant under the *Convention*. What the plaintiff also needed to show was that the Minister's assessment of a visa applicant's 'character' was also to be made by reference to *Convention* criteria. The difficulty was that section 501 did not say this explicitly. The best that could be said was that sections 500(1)(c), 502 and 503, by referring to ministerial decisions to refuse to grant protection visas 'relying on' the disentitling criteria in articles 1F, 32 or 33(2) of the *Convention*, implied that this was the case. If this could be established then it became much easier to assert that the additional ASIO assessment introduced by the *Migration Regulations* was inconsistent with the general purpose and scheme of the *Migration Act*.

To support the proposition that the *Migration Act* constitutes an integrated set of provisions directed to the implementation of the *Refugees Convention* the Chief Justice engaged in a very detailed analysis of the text, structure, objectives and legislative history of the relevant statutory provisions,<sup>54</sup> read in the light of the *Refugees Convention*.<sup>55</sup> Indeed, his Honour engaged in this analysis *before* even turning to a discussion of the regulation-making power<sup>56</sup> and the regulations made under the *Migration Act*.<sup>57</sup> The other members of the majority reasoned similarly, with extensive references to the specific provisions of the *Act*, the structural relationships between those provisions and the *Act's* general purpose of giving effect to Australia's international obligations.<sup>58</sup> In this respect, two principles of statutory interpretation previously articulated in *Project Blue Sky*

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54 *M47* (2012) 292 ALR 243, 256–62 [33]–[52] (French CJ).

55 *Ibid* 248–56 [11]–[32] (French CJ).

56 *Ibid* 262–3 [53]–[56] (French CJ).

57 *Ibid* 263–4 [57]–[61] (French CJ).

58 *Ibid* 288–301 [167]–[220] (Hayne J), 344–8 [381]–[399] (Crennan J), 353–60 [416]–[452] (Kiefel J).

*Inc v Australian Broadcasting Authority*<sup>59</sup> were thought important by all members of the Court.<sup>60</sup> The first principle was that:

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.<sup>61</sup>

The second was described as the ‘known rule in the interpretation of Statutes that ...’:

such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.<sup>62</sup>

Read together, these principles suggest that the ideal interpretation is one which offers a complete and coherent explanation for every aspect of a statute, from its most specific and minute details through to its most general and encompassing structures and motivating purposes. Not even the smallest part is to be presumed to be redundant or insignificant, and all of the provisions put together are expected to form a coherent unity and to give effect to harmonious goals.

On the reasoning of the majority, the argument around sections 500(1)(c), 502 and 503 provided a prime example of the operation of these principles. Close attention to the exact wording of these provisions reveals that embedded in them are references to articles 1F, 32 or 33(2) of the Convention that need to be explained. If these articles are *not* grounds for the refusal of a protection visa in terms of the ‘character test’ under section 501(1), then why do they appear in each of these three sections? It is not sufficient, the majority reasoned, to hypothesise that they are the result of a mistake. Interpreted in the light of the overarching purpose of the *Migration Act* to give effect to Australia’s international obligations, the best explanation of their existence, so the argument went, is that they are evidence of the intention of the legislature that the criteria in articles 1F, 32 or 33(2) constitute grounds for the refusal of a protection visa, even though those grounds are not explicitly referred to in the operative words of section 501.<sup>63</sup>

Whatever we may think of this argument, the standard according to which its soundness is to be evaluated seems clear: text, structure, purpose and history are

59 (1998) 194 CLR 355 (*‘Project Blue Sky’*).

60 *Ibid* 259 [41] (French CJ), 286–7 [162], 287 [164], 289–90 [172], 294–5 [193] (Hayne J), 344–5 [382] (Crennan J), 353–4 [421], 360 [450] (Kiefel J).

61 *Project Blue Sky* (1998) 194 CLR 355, 381–2 [70] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted).

62 *Ibid* 382 [71], citing *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ), citing *R v Berchet* (1688) 1 Show KB 106.

63 *M47* (2012) 292 ALR 243, 256 [31], 258–9 [36]–[42] (French CJ), 287–8 [165]–[166], 292 [183], 294–5 [193]–[194], 297–8 [206] (Hayne J), 346–7 [391] (Crennan J), 353–4 [421], 357–8 [440]–[441], 360 [450]–[452] (Kiefel J).

all relevant, and it is in the rational integration of these modalities of reasoning that an interpretation ought to be assessed.

## B The Minority

Arguments from text, structure and purpose, as well as history and doctrine, were also prominent in the minority judgments.

Indeed, probably the most striking use of close textual reasoning in the case was the way in which the dissenting judges, Gummow, Heydon and Bell JJ, drew attention to the unusual wording of section 36(2) of the *Migration Act*, which somewhat awkwardly begins with the following words: ‘A criterion for a protection visa is that the applicant for the visa is ...’. Justice Gummow pointed out that the *Act* thus refers to ‘[a] criterion’ – not ‘the criterion’ – for the grant of a protection visa,<sup>64</sup> and concluded that ‘[i]t is plain from the terms of the section that s 36(2) ... does not purport to cover “completely and exclusively” the criteria for the grant of a protection visa’.<sup>65</sup> Justice Heydon similarly observed that the use of the indefinite article suggests the presence of additional criteria,<sup>66</sup> with the implication that the existence of a protection obligation is a necessary but not a sufficient condition for the grant of a protection visa pursuant section 36(2).<sup>67</sup> Justice Bell did not explicitly refer to the use of the indefinite article, but she similarly noted that section 36(2)(a) sets out ‘a criterion for the grant of a protection visa’, leaving room for the specification of ‘[a]dditional criteria’ in the regulations.<sup>68</sup>

The exact wording of section 36(2) was a textual feature of the *Act* for which the plaintiff’s preferred interpretation did not provide a convincing explanation. The minority judgments drew attention to this and other anomalies in the plaintiff’s proposed construction of the *Act*. Justice Bell, for example, pointed out that, contrary to the plaintiff’s argument, the *Migration Act* does not contain any ‘express power’ to refuse to grant a protection visa ‘relying on’ articles 1F, 32 or 33(2).<sup>69</sup> At best, she suggested, the references to articles 32 or 33(2) in sections 500, 502 and 503 had been inserted out of an abundance of caution and had only an ‘epexegetical’ purpose.<sup>70</sup> This close attention to textual detail was also an important characteristic of Justice Gummow’s and Justice Heydon’s reasoning. For Gummow J, in particular, the whole case turned on whether the *Migration Regulations* were literally ‘inconsistent’ with the *Migration Act*. As his Honour put it: ‘it is the strong term “inconsistent” in s 504(1) which controls the

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64 Ibid 271 [90] (Gummow J) (emphasis added).

65 Ibid [136] (Gummow J) (citations omitted).

66 Ibid 319 [283] (Heydon J).

67 Ibid 310–11 [264], 316–17 [279] (Heydon J).

68 Ibid 362–3 [464] (Bell J).

69 Ibid 366 [477] (Bell J).

70 Ibid 367 [479] (Bell J), quoting *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, 179 [57] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

relationship between the statute and delegated legislation, not the need, if possible, to give an harmonious operation to a statute as a whole.<sup>71</sup>

The dissenting judges also presented an alternative account of the *Migration Act* as an integrated whole. Justice Heydon especially drew attention to the way in which the text and structure of *Migration Act*, read in the light of its enactment history, work together to secure the *Act*'s explicitly stated purposes. The stated objective of the *Migration Act*, he pointed out, is to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens', and the statutory means adopted to achieve this objective is to provide 'for visas permitting non-citizens to enter or remain in Australia', the intent of the Parliament being that the *Act* 'be the only source of the right of non-citizens to so enter or remain'.<sup>72</sup> Numerous sections of the *Act* combine to achieve this objective he went on to observe. The *Act* provides for several types of visas and stipulates criteria for the grant of each one, including protection visas. Section 36(2), as noted, implies that additional criteria may be added to those that it stipulates; section 31(3) plainly says that this can be done by regulation; and section 65(1) makes clear that the Minister is to decide whether to grant or refuse to grant a visa depending on whether the stipulated criteria, including criteria prescribed by regulation, are satisfied.<sup>73</sup> These three provisions, Heydon J reasoned, create an 'exhaustive' scheme intended to eliminate any possibility that a non-citizen without a visa may be entitled to remain within Australia. As the relevant Explanatory Memorandum explains, 'the general principle of the legislation' is that 'the visa should be the basis of a non-citizen's right to remain in Australia lawfully'.<sup>74</sup>

Justice Heydon was also able to point to decided cases which supported this view of the legislation as a whole, most prominently *Al-Kateb v Godwin*, where it had been observed that the objective of the migration scheme was to provide for the 'mandatory detention of unlawful non-citizens ... regardless of whether the person concerned was seeking permission to remain in Australia (whether as a refugee or otherwise)'.<sup>75</sup> Justice Heydon concluded that the 'plaintiff's argument that some unlawful non-citizens cannot lawfully be detained or removed would leave a hole in the statutory scheme'.<sup>76</sup> On his Honour's reasoning, arguments from text, structure, purpose, history and judicial doctrine *combined* to defeat the plaintiff's submissions in this respect.

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71 Ibid 270 [86] (Gummow J) (emphasis added), citing *Project Blue Sky* (1998) 194 CLR 355, 381–382 [70]. See also *M47* [2012] HCA 46 [91], [122] (Gummow J)

72 *Migration Act*, s 4(1)–(2), cited in *M47* (2012) 292 ALR 243, 310–11 [264] (Heydon J). Justice Bell similarly drew attention to Australia's 'sovereign right to determine which persons ... will be permitted to enter and reside within its territory': *M47* (2012) 292 ALR 243, 368–9 [487] (Bell J).

73 *M47* (2012) 292 ALR 243, 310–11 [264] (Heydon J).

74 Explanatory Memorandum, Migration Reform Bill 1992, Migration (Delayed Visa Applications) Tax Bill 1992, 18 [27], cited in *M47* (2012) 292 ALR 243, 312 [269] (Heydon J).

75 *Al-Kateb v Godwin* (2004) 219 CLR 562, 633–4 [207], quoted in *M47* (2012) 292 ALR 243, 312–13 [269] (Heydon J).

76 *M47* (2012) 292 ALR 243, 313 [269] (Heydon J).

### C Assessment

I hesitate to express any finally concluded view as to which interpretation of the *Migration Act* is to be preferred. What I principally want to draw attention to is the way in which the reasoning of both the majority and the minority drew on considerations of text, structure and purpose, and how it is in the rational integration of all of these modalities of reasoning that the soundness of the competing interpretations is best assessed. There is, however, an element of complexity and technicality in the majority judgments that was not so apparent in those of the minority. Indeed, the minority judgments seemed to display a degree of simplicity, clarity and decisiveness that simply was not there in the judgments of the majority. Why is this so? Part of the reason must lie in the labyrinthine character of the *Migration Act* itself. However, all of the judges had to grapple with this. Another important part of the explanation, I suggest, lies in what it means for an interpretation to have explanatory power. For the explanatory power of a theory rests, not only on the specificity and generality of its descriptive explanations, but also on its simplicity or elegance. An elegant theory is one which relies on a relatively small and simple set of hypotheses or concepts to provide an explanation of data.<sup>77</sup> The explanatory power of a theory is maximised as the explanatory concepts are reduced while the data that is explained is increased. There is an unavoidable trade-off between simplicity and descriptiveness such that, when confronted by one theory that is highly intricate but which purports to explain a lot of data and another theory that is simpler and more elegant but which describes relatively less, it may be difficult to decide between the two. But when two theories offer explanations of similar ranges of data, one of which is simpler and more elegant, we regard the simpler one as having more explanatory power and as being preferable for this reason.

I was reminded of this as I read the judgments in *M47*. Those of the majority, for all the explanations of the technical details of the *Migration Act* that they offered, remained highly complex and at times almost impenetrably intricate and obscure. Those of the minority, on the other hand, although they offered explanations for many of the same technical details, seemed simple, clear and unambiguous by comparison.

If this is so, does it make the minority interpretation preferable? I think, on balance, that it does. When a document is interpreted through close and careful textual and structural analysis, and when it is read in the light of its intended purposes as illuminated by its enactment history, an interpretation of greater explanatory power is more likely to arise than when these insights are subordinated to a desire to turn the meaning of the document towards an outcome that is preferred for reasons external to it. No doubt, the *Migration Act* reflects an intention to implement at least some aspects to the *Refugees Convention*, but as Gummow J pointed out, provisions of the *Convention* were implemented only

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<sup>77</sup> Alan Baker, 'Quantitative Parsimony and Explanatory Power' (2003) 54 *British Journal for the Philosophy of Science* 245. I explain this in more detail in Aroney, 'Explanatory Power', above n 13.

selectively by the Parliament.<sup>78</sup> A more convincing characterisation of the *Migration Act* as a whole is one which gives due regard to the stated objectives of the *Act* and the way in which the text and structure of the *Act* give effect to those objectives, as Justice Heydon's dissenting judgment, I think, demonstrated.

#### IV WILLIAMS V COMMONWEALTH

*Williams* concerned a challenge to Commonwealth payments made to a state school pursuant to a funding agreement between the Commonwealth and Scripture Union Queensland, an agency contracted to provide chaplaincy services as part of the Commonwealth's National School Chaplaincy Program. The two constitutional grounds of the challenge were, first, that the formation of the contract and the expenditure of the money were beyond the executive power of the Commonwealth and, second, that the arrangement was contrary to the Constitution's prohibition on the imposition of a religious test as a qualification for any office or public trust under the Commonwealth. This latter submission was disposed of shortly by the Court on the ground that the Chaplaincy Program did not involve the establishment of a public office. The Executive's power to contract and spend was the main and most difficult issue that had to be considered by the Court.

In *Pape v Federal Commissioner of Taxation*, the Court had held that an appropriation under sections 81 and 83 of the Constitution does not confer substantive spending power and that the power to expend appropriated moneys must be found elsewhere in the Constitution or authorised by statute.<sup>79</sup> In *Williams*, however, no such authorising law had been enacted by the Parliament, so the question was whether the power to spend and to enter contracts might be an aspect of the executive power of the Commonwealth quite apart from specific legislative authorisation.<sup>80</sup> The Commonwealth made two principal submissions in this respect. The first and broader submission was that the executive power to spend is essentially unlimited; the second and narrower one was that, in the alternative, the executive power at least extends to all matters in respect of which the Parliament is able to legislate.

A majority of the Court (French CJ, Gummow and Bell JJ and Crennan J) rejected both the broader and the narrower submissions of the Commonwealth. They held that the executive power is not of itself sufficient to support a general capacity to contract and spend, with the result that the entry into the funding agreement and the making of the payments was unconstitutional. Justices Hayne

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78 See *M47* (2012) 292 ALR 243, 278 [123] (Gummow J).

79 (2009) 238 CLR 1, 55 [111] (French CJ), 73–4 [178]–[183] (Gummow, Crennan and Bell JJ), 113 [320] (Hayne and Kiefel JJ), 210–13 [600]–[607] (Heydon J) ('*Pape*'); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169 [41] (French CJ, Gummow and Crennan JJ).

80 *Williams* (2012) 288 ALR 410, 412–13 [2] (French CJ), 443 [90] (Gummow and Bell JJ), 537 [480] (Crennan J).

and Kiefel, who agreed that the payments were unconstitutional, also rejected the broader submission but considered it unnecessary to determine the correctness of the narrower one, having found that there was no relevant head of power under which authorising legislation could validly have been enacted. Justice Heydon dissented on the ground that the Commonwealth's power to legislate with respect to 'benefits to students' under section 51(xxiiiA) of the Constitution provided the necessary basis for the contracting and spending. His reasoning was in a sense the mirror image of Justices Hayne and Kiefel's: he accepted the narrower submission and found it unnecessary to determine the broader one.

### A Text and History

Although the question before the Court involved what might be regarded as a fairly mundane and uncontroversial operation of government, it raised several theoretical and interpretive questions of the highest significance and gave rise to sharply divided opinions among the judges on these fundamental points. Part of the reason for the difficulty of the issue was that the text of section 61 provides only limited guidance as to the scope of the executive power, which it describes in the following terms:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

While it seems at least clear that the executive power includes the power to execute and maintain Commonwealth laws, because the Commonwealth had established the Chaplaincy Program entirely by administrative means, constitutional authority to contract and spend had to be found in some other aspect of the executive power. The Chaplaincy Program could not be said to involve the execution or maintenance of the Constitution itself, so the only remaining possibilities were the historic prerogatives and capacities of the Crown, or some other necessarily implied power.

The prevailing understanding of the scope of Commonwealth executive power prior to *Williams* is most easily explained by reference to its so-called 'depth' and 'breadth'.<sup>81</sup> In relation to its 'depth', the executive power was widely thought to include not only the historic prerogatives of the Crown, but also the 'capacities' that the Crown has in common with other entities having legal or juristic personality, such as natural persons and corporations.<sup>82</sup> In relation to its 'breadth', it was also thought that the executive power of the Commonwealth could at least be exercised with respect to the topics about which the Parliament is authorised to make laws, and it might even be exercisable 'at large' (hence the

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81 George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) chs 2 and 3. On the utility of these concepts after *Pape* and *Williams*, see Peter Gerangelos, 'The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, "Nationhood" and the Future of the Prerogative' (2012) 12 *Oxford University Commonwealth Law Journal* 97.

82 Winterton, above n 81, 44–7.



Commonwealth's 'broad' and 'narrow' submissions, referred to above).<sup>83</sup> Both of these propositions seemed to be potentially relevant in *Williams*: the first because the contracting and spending was not specifically authorised by any law, the second because, not only had no legislation been enacted, but there was doubt whether the Chaplaincy Program fell within any of the Commonwealth's heads of legislative power in the first place.

The incorporation of the prerogative as part of the Commonwealth's executive power has its textual foundation in the fact that the power is vested in the Queen,<sup>84</sup> and is further supported by abundant evidence that the framers intended that the prerogatives apply, subject to the Constitution.<sup>85</sup> But does the executive power include, apart from the prerogative narrowly understood, the ordinary capacities to contract and spend that the Queen has in common with natural persons? The back story to this question concerns the old common law theory of the 'King's two bodies'.<sup>86</sup> According to this theory, the King possesses two 'bodies', a 'natural body' and a 'body politic'. Each of these two bodies (or persons) has certain attendant legal powers: the ordinary juristic capacities of a natural person, and the special powers of the Crown as a 'corporation sole' which is representative of the body politic as a whole.

How much of this ancient theory of the common law is to be taken as presupposed and implied by the Australian Constitution? By holding, in the result, that the executive power does not include the ordinary legal capacities of a natural person, the majority in *Williams* went a long way towards rejecting the whole idea of the 'two bodies' in favour of an alternative conception of the corporate identity of the body politic. This was most explicit in the judgment of Hayne J, who was highly critical of the 'anthropomorphism' implicit in the idea that the executive power includes the capacities of a natural person.<sup>87</sup> But it was also present in the judgments of the other members of the majority, who rejected the view that the Commonwealth, considered as a legal entity, could simply be identified with the Executive. Rather, they insisted, the relevant legal personality is that of the entire body politic of the Commonwealth, the governing powers of

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83 Ibid 30.

84 The investiture is expressed, notably, in the indicative rather than the imperative mood: see *Williams* (2012) 288 ALR 410, 428–9 [50] (French CJ), citing Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 64. See also, *Australian Constitution* s 74.

85 See, eg, Inglis Clark, above n 84, 5–6; John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 389–90, 406, 702, 707, 710; W Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1<sup>st</sup> ed, 1902) 219–21.

86 William Maitland, 'The Crown as Corporation' in Herbert Albert Laurens Fisher (ed), *The Collected Papers of Frederic William Maitland* (Cambridge University Press, 1911) vol 3, 244. For a longer study, see Ernst H Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press, 1957).

87 *Williams* (2012) 288 ALR 410, 470–1 [204]–[206], 474 [215]–[217] (Hayne J).

which are exercised by the three branches of government, of which the Executive is only one.<sup>88</sup>

The interpretation adopted of the majority was thus highly ‘republican’ in the sense detected by Justice Selway some years ago.<sup>89</sup> This was not only because it turned against the old common law idea of the King’s two bodies, but because it affirmed one of the fundamental assumptions of the American version of Montesquieu’s theory of the separation of powers: namely, that the body politic governs itself through three separate branches of government, no single one of which can claim to embody or represent the entire polity in itself.<sup>90</sup> This does not necessarily mean that the *Williams* decision is republican in a sense that would deny the possibility of a ‘Crowned republic’, for it leaves open the idea, as Frederick Maitland pointed out, of a ‘Commonwealth’ over which there is a monarch who reigns,<sup>91</sup> even if she does not also rule.<sup>92</sup> But as an interpretation of section 61, it coheres with a theory of the Constitution which treats the structural separation of powers as more decisive than its common law background.

According to this ‘republican’ reading of the Constitution, although the Commonwealth can act only through the operation of one or more of its branches of government, it is the Commonwealth itself which is the underlying juristic person that so acts. This suggests that while the particular operations of the Executive, the Parliament and the courts have to be distinguished, they must not be understood in a manner that is wholly independent of each other, for a reading of the Constitution as a means of controlling the exercise of governmental power envisages the distinct branches of government as the means by which the Commonwealth’s powers are not only exercised and balanced, but also regulated and checked.<sup>93</sup> On this view, it became very relevant for the majority judges to take into consideration the way in which the Constitution regulates the activities of the three branches of government in relation to each other. The exercise of executive power, in other words, needed to be interpreted and assessed in relation to the exercise, in particular, of legislative power.

## B Structure and Principle

The relationship between the Parliament and the Executive in the Constitution is a complex one, as the majority judgments amply demonstrated.<sup>94</sup> Several provisions contained in Chapters I and II of the Constitution bear on the relationship, which can only be understood adequately through a close and

88 Ibid 416 [21] (French CJ), 457–8 [153]–[154] (Gummow and Bell JJ), 545 [516], 550–1 [544] (Crennan J). Cf *Sue v Hill* (1999) 199 CLR 462, 498 [84]–[85] (Gleeson CJ, Gummow and Hayne JJ).

89 Bradley Selway, ‘All at Sea – Constitutional Assumptions and “the Executive Power of the Commonwealth”’ (2003) 31 *Federal Law Review* 495.

90 James Madison, ‘Federalist No. 47’, in Clinton Rossiter (ed), *The Federalist Papers* (New American Library, 1961).

91 Maitland, above n 86, 253, citing Sir Thomas Smith’s *De republica Anglorum* (1583).

92 Vernon Bogdanor, ‘The Monarchy and the Constitution’ (1996) 49 *Parliamentary Affairs* 407, 407.

93 *Williams* (2012) 288 ALR 410, 541 [496] (Crennan J).

94 Ibid 416 [21] (French CJ), 443 [89], 458 [155] (Gummow and Bell JJ), 474–5 [219]–[220] (Hayne J), [487], 544–5 [511]–[517] (Crennan J).

careful analysis of the Constitution's text, structure, history, principles and purposes. The most obvious structural principle that shapes the relationship concerns the institution of parliamentary responsible government, the basic principle of which is that executive power is exercised by the Governor-General on the advice of Ministers who are responsible to the Parliament. The principle is put into practice through numerous conventions which control and shape the exercise of executive power. As the majority judgments pointed out, these conventions are also supported by several provisions of the Constitution which require, among other things, that Ministers become members of Parliament within three months of appointment (section 64), that revenues must form one consolidated fund (section 81) and that the Executive is not able to appropriate moneys from consolidated revenue without parliamentary approval (section 83).<sup>95</sup> Perhaps the most fundamental principle of them all, however, is implied rather than explicitly stated in the Constitution: namely, the supremacy of Parliament over the Executive, for it is axiomatic that laws enacted by the Parliament, provided they are consistent with the Constitution, are binding on the Crown. These and other features of the constitutional system combine to ensure what Gummow and Bell JJ called the 'basal assumption of legislative predominance' and what Hayne J called 'the cardinal principle of parliamentary control' over the Executive.<sup>96</sup>

In a real sense, the underlying question in *Williams* was whether the requirement of parliamentary approval of the appropriation of moneys exhausts the constitutionally essential role of the Parliament so far as the authorisation of expenditure by the Executive is concerned. This was a question that went to the nature and extent of parliamentary supremacy over the Executive, but it was also a question that went to the way in which the principle of federalism is embodied in the constitutional system. That this is the case emerges from a close examination of the relevant provisions of the Constitution, understood structurally and in the light of their enactment history. When Parliament authorises the appropriation of money from consolidated revenue, it must do so by enacting a law. However, when the Constitution was being debated in the 1890s, there was a great deal of discussion about precisely what powers the two houses of Parliament would have over the enactment of laws dealing with taxation and expenditure, for those powers were understood to be fundamental to the Parliament's control over the Executive. Those who wished to create a strongly centralised form of government, argued that a system of responsible government more or less modelled on the United Kingdom should be adopted, in which governments would be responsible only to the 'national' chamber of Parliament, the House of Representatives. Because parliamentary control over taxation and appropriation is fundamental to maintaining the responsibility of the Executive to Parliament, they therefore advocated that the House of Representatives should have a leading and predominating role in relation to

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95 See Ibid 454 [136] (Gummow and Bell JJ), 474–5 [219]–[221] (Hayne J).

96 Ibid 454 [136] (Gummow and Bell JJ), 475 [219] (Hayne J), quoting *Pape* (2009) 238 CLR 1, 105 [294].

money bills and that the Senate's role should be minimised if not eliminated altogether. However, those who wished to create a more decentralised federation questioned the applicability of the British model of responsible government. While they too believed in parliamentary control over the taxation and expenditure, they considered that the powers of the Senate over money bills should be co-ordinate with those of the House of Representatives. The prudential compromise reached between these two positions, reflected in section 53 of the Constitution, was that the House of Representatives would have sole power to initiate and amend money bills, but that the powers of the Senate would in all other respects be equal to that of the House – including a power to reject or refuse to pass the annual supply bills.<sup>97</sup>

Now, if the Parliament's only role in relation to the authorisation of expenditure is through appropriation, then the Senate's role, while important, is limited under section 53 to recommending amendments and, if necessary, refusing to pass the appropriation bill altogether. On the other hand, if in addition to appropriation, separate legislation authorising actual expenditure is required, then a much fuller, coordinate role for the Senate is maintained, for the consent of the Senate is usually required for the passage of ordinary legislation.<sup>98</sup> Because the question in *Williams* turned on exactly this issue, the Court's decision had major implications for how the principles of responsible government and federalism are understood to be integrated within the constitutional system.

Notably, the 'nationalists' among the framers of the Constitution, who wanted the House of Representatives to be the dominating chamber of the Parliament, characteristically believed that the 'federal principle' would be adequately implemented in the Constitution merely if a 'division of legislative powers' between the Commonwealth and the States was maintained. However, their opponent 'federalists' believed that a second, equally important application of the federal principle was that the people of each of the original states should be equally represented in a Senate which would have powers equal, or at least near-equal, to those of the House of Representatives. Importantly, on the question of the composition of the Senate, it was the latter party which won the debate.

The question that the Court had to decide in *Williams* recapitulated this fundamental debate between two competing conceptions of the relationship between responsible government and federalism under the Constitution. The 'common assumption' that, as far as the question of 'breadth' is concerned, the executive power extends to all of the matters in relation to which the Parliament can legislate, is essentially the outlook of the 'nationalists' applied to the executive power, for it involves the view that the requirements of federalism are sufficiently met by the constitutional distribution of powers between the Commonwealth and the States. On the other hand, the proposition that contracting and spending must be specifically authorised by legislation – that is,

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97 This was explicitly recognised by those, such as George Reid and Henry Bournes Higgins, who did not like it: see Aroney, above n 7, 361.

98 That is, apart from joint sittings under s 57.

legislation enacted with the consent of both the House of Representatives and the Senate – applies the perspective of the ‘federalists’ to the relationship between the Executive and the Parliament. For they believed that a powerful Senate representing the people of the States was as much an essential principle of federalism as the division of powers. In finding that such legislation was indeed required, the majority in *Williams* seem quite deliberately to have adopted a ‘federalist’ view of the matter. To explain and justify this, they drew on a whole range of textual, structural, historical and principled arguments for doing so. As the Chief Justice succinctly put it:

A Commonwealth Executive with a general power to deal with matters of Commonwealth legislative competence is in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power. It would undermine parliamentary control of the executive branch and weaken the role of the Senate.<sup>99</sup>

Part of the ‘common assumption’ that had generally prevailed prior to *Williams* was that issues of ‘depth’ and ‘breadth’ of executive power involve separate and distinguishable questions.<sup>100</sup> However, the reasoning in *Williams* now suggests that questions of breadth and depth cannot be allowed to obscure the deeper and more fundamental question that always has to be addressed, namely whether there is a constitutional ‘source’ or legally adequate authorisation for the exercise of governmental power in the first place. For while the enumerated topics of legislative power might have been able to provide a measure by which the breadth of executive power could be determined, section 51 is not of itself a source of executive power. But a source must be found somewhere, for not only is it impossible for a stream to rise above its source,<sup>101</sup> but there will be no stream at all without a fountainhead of some kind or another. Once the ‘natural capacities’ argument was rejected and it was seen that section 51 does not provide a source of executive power, questions of depth and breadth resolved themselves into this deeper question of source. And in the circumstances presented in *Williams*, the only possible source of power left standing was a Commonwealth statute which specifically authorises the Executive to engage in the relevant contracting and spending.<sup>102</sup>

Are there good reasons for this set of interrelated conclusions? The text of section 61, although not decisive, supports them in so far as it makes clear that the executive power at least ‘extends to the execution and maintenance ... of the laws of the Commonwealth’. Section 61 also uses the name of the Queen and thus seems to invoke her common law prerogatives and capacities,<sup>103</sup> but what those capacities are depends on one’s view of how far the Constitution is a

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99 *Williams* (2012) 288 ALR 410, 433 [60] (French CJ).

100 On the relationship between the common assumption and the breadth/depth distinction, see *Williams* (2012) 288 ALR 410, 510 [368] (Heydon J).

101 *Australian Communist Party v Commonwealth* (1950) 83 CLR 1, 258 (Fullagar J).

102 *Williams* (2012) 288 ALR 410, 433 [61] (French CJ).

103 See *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 304 (Dixon J), quoted in *Williams* (2012) 288 ALR 410, 418 [24] (French CJ).

‘republican’ document, premised on the separation of powers. Several intertextual and structural features of the Constitution also provide certain very important leads, relating to the institutions of responsible government, federalism and the rule of law, but they will only have rational force if integrated into a reasonably coherent account of the Constitution as a whole. Here the majority were able to add to the considerations the proposition that a wide view of the executive power to contract and spend would tend to make the Commonwealth’s grants power in section 96 otiose, whereas a narrower interpretation of section 61 helps to explain its very existence. For although section 96 is certainly used by the Commonwealth to shape State policy, it operates only through the States’ acceptance of funding on terms and conditions proposed by the Commonwealth.<sup>104</sup> The weaker financial position of the States means that they are often pressured into accepting the Commonwealth’s proposals in relation to matters falling outside the Commonwealth’s legislative powers, but the Commonwealth still has to rely on their agreement, and this gives the States at least some negotiating capacity. By contrast, when the Commonwealth uses the ‘incidental’ power in section 51(xxxix) to enact a law to support a scheme that involves the expenditure of money by the executive under section 61, the law that has been enacted ‘demands obedience’.<sup>105</sup> As the majority pointed out, the coerciveness of the Commonwealth law therefore potentially triggers the application of the *Melbourne Corporation* principle to protect the constitutional integrity and autonomy of the states.<sup>106</sup> Interpreting the executive power narrowly is accordingly to be preferred because it coheres with these aspects of the federal design and interpretation of the Constitution as well. As Mason J observed in *Victoria v Commonwealth and Hayden*:

[the] presence [of section 96] confirms what is otherwise deducible from the Constitution, that is, that the executive power is not unlimited and that there is a very large area of activity which lies outside the executive power of the Commonwealth but which may become the subject of conditions attached to grants under s 96.<sup>107</sup>

These and other features of the constitutional system as a whole provided, on the reasoning of the majority, a set of mutually reinforcing reasons for their conclusions. The majority’s integrated account of the Constitution’s text, structure, history and purpose contributed, in other words, to the explanatory power of their interpretation of section 61.

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104 *Williams* (2012) 288 ALR 410, 455 [143], 456–7 [147]–[148] (Gummow and Bell JJ), 481–3 [244]–[248] (Hayne J), 541–3 [497]–[507] (Crennan J), 561–2 [592]–[593] (Kiefel J).

105 *Ibid* [248] (Hayne J) (emphasis added).

106 See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 and, in particular, *Austin v Commonwealth* (2003) 215 CLR 185, 220 [29] (Gleeson CJ), 269 [181] (Gaudron, Gummow and Hayne JJ), 298 [273] (Kirby J).

107 *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 398 (Mason J) (‘the *AAP* case’). See also *A-G (Vic) (Ex rel Dale) v Commonwealth* (1945) 71 CLR 237, 266 (Starke J), 282 (Williams J). On Justice Mason’s observations about the Commonwealth’s power to spend, see Cheryl Saunders, ‘The Development of the Commonwealth Spending Power’ (1978) 11 *Melbourne University Law Review* 369, 374.

### C History and Meaning

The force of the majority's reasoning lies in the way in which these considerations of text, structure, principle and purpose could be combined into a generally coherent explanation of the Constitution, extending from its finest textual details through to its most general structural principles and overarching purposes. Justice Heydon dissented on the ground that the text, structure, history, principles and purposes of the Constitution do not support such a conclusion. Are his criticisms convincing? The explanatory power of a theory turns on its capacity to account for the facts; the more facts that can be explained, the better. Did Heydon J offer a more convincing explanation?

One of Justice Heydon's most powerful counterarguments concerned the enactment history of the clause that became section 61. One of the earlier drafts of the provision had been in the following terms:

The executive power and authority of the commonwealth shall extend to all matters with respect to which the legislative powers of the parliament may be exercised, excepting only matters, being within the legislative powers of a state, with respect to which the parliament of that state for the time-being exercises such powers.

On first reading, this wording seems to have adopted the 'middle view' of the breadth of the executive power – that it extends to all of the matters with respect to which the Commonwealth can legislate, but it does not depend upon the enactment of Commonwealth legislation. Whatever its meaning, however, the language of the proposed clause was prolix and clumsy. Samuel Griffith, its primary drafter and the recognised leader of the Federal Convention of 1891, acknowledged this and proposed a simplified alternative which, he explained, would 'not alter its intention'. This simplified revision, in terms relevantly similar to the present section 61, instead of stipulating 'a negative limitation upon the powers of the executive', gave 'a positive statement as to what they are to be'.<sup>108</sup>

Reflecting on Griffith's comments, Heydon J observed that it:

constitute[s] evidence that the 'contemporary meaning' of the words 'execution ... of the laws of the Commonwealth' used in s 61 included all matters on which Commonwealth legislative power might be exercised, even though it had not been exercised, subject to the stated exception.<sup>109</sup>

This was potentially a very important anomaly in the theory adopted by the majority. But does it follow? The first problem is with the natural meaning of the text. The words 'execution of the laws of the Commonwealth' are not ordinarily equivalent in meaning to 'the administration of any matter concerning which the Commonwealth has power to legislate'. The second problem is with the 'stated exception' to which his Honour referred in the quotation above. To see this problem, it needs to be recalled that the legislative powers of the States are (and

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108 *Official Report of the National Australasian Convention Debates*, Sydney, 6 April 1891, 777–8, quoted in Williams (2012) 288 ALR 410, 504 [347] (Heydon J).

109 Williams (2012) 288 ALR 410, 504 [347] (Heydon J).

were always contemplated to be) plenary, subject only to certain specific limitations that would be imposed by the Constitution (eg, sections 90 and 92) and the overriding force of validly enacted federal laws (sections 52 and 109). The effect of the stated exception in Griffith's original draft was that the scope of the executive power of the Commonwealth would have constitutionally expanded and contracted as a result of legislation enacted by each State. Because the States could enact laws on virtually any topic, the Commonwealth's executive power would automatically shrink in response to State laws unless it enacted counteracting federal laws, noting that it could only do so if the subject matter fell within the Commonwealth's legislative power. In every one of these instances the Commonwealth would effectively need to legislate in order to 'enliven' its executive power. Especially in the early years of the federation, when State legislation addressed most areas of government regulation, this would not have been very much different in practice from the Commonwealth always having to legislate positively to authorise the exercise of its executive power.

This being the case, when Griffith said that his 'positive' restatement of the executive power did not alter the 'intention', to which aspect or aspects of the older draft was he referring? He would certainly have understood not only the ordinary meaning of the words of both formulations, but also the practical implications of the draft provision. Certainly the ordinary meaning of the words that he proposed suggests that it was enacted laws, rather than legislative powers, that he relevantly had in mind when defining the scope of executive power.<sup>110</sup>

Another comment made by Griffith, cited by French CJ, seems relevant. Earlier in the debate, explaining the executive power of the Commonwealth, Griffith, speaking of the Commonwealth, said that its 'executive authority shall be co-extensive with its legislative power'.<sup>111</sup> This again appears, on first reading, to suggest that executive power would track legislative power, in the sense that executive power could be exercised without any federal legislation being enacted. But such a reading rests on the assumption, which we may be too casually inclined to make, that the 'Commonwealth' is to be identified with the Executive in this passage. But a more careful reading of Griffith's statement reveals that this is quite inconsistent with what he actually said. Griffith's actual words were that it would be the Commonwealth – not the Executive or the Parliament – which would possess 'executive authority' and 'legislative power'. Read carefully, therefore, his words suggest, or at least are quite consistent with, the image of the 'Commonwealth' actively legislating (through the Parliament) to confer authority (upon the Executive) to undertake some particular executive action.

These readings of the intentions behind section 61, although of themselves not conclusive, are confirmed by one other aspect of the legislative history to which Heydon J did not refer. As French CJ noted, the Commonwealth Bill

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110 Chief Justice French seems to allude to this line of interpretation: *Williams* (2012) 288 ALR 410, 426–7 [46].

111 *Official Report of the National Australasian Convention Debates*, Sydney, 31 March 1891, 527, quoted in *Williams* (2012) 288 ALR 410, 426 [46] (French CJ).



produced by the first Federal Convention of 1891 was not approved. Rather, it was at the successful Second Convention of 1897–8, led this time by Edmund Barton, that Barton himself said that the executive power of the Commonwealth would consist of two aspects: the prerogative, and instances where it is ‘prescribed that the Executive shall act in Council’, which latter category he described as ‘the offspring of statutes’.<sup>112</sup> Barton said this specifically in response to concerns expressed by George Reid that the Constitution should expressly stipulate that the executive power is to be exercised by the Governor-General acting strictly on the advice of the Executive Council. Barton thought this unnecessary, and in explaining why, drew a distinction between the prerogative and statutory executive powers, the latter of which are exercised formally by the Governor-General in Council, but both of which are, according to the conventions of responsible government, exercised upon the advice of responsible Ministers. Drawing the distinction between prerogative and statutory executive powers in this way suggests a narrow view of the prerogative. And, indeed, Andrew Inglis Clark’s view of the executive power seems to have been even narrower still. Consistent with his strong republicanism, Inglis Clark said that executive power consists primarily of the enforcement of existing laws (statutory or constitutional), and only secondarily includes ‘the discretionary authority of the Crown within the Commonwealth’.<sup>113</sup>

While the available evidence from the founding era is thus limited, Griffith’s statements are capable of at least two alternative interpretations, and the opinions of Barton and Inglis Clark seem clearly to favour the narrow view. Given these statements, there is reason to discount the opinion of Alfred Deakin, expressed in the so-called Vondel Opinion of 1902, that the executive power exists antecedently to legislation and extends at least to every matter to which federal legislative power extends.<sup>114</sup> Deakin was not especially representative of the consensus of opinion among the framers of the Constitution, especially on questions of federalism. He dissented, for example, on such crucial questions as the equal representation of the original states in the Senate and on the powers of the Senate being nearly coequal with those of the House of Representatives. On most matters, it was the views of Griffith in 1891, and Barton in 1897–8 which, among others, most often accorded with majority opinion at the two Federal Conventions.<sup>115</sup> Moreover, although he very likely played an important role in drafting the Vondel Opinion for Deakin, Sir Robert Garran’s mature opinion,

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112 *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 910, quoted in *Williams* (2012) 288 ALR 410, 427–8 [48] (French CJ).

113 Inglis Clark, above n 84, 38, 64, cited in *Williams* (2012) 288 ALR 410, 429 [50] (French CJ).

114 Alfred Deakin, ‘Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth’, in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14* (Australian Government Publishing Service, 1981) 129, 131.

115 Aroney, above n 7, chs 7, 8.

shaped by the text of section 61 itself, was that the sources of executive power must be limited to the Constitution itself, or statute.<sup>116</sup>

To reason in this way about the enactment history of the Constitution is to seek to identify the framer's intended meanings and specific intentions concerning the legal effect of the provision. But as has been seen, the available evidence can sometimes be mixed or ambiguous. To reason about the Constitution's history in a documentarian manner is thus not only to be concerned about the framers' specific intentions or understandings as such, but also with the explanatory light that these intentions and understandings can shed on the document itself. The point of historical inquiry on a documentarian approach is, in other words, to use historical evidence to provide insight into the text, structure and purposes of the Constitution understood as a coherent and authoritative body of law. When the text and structure is ambiguous, historical evidence can help to specify the intended meaning and purpose. When the historical evidence is itself mixed, text and structure can help us to decide between alternative accounts of the intent and purpose. The explanatory power of an interpretation is maximised when the textual, structural and historical evidence coincides, but sometimes, despite our best endeavours, choices between alternative constructions may still have to be made. However, the fact that such choices sometimes have to be made does not undermine the rational desirability of an interpretation which has superior explanatory power. In the case of section 61, although the historical evidence is somewhat ambiguous, the first thing that can be said is that it is at least capable of an interpretation that accords with the natural meaning of the words actually used in section 61. Moreover, when read in the light of the framers' deliberations about the composition, powers and purposes of the two houses of Parliament within the federal-democratic system, a combination of textual, structural and principled arguments coalesce in favour of an interpretation of section 61 which requires legislation to be enacted to authorise executive contracting and spending, as the majority in *Williams* concluded. The explanatory power of this interpretation consists in the synthetic combination of reasons that can be marshalled in its support.

#### **D Doctrine and Document**

The explanatory power of an interpretation depends on the extent to which considerations of text, structure, history, principle and purpose combine to support it. The corollary of this is that the less coherence there is between these elements, the weaker the argument becomes. Sometimes the lack of coherence means that there is a problem with the theory and that an alternative is to be preferred; sometimes it indicates that the recognised sources of law are themselves in disarray. These tensions can exist across of all of the various modalities of constitutional argument, but one of the most fundamental occurs when there is a contradiction between the document itself and judicial doctrine

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<sup>116</sup> Commonwealth, Royal Commission on the Constitution of the Commonwealth, *Report of Proceedings and Minutes of Evidence* (1927) 89, cited in *Williams* (2012) 288 ALR 410, 429 [50] (French CJ).

that is meant to be expounding its meaning.<sup>117</sup> In *Williams* there were several potentially very difficult obstacles to a coherent explanatory theory of section 61 arising out of the decided case law that had to be addressed. The commonly-held assumption that the Crown has the capacities of a natural person and that the executive power extends to all of the matters in respect of which the Parliament is able to legislate was not, after all, without judicial warrant.

The question of how tensions between the document and the doctrine are to be resolved is a complex and difficult one. Considerations of constitutional text, structure and history themselves point to a vital role for the High Court as the authoritative interpreter of the Constitution.<sup>118</sup> But what if a judge of the High Court conscientiously considers that the established doctrine of the Court is not consistent with the best interpretation of the Constitution itself? Sometimes there will have to be an unavoidable choice between the document and the doctrine, but there are several techniques which enable judges to avoid this as far as possible. One of them involves the longstanding distinction between the ratio decidendi of a case and its obiter dicta. Another is the distinction between well-established precedents that have been widely and deeply followed by the courts and the other political branches and those which have not. Despite undoubted difficulties around their borders, judges continue to use these and other distinctions, and they do so with good reason.

Faced with a longstanding practice by the Commonwealth to assume the existence of a virtually unlimited power to contract and spend, and an array of cases in which statements had been made which seemed to support the ‘common assumption’ to this effect, the majority in *Williams* avoided any direct conflict between the document and the doctrine by identifying precisely what had been said in the previous cases and limiting their authority to those reasons that were strictly necessary for the resolution of the exact issues before the Court. Space does not permit a detailed account of how this was done. The essential point made by the majority was that in no previous decision had a clear majority of the Court unambiguously supported the unqualified proposition that Commonwealth’s power to contract and spend extends to matters about which the Commonwealth is empowered to legislate, and certainly in no previous case had this particular proposition been an essential element of the Court’s resolution of the particular question or questions before it.

Indeed, early decisions, such as *Wool Tops*,<sup>119</sup> *Australian Shipping Board*<sup>120</sup> and *Colonial Ammunition*,<sup>121</sup> could be cited as instances where the power to

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117 See, eg. Amar, above n 4. For a doctrinalist critique of Amar, see Adrian Vermeule and Ernest Young, ‘Commentary: Hercules, Herbert, and Amar: The Trouble with *Intratextualism*’ (2000) 113 *Harvard Law Review* 730.

118 Brian Galligan, ‘Judicial Review in the Australian Federal System: Its Origin and Function’ (1979) 10 *Federal Law Review* 367.

119 *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 (‘*Wool Tops*’).

120 *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 (‘*Australian Shipping Board*’).

121 *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 (‘*Colonial Ammunition*’).

engage in contractual relations without statutory authority had actually been denied,<sup>122</sup> and two other decisions could be cited as examples where the existence of legislation was considered to be an essential prerequisite to the exercise of executive power in the circumstances.<sup>123</sup> Other important cases, however, pointed in the other direction, and these needed to be addressed. For example, the finding in *New South Wales v Bardolph*<sup>124</sup> that a State Government could, without prior parliamentary appropriation, enter into a binding contract for the expenditure of money, had to be dealt with. The majority considered that this case could be limited to its specific facts, primarily because it was concerned with the States, which have ‘unitary’ constitutions, unlike the ‘federal’ nature of the Commonwealth.<sup>125</sup> Some of the judgments in the *Pharmaceutical Benefits Case*<sup>126</sup> also posed problems. However, the majority could show that the opinions expressed in that case were both diverse, and were in any event specifically concerned with the interpretation of the reference to the ‘purposes of the Commonwealth’ in section 81 rather than the meaning and scope of the executive power in section 61.<sup>127</sup> There were also statements made by Barwick CJ and Gibbs, Mason and Jacobs JJ in the *AAP case*<sup>128</sup> which tended towards a wide view of the executive power. The majority characterised these statements as merely obiter dicta and interpreted them narrowly.<sup>129</sup>

In his dissenting judgment, Heydon J considered that the common assumption about the scope of the executive power was so widely acknowledged in the cases and learned commentary that it should be ‘treated as the law’.<sup>130</sup> Read as abstract statements of principle, the passages in the various cases and commentaries indeed seemed to speak for themselves, and his Honour reproduced them with little commentary or gloss in his judgment.<sup>131</sup> He also drew attention to several statements that were not addressed by the majority,<sup>132</sup> and in response to those statements that were cited by the majority to support their conclusions, Heydon J pointed out that their relevance was ‘obscure’ and that

122 *Williams* (2012) 288 ALR 410 419–20 [29], 435 [65]–[67] (French CJ), 452 [130] (Gummow and Bell JJ), see also 473 [211]–[212] (Hayne J), 555 [565], 559 [580], 562 [595] (Kiefel J).

123 *A-G (Vic) v Commonwealth* (1935) 52 CLR 533; *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424, discussed in *Williams* (2012) 288 ALR 410, 437–8 [73] (French CJ), 457 [151] (Gummow and Bell JJ).

124 *New South Wales v Bardolph* (1934) 52 CLR 455.

125 *Williams* (2012) 288 ALR 410 438–40 [74]–[79] (French CJ), 448 [115] (Gummow and Bell JJ), 540 [493], 547–8 [527]–[532] (Crennan J), see also 471–2 [207]–[209] (Hayne J), 559 [580] (Kiefel J).

126 *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 (‘*Pharmaceutical Benefits Case*’).

127 *Williams* (2012) 288 ALR 410, 464–5 [189] (Hayne J), 554 [563], 560 [584] (Kiefel J).

128 *AAP Case* (1975) 134 CLR 338.

129 *Williams* (2012) 288 ALR 410, 419–20 [29] (French CJ), 451 [127]–[134] (Gummow and Bell JJ), 549–50 [538]–[540] (Crennan J), see also 465–6 [190] (Hayne J), 554–5 [564] (Kiefel J).

130 *Ibid* 520 [403] (Heydon J).

131 *Ibid* 507–12 [356]–[374], 512–15 [376]–[385] (Heydon J).

132 See, eg, *Attorney-General (Vic) v Commonwealth* (1935) 52 CLR 533, 567 (Starke J); *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J); *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 61 (Barwick CJ), 113 (Aickin J); *Western Australia v Ward* (2002) 213 CLR 1, 391 [962] (Callinan J), cited in *Williams* (2012) 288 ALR 410, 507 [357], [359], 511 [370], [373] (Heydon J).

they could be distinguished.<sup>133</sup> In referring to so many statements in favour of the common assumption, including sources not addressed by the majority, the explanatory power of Justice Heydon's reasoning gained significant ground. The principal weakness in the argument from the authorities however was that, as his Honour acknowledged, the statements were generally in the nature of obiter.<sup>134</sup> The case therefore had to turn on more than doctrine alone.

## V CONCLUSIONS

Close and careful analyses of text, structure and history, when rigorously pursued, tend to reinforce the findings of each other, and can help to disclose the ethical principles and prudential compromises that demonstrably motivated the making of the Constitution. In hard cases, of course, reasonable minds may well differ about what the most coherent, integrative interpretation of the Constitution may be. But the practice of judges points to the rational attractiveness of an interpretation that offers the 'best explanation'. The goal of interpretation, in other words, is to maximise the 'explanatory power' of our constitutional theories – in as exhaustive and inclusive a manner as possible. To do this, as Professor Jules Coleman has pointed out, our interpretations must meet the norms of theoretical adequacy that apply generally to theories within all fields of inquiry (such as simplicity, coherence and consilience), as well as the more particular norms that apply to theories that seek to advance an explanation of something (such as descriptive precision or predictive accuracy).<sup>135</sup>

The explanatory adequacy of a constitutional interpretation thus turns on general standards of rationality that are common to all kinds of explanatory theories. While philosophical accounts of the norms of explanatory adequacy (as applied in both the natural and the social sciences) vary, several generalisations can be advanced around the central concepts of simplicity, descriptiveness and consilience.<sup>136</sup> The explanatory power of a theory is maximised in proportion to these features: the greater the simplicity, descriptiveness and consilience of a theory, the greater its explanatory power. Simplicity or elegance concerns the economy of entities or concepts that are postulated by the theory. Descriptiveness concerns the specificity as well as generality of a theory's explanations; a desirable theory provides explanations that are highly specific and detailed, and which apply generally to a wide range of phenomena. The more that is explained by a theory, in terms of both the specificity and the generality of the explanations, but with an economy of concepts or entities, the greater its explanatory power. The consilience of a theory – its coherent integration with other theories – is also a desirable attribute, for consilience between theories

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133 *Williams* (2012) 288 ALR 410, 516 [388]–[391] (Heydon J).

134 *Ibid* 507 [356] (Heydon J).

135 Jules Coleman, *The Practice of Principle* (Oxford University Press, 2001) 3–4.

136 For more detail, see Aroney, 'Explanatory Power', above n 13.

contributes to their explanatory power as a group. This consilience can occur when a relatively general theory provides a broad explanation which coheres with the explanations of more specific theories, or when a specific theory provides a particular explanation that coheres with the broader explanations of a more general theory.

When the High Court engages in the kind of reasoning that it did in *M47* and *Williams*, we see it endeavouring to identify broad explanations of the purposes and principles which help to explain the text and structure of the document, extending from its most specific features through to its most general structural relationships. Because statutes and constitutions are the products of historical actors, insight into the enactment history of such documents often sheds light on how the text and structure of the document contributes to the achievement of the goals and principles which motivated its framers. Because human beings are rational, constitutions are deliberately drafted in order to achieve such goals, and even when there is legislative disagreement and the document is in that respect the product of a compromise, the document is nonetheless rationally designed to give effect to the terms of that compromise.

This does not mean that there are bright lines or easy answers to all questions. Obviously this is not the case. Legal texts can be vague and ambiguous, sometimes deliberately so. And judges and commentators often disagree about the best interpretation to be placed upon them. This is because the various elements of what makes for a theory possessing explanatory power are somewhat in tension with each other. However, the idea of explanatory power remains helpful even in such cases. Put simply: Theory A may offer a detailed explanation of an admittedly small range of data but at a very high level of specificity, whereas Theory B may offer a broad explanation of a very wide range of data but only at a relatively high level of generality. In these circumstances, we will have difficulty deciding which of the two theories has greater explanatory power and we may well conclude that both theories are equally useful but for different purposes. However, if Theory C offers an explanation as detailed and specific as Theory A, yet as general and broad as Theory B, we will conclude that Theory C has more explanatory power than either of the other two and we will rationally prefer it to them.

Theories about legal documents are the same. We see the judges in cases such as *M47* and *Williams* presenting alternative interpretive explanations, all on the assumption, I would suggest, that the interpretation that most adequately explains the text, structure and purpose of the document is to be preferred. The enactment history of such documents is of large significance in such inquiries, not only because it sheds light on the framers' intentions and understandings in themselves, but because those intentions and understandings help to bring to light textual details, structural relationships and motivating purposes which together

help us to make sense of the document as an integrated whole.<sup>137</sup> In hard cases, no interpretation is without its anomalies and it is not always easy to decide between competing explanations. Sometimes judges are very candid about the anomalies that cannot be resolved on their preferred interpretation, and they admit that an element of choice is involved. Other times the anomalies are either avoided, or presented in a way that tries to downplay the force of the inconsistency. Critics routinely draw attention to these anomalies and present them as reasons to reject the interpretation. But, as is so often the case, the theories of the critics are also not without their anomalies. This is essentially because the law, although it aspires to consistency and coherence, is as imperfect as the human beings who make and interpret it. But this does not mean that the maximisation of the explanatory power of our interpretations is not the goal to which we aspire.

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137 For a succinct illustration (using somewhat different terminology), which demonstrates the inadequacy of pure textualism, see Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 103–7.