BEYOND THE TEXT:

A VISION OF THE STRUCTURE AND FUNCTION OF THE CONSTITUTION

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I

John Adams was the highly skilled Massachusetts lawyer who successfully defended British troops at the Boston Massacre and who went on to become the second President of the United States. In David McCullough's Pulitzer Prize Winning Biography of him there is an observation attributed to a British spy in Philadelphia at the time of the Continental Congress which resulted in the Declaration of Independence. It was said of John Adams that he "saw large issues largely".[1] It should be said also of that quintessential Australian lawyer, Sir Maurice Byers, that he saw large issues largely. Underlying the acuteness and agility of mind that he brought to each of the many constitutional cases in which he appeared during his half century at the New South Wales Bar was a profound understanding of the constitutional system in which he worked. Elements of the constitutional vision of Sir Maurice Byers are spelt out in the two volume Final Report of the Constitutional Commission which he chaired.[2] The Final Report of the Constitutional Commission, published in 1988, should be a standard reference for any practising constitutional lawyer. Other important elements of the constitutional vision of Sir Maurice Byers emerged more subtly in his arguments. More often than not, those arguments were successfully translated into law. One of my fondest recollections as a new barrister was sitting with Sir Maurice in his chambers preparing for argument in the Political Advertising Case.[3] We sat and discussed the case for some time and then he decided to write part of the argument himself.

He wrote in longhand in fountain pen on ruled sheets of paper. With an elegance of hand that matched his elegance of prose, he penned a submission which still can be found, in a slightly edited form, in the report of that case in the Commonwealth Law Reports. I read it in part for the beauty of its language and in part for the grandeur of its vision:[4]

> The agreement of the Australian people called the Constitution into existence and gave it substantial validity. The *Commonwealth of Australia Constitution Act* … gave that agreement legal form. The Constitution derives its continuing validity from the will of the Australian people. … The Constitution enshrines the principles of representative and responsible government:. … Section 106 preserves the existence of State Constitutions in which representative and responsible government were at the time of federation, and remain, essential characteristics … The principle of responsible government permeates the Constitution, forming part of the fabric on which the written words of the Constitution are superimposed. That principle, involving as its essential feature executive responsibility to a popularly elected legislature, has as its principal design and effect that the actual government of the State is conducted by officers who enjoy the confidence of the people … Representative and responsible government is responsive to the voice of the people … The fundamental premise of the structure of the Constitution, and in particular of the electoral processes specifically provided for by ss 7, 24, 28 and 128 and preserved in the case of State Constitutions by s 106, is the continuous ability of the Australian people as a whole to make informed judgments on matters of political significance. This necessarily involves the capacity at all times for free and unhindered public discussion on all such matters, subject to traditional and proportional limitations … A law which seeks to control the content of a communication on a matter of political significance, in the absence of some compelling justification, is therefore invalid on two grounds: first, as an interference with the free operation of the institutions and processes created or preserved by the Constitution, in particular the electoral processes required or preserved by ss 7, 24, 28, 106 and 128; secondly, as a denial of a fundamental premise on which the representative and responsible government established and preserved by the Constitution is based, viz. the ability of the Australian people to control the institutions of government through electoral processes.

At this point Sir Maurice put down his pen and chuckled to himself. "It's a fraud on the power", he exclaimed, "a fraud on the power". History shows that the argument won the case. More importantly than winning the case, history shows that the constitutional vision reflected in the argument informed the reasoning of the majority in a way that had a profound effect on the development of constitutional principle. The particular constitutional principle to which the Political Advertising Case gave rise has been refined and confined in subsequent cases to the point of being reduced to a two part "test" for constitutional validity. In that form it endures and has become part our constitutional heritage.

My intention is not to focus on any particular constitutional principle. My intention is rather to look at the broad sweep of modern constitutional doctrine as that doctrine emerged soon after Australia's coming of age in the First World War and particularly as that doctrine developed in the last quarter of the twentieth century when the influence of Sir Maurice Byers was at its height.

My hope is to provide a coherent conceptual explanation not only for some of the main themes of modern constitutional doctrine but also for some of the apparent contradictions for which it is sometimes criticised. Why are things implied seemingly more important than things expressed? Why are some things matters of form and other things matters of substance? Why is there judicial deference to legislative choice in some areas and strict scrutiny in others? How, legitimately and without constitutional amendment, has there been allowed to occur the steady centralisation of power in the central organs of government?

My premise is that no coherent conceptual explanation for the observed constitutional phenomena can occur except through the prism of some over-arching understanding of the structure and function of the Australian Constitution and of the role of the exercise of judicial power in maintaining that structure and function. The text is not determinative.

II

Before I attempt to give my own explanation, let me attempt to answer two groups who would deny the premise: interpretivists and originalists. Neither is a true type and my attempt at personification is to criticise ideas not any individual.

The epitome of the interpretivist was Professor Anstey Wynes whose book entitled "Legislative, Executive and Judicial Powers in Australia" went through several editions between 1936 and 1976.[5] The central notion of interpretivism is that the exercise of judicial power is properly confined to the exposition and application of the constitutional text. Constitutional

interpretation is not fundamentally different from statutory interpretation and the exercise of judicial power in a constitutional case is not fundamentally different from the exercise of judicial power in any other case. The text, read in context, is determinative and the exercise of the judicial power in a constitutional case involves nothing more than the application of the interpreted constitutional text to the facts if and to the extent that to do so is required in order to determine a controversy about the legal rights or duties of the particular parties before the court. There is, of course, a large element of truth in this: the Constitution, in a carefully crafted and much debated written form, was enacted as a schedule to an Act of the Imperial Parliament which declared it to be binding on "the courts, judges, and people of every State and of every part of the Commonwealth"[6] and the sole method of changing the Constitution is in essence a legislative process in which a "proposed law" for the alteration of the Constitution is to be passed by both Houses of the Commonwealth Parliament and approved by electors before being presented to the Governor-General for the Queen's assent.[7] The Australian Constitution is therefore undeniably cast in statutory form and the statement of Chief Justice John Marshall in Marbury v Madison in 1803 that a court, in applying the law to the facts in a particular case, is obliged to interpret and apply the constitutional text as the supreme law was never in doubt in Australia.[8] But nor was the emphasis placed by that same great judge in McCulloch v Maryland in 1819 on the constitutional nature of the constitutional text.[9] Translated but unattributed in the language of Sir Owen Dixon in 1945:[10]

> … it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.

The largest and most emphatic words in the Constitution – take "judicial power" and "absolutely free" as well-worn examples – have no fixed or intrinsic meaning and it would be in vain to attempt to search for one. It is in the nature of our shared human existence that language is inherently ambiguous and that the ambiguity of language is compounded the bigger is the idea and the more enduringly it is expressed. The beginning of wisdom is to embrace the ambiguity of the ancient and canonical text; not to deny it. That insight may not be limited to law and it is

certainly not limited to constitutional law. In 1959 three members of the High Court - Sir Owen Dixon, Sir Victor Windeyer and the usually very black-letter Sir Frank Kitto - said this of the Statute of Monopolies:[11]

> The truth is that any attempt to state the ambit of s 6 of the *Statute of Monopolies* by precisely defining 'manufacture' is bound to fail. The purpose of s 6, it must be remembered, was to allow the use of the prerogative to encourage national development in a field which already, in 1623, was seen to be excitingly unpredictable. To attempt to place upon the idea the fetters of an exact verbal formula could never have been sound. It would be unsound to the point of folly to attempt to do so now, when science has made such advances that the concrete applications of the notion which were familiar in 1623 can be seen to provide only the more obvious, not to say the more primitive, illustrations of the broad sweep of the concept.

If the sentiment expressed in that statement was true for a Jacobean statute which established basic principles to govern a field of intellectual property, how much more must they be true for a Victorian statute which established basic principles for the government of a nation. How much more still must it be true of that statute going into the twenty-first century when, with the growth of Australian nationhood and the waning and ultimate abdication of Imperial parliamentary power, it must now be treated as having an independent ongoing existence deriving its legitimacy from the sovereignty of the Australian people.

That brings me to the originalists. Originalism in Australia is a relatively new phenomenon. It appears to have been sparked largely through the intellectual influence of the neoconservative American Federalist Society. And it appears to have been encouraged by a misunderstanding of the use made of pre-federation history in the unanimous judgment of the High Court in Cole v Whitfield in 1988.[12] In the face of the inherent ambiguity of the constitutional text, the claim of the originalist is to find meaning in the intentions of those who framed that text. The originalist invokes "the framers' intent" not as a metaphor for "meaning" but as an historical fact external to the text which in turn provides meaning to the text. More often than not, it is a claim that cannot be delivered in practice because it involves looking for something that is just not there. But much more problematic conceptually for the originalist in Australia than what we don't know

from history about the intentions of the framers is what we do. What we do know is that on big things that mattered: (a) the intentions of the framers differed between themselves; (b) the intentions of the framers were not static; and (c) at least for the most part the framers were not themselves originalists. We know all of that from the pages of the Commonwealth Law Reports, without needing to pore over the Convention Debates or other historical materials, because we know that the first five members of the High Court were drawn from amongst those who had been most influential in framing the constitutional text. There is to be seen chronicled in the pages of the first 28 volumes of the Commonwealth Law Reports a deep division between Sir Samuel Griffith on the one hand and Sir Isaac Isaacs on the other as to the fundamental nature of the federal system established by the Constitution. The division was apparent from the beginning and was only ultimately resolved with the triumph of Sir Isaac Isaacs in the Engineers Case in which judgment was delivered on 31 August 1920, exactly one year after Sir Samuel's retirement and less than three weeks after his death. What cannot be underestimated in having produced the change in the climate of judicial thought in which the long-held views of Sir Isaac would triumph was the profound effect on the Australian psyche of the shared experience of the horrors of World War I. That experience had a profound effect on the thinking of Sir Samuel himself. Volume 25 of the Commonwealth Law Reports records an extraordinary ceremonial sitting of the High Court on 13 November 1918, two days after the Armistice. There, in the presence of Sir Isaac and three other justices, Sir Samuel made a short speech from the Bench in which he referred to the occasion as being "without precedent in the recorded annals of the world".[13] He said that "Australia may look with pride upon the part taken by her sons, whose valour will not be forgotten".[14] He then continued as follows:[15]

> But only a small part of the work is done. The task before the nation involves the recasting of conditions and the revision of doctrines that have long been regarded by multitudes as axiomatic and fundamental.
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> If, after a long and not inactive or unobservant life, I may say what to me appears the matter most urgently calling for treatment; it is the question of the mutual relations of the people of a State to one another. The old deeply rooted idea of division into classes, who are natural enemies, and whose destiny and duty are to prey upon each other, must give place to the sense of equality and of the paramount duty of every man to bear his part of the load of his neighbours' burdens as well as of his own. I know that a radical change of mental attitude,

> not in one part only of the community, is essential to a wise performance of this task – but I do not despair of the result.

Justice Richard O'Connor in 1908 had referred to the "broad and general" terms of the Constitution as having been "intended to apply to the varying conditions which the development of our community must involve".[16] Neither Sir Samuel Griffith nor any other member of the High Court ever did anything to indicate disagreement with that essentially progressive and dynamic approach.

It would be a serious misunderstanding of Cole v Whitfield to see the use made of pre-federation history by the High Court as an attempt to tie the course of modern constitutional development to the original intention of the framers. The High Court referred to pre-federation history not to fix the meaning to the words "absolutely free" as at 1900 but to identify the mischief to which section 92 was directed when it declared that "on the imposition of uniform duties of customs" – something that was to occur soon after federation by force of legislation of the new national Parliament – "trade, commerce and intercourse among the States … shall be absolutely free". There is a difference between being informed by history as to the provenance of a constitutional command expressed in grand and emphatic terms and being captured in the application of that command by the historical position as it appears to have existed at a particular point in time. There has been a continuity in our national economic development which started before federation, which continued after federation and which it has been the important function of section 92 at and from federation to augment. In re-aligning the legal operation of section 92 to the function originally conceived for it, Cole v Whitfield should be seen as re-establishing the functional approach to section 92 adopted by all of the first five members of the High Court in Fox v Robbins in 1908[17] which had become lost through the distortions of text-based and reality-free interpretivism. The recent decision in Betfair[18] illustrates that section 92 after Cole v Whitfield remains well capable of adaptation to the new economic and technological conditions of the twenty-first century. Neither in respect of section 92 nor more generally should Cole v Whitfield be seen as having replaced the error of interpretivism with the error of originalism.

Note that I have said nothing critical of legalism. I have empathy with legalists. After all, I am a lawyer. Law is what I do and law is all I do. Law is my field of expertise and my zone of comfort. I understand why, in the aftermath of the decision in the Communist Party Case[19] and the defeat of the subsequent communist party referendum, Sir Owen Dixon on the occasion of his swearing-in as Chief Justice wanted to extol the virtues of "strict and complete legalism".[20] I understand why, at the time of explaining or deciding cases of great political controversy, other judges have thought it appropriate to invoke that same dictum. My great difficulty is that, despite reading Judge Richard Posner's recent sympathetic examination of its modern American incarnation,[21] I have never been sure exactly what legalism means. Strict and complete legalism, like absolutely free trade and commerce, is an emphatic statement of the obscure. It is a statement that is devoid of any fixed or definite meaning. It seems to mean different things to different people. To some it refers to the traditional common law process by which, in an individual case, issues are joined, arguments are made and the case is decided. To others it encompasses also the essential ethical and prudential qualities of judicial decision-making: intellectual rigour, intellectual honesty, respect for authority and absolute transparency of reasoning. If that is all that strict and complete legalism means, then I would aspire to be counted a legalist. I am also prepared to concede that legalism as defined to that point can properly be used to predict and explain the vast majority outcomes in the vast majority of cases. But it seems that to some strict and complete legalism extends to the content of constitutional principle as if logic and technique were somehow determinative. That far I cannot go. Legalism can tell us how. Legalism cannot tell us why. The strictest of logic and the highest of technique cannot alone explain why any important constitutional principle takes the form that it does. The Engineers Case,[22] Melbourne Corporation,[23] the Communist Party Case,[24] the Boilermakers' Case,[25] the Tasmanian Dam Case,[26] the Political Advertising Case,[27] Kable:[28] none of them can be explained simply in terms of logic or technique. As Professor Leslie Zines demonstrated in a pioneering article written in 1965, that legalist of legalists, Sir Owen Dixon, had a very clearly defined vision of the structure and function of the Australian Constitution.[29] The constitutional vision of Sir Owen Dixon differed slightly from that of Sir Isaac Isaacs which in turn differed

markedly from that of Sir Samuel Griffith. The difference had nothing to do with lawyering: no one of them was a lesser lawyer than the other.

III

In 1987, with the enthusiasm of youth, I published an article in the Federal Law Review with the ambitious title "Foundations of Australian Federalism and the Role of Judicial Review".[30] The article was my attempt to refute the broadest notion of what I then understood to be legalism and to provide an alternative conceptual explanation for some of the main themes of constitutional doctrine as they had emerged to that date by focussing less on the text and more on the structure and function of the Constitution. Twenty-two years later, I continue to adhere broadly to that explanation and I continue to adhere broadly to the vision of the structure and function of the Constitution. The explanation, I think, continues to make sense of the bulk of the decided cases. The underlying vision of the structure and function of the Constitution was and remains contestable. It is incapable of empirical justification. It involves simplification and abstraction. It is inherently idealised and aspirational. It is therefore inherently incomplete and it cannot, if only for that reason, be taken too far. It remains, nevertheless, the way I see it.

The vision begins with the first of the unanimous resolutions of the Australasian Federation Conference in 1890. That resolution expressed the opinion that "the best interests and the present and future prosperity of the Australian Colonies" would be "promoted by an early union under the Crown" and that "the national life of Australia in population, in wealth, in the discovery of resources, and in self governing capacity" had developed to an extent that justified that "higher act".[31] The preamble to the preliminary resolutions of the National Australasian Convention in Adelaide in 1897 contained a similar declaration that the purpose of federation was "to enlarge the powers of self-government of the people of Australia".[32] Sir Robert Garran much later explained that the reason for that declaration was "to direct the attention of opponents and lukewarm supporters to the fact that, though federation involved the surrender by

the governments of certain rights and powers, yet as regards each individual citizen there was no surrender, but only the transfer of those rights and powers to a plane on which they could be more effectively exercised".[33] In contrast to the justification offered by James Madison and other American Federalists for federation of the newly liberated politically turbulent American colonies a century earlier, it appears to me incontrovertible that federation of the newly self-governing Australian colonies at the end of the nineteenth century was conceived not as a means of dividing and constraining government but as a means of empowering self-government by the people of Australia. There is in our pre-federation history no hint of which I am aware of any intention of giving effect to the dominant American Federalist view that federation should be designed to achieve "mutual frustration":[34] that federalism itself should operate as a mechanism for avoiding majoritarian excesses by setting up rival institutions of government which would make ambition check ambition and thereby secure the "rights of the people".[35] The Australian Constitution was conceived rather as a mechanism for moving to a higher and more beneficial plane the powers of self-government of those people who, as ultimately recorded in the preamble to the Imperial Constitution Act, "agreed to unite in one indissoluble Federal Commonwealth under the Crown".

The vision then accommodates itself to the structure of the Constitution and of the Imperial Constitution Act to which the Constitution is scheduled. The critical elements of that structure appear to me to be as follows:

- the declaration in covering clause 3 that upon the proclamation in fact made by the Queen to take effect from 1 January 1901 the people of the former colonies "shall be united in a Federal Commonwealth under the name the Commonwealth of Australia";

- the transmogrification by covering clause 6 of the former colonies into States whose constitutions were to continue as at the establishment of the Commonwealth by force of section 106;

- the establishment by section 1 of the Constitution of a Parliament of the Commonwealth consisting of the Queen, as represented by the Governor-General, the Senate and the House of Representatives each of which by sections 7 and 24 of the Constitution was to be composed of representatives "directly chosen by the people";

- the conferral on the Parliament of the Commonwealth by section 51 of the Constitution of specific and enumerated legislative powers;

- the declaration in covering clause 5 that the Constitution Act, including the Constitution, "shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth"; and

- the automatic invalidation by section 109 of the Constitution of any law of a State to the extent that it is inconsistent with any law of the Commonwealth..

The vision then accommodates itself to not only to the result but also to the actual reasoning in the Engineers Case. In a pivotal passage that is unfortunately rarely read and even more rarely understood, the joint judgment authored by Sir Isaac Isaacs said this:[36]

> For the proper construction of the Australian Constitution it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depositary of the residual powers, radically distinguish it from the American Constitution. Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government. The combined effect of these features is that the expression "State" and the expression "Commonwealth" comprehend both the strictly legal conception of the King in right of a designated territory, and the people of that territory considered as a political organism.

The import of the passage will emerge in a moment but the passage itself first needs to be unpacked. As understood in the Australasian Colonies at the end of the nineteenth century, responsible government meant much more than simply the existence of a particular relationship

between the legislature and the executive. Sir Samuel Griffith in his Notes on Australian Federation explained in 1896:[37]

> The system called Responsible Government is based on the notion that the head of the State can himself do no wrong, that he does not do any act of State of his own motion, but follows the advice of his ministers, on whom the responsibility for acts done, in order to give effect to their volition, naturally falls. They are therefore called Responsible Ministers. If they do wrong, they can be punished or dismissed from office without effecting any change in the Headship of the State.

Sir Samuel continued:[38]

> The system is in practice so intimately connected with Parliamentary Government and Party Government that the terms are often used as convertible. The present form of development of Responsible Government is that, when the branch of the Legislature which more immediately represents the people disapproves of the actions of Ministers, or ceases to have confidence in them, the head of the State dismisses them, or accepts their resignation, and appoints new ones. The effect is that the actual government of the State is conducted by officers who enjoy the confidence of the people.

Sir Owen Dixon was much later to observe in a different context that the Constitution "from beginning to end treats the Commonwealth and the States as organisations or institutions of government possessing distinct individualities" and made the point that in so doing it avoided the complexities that might arise from conceptions of sovereignty and went instead "directly to the conceptions of ordinary life".[39] The point to be made for present purposes is that both for the Commonwealth and for each of the States there exists through the mechanism of responsible government something that can be described as "the government" and which not only itself lacks sovereign status but which, through the need for the government constantly to maintain the confidence of a popularly elected legislature, can be seen to have an existence constantly contingent on it maintaining the confidence of the people. The government at each level is thus formally responsible to a head of State who can legally do no wrong yet in practice politically responsible to and identifiable with the people.

What, according to the majority in the Engineers Case, was the importance of responsible government and the unity of the Crown to the Australian federal system? The importance emerges when it is recognised that the people who comprise the Commonwealth and the people who comprise the States are one and the same people. Those people, through the exercise of political power, ought at least for the most part be well able to look after themselves. Conflicts between the Commonwealth and the States are not the conflicts of warring sovereigns but those of institutional functionaries each in law formally answerable to a unified Crown and each in fact politically answerable to a unified Australian people. "When the people of Australia", wrote Sir Isaac, "united in a Federal Commonwealth, they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers." The consequence was that "[i]f it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done." [40]

This understanding of the Commonwealth and the States as institutional functionaries politically answerable to, and identifiable with, the same people of Australia can then accommodate itself to the factual circumstances of our national development as recorded in the observations of Sir Victor Windeyer in the Payroll Tax Case in 1971[41] and as repeated by the majority in the Work Choices Case in 2006[42] as continuing to have contemporary resonance:

> The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in

> fact by financial dominance. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur.

This is not in its content a statement of legal principle and it does not become one simply because it was written by one Justice of the High Court and quoted by others. Nor is it purely historical. It is an encapsulation of the political and economic development of Australia as a nation which could just as easily been authored by a political scientist or a politician who seeks to be a statesman. It is value-laden but the values with which it is laden are long-term national values with which few Australians, on mature reflection, could disagree. It appeals to our sense of national destiny. Its utility is that it can stand above the immediate political or economic controversies of the moment but still inform and justify the choices that are to be made in their just resolution. It tells us where we have come from and helps us to understand where we might be going.

IV

There was an inter-disciplinary seminar held in 1951 at the newly formed Australian National University to celebrate the Jubilee of the Australian Constitution.[43] The seminar was held at a time when the extreme concentration of Commonwealth power which had characterised the era of the Second World War was abating, albeit in what Professor Geoffrey Sawer who convened the seminar presciently identified at the time as "merely a temporary pause in the steady growth of Commonwealth power".[44] Percy Herbert Partridge, who was then Professor of Social Philosophy at the Australian National University, presented a paper entitled "The Politics of Federalism".[45] Professor Partridge's thesis was that in its first 50 years of operation the Australian federal system "[had] itself been moulded by circumstances and events at least as much as it [had] forced them into its own mould"; that Australian public opinion had come to accept and expect the pre-eminence and leadership of the Commonwealth in an increasingly wide range of fields; that Australian citizens no more identified themselves with State governments than they did with the Commonwealth government and were increasingly less apt to make the

assumption that the State governments as distinct from the Commonwealth government were "instruments of self-government"; and that "it is the existence of the six separate governments which chiefly produces the sentiments, the attitudes and the interests which in turn support those governments". "In other words", argued Professor Partridge, "I am putting the view that in Australia the States no longer correspond with distinct interests or social foundations for the political divisions within the federal structure: it is the political divisions themselves which are the important thing".[46] What he was saying was that it was the institutional structures of the Commonwealth and the States themselves which had come by and large to result in the practical division or overlap between Commonwealth and State responsibilities not any formal allocation of power.

Professor Partridge's paper was not specifically directed to the role of the exercise of judicial power and no-one appears at the time to have thought that it had any implications for the judicial review of legislative or executive action. Contrast the fate of an almost identical thesis advanced just three years later by Herbert Weschler, Professor of Law at Columbia Law School. At a conference held in 1954 as part of the Bicentennial Celebration of Columbia University, Professor Weschler delivered a now famous paper entitled "The Political Safeguards of Federalism: The role of the States in the Composition and Selection of the National Government".[47] In it Professor Weschler enumerated in the design of the United States Constitution three structural mechanisms that were employed to serve the ends of federalism. The first was the preservation of the States as separate sources of authority and organs of administration. The second was that the role of the States in the composition and selection of the central government. Only the third was the formulation of a distribution of authority between the central government and the States "in terms which gave some scope at least to legal processes for its enforcement". Professor Weschler explained:[48]

> Scholarship – not only legal scholarship – has given most attention to the last of these enumerated mechanisms, perhaps because it has been fascinated by the Supreme Court and its interpretations of the power distribution clauses of the Constitution. The continuous existence of the states as governmental entities

> and their strategic role in the selection of the Congress and the President are so immutable a feature of the system that their importance tends to be ignored. Of the Framers' mechanisms, however, they have had and have today the larger influence upon the working balance of our federalism. The actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority.

The existence of the States as governmental entities, Professor Weschler argued, was the "prime determinant" of what he described as "working federalism". The national political process, was "intrinsically well adapted to retarding or restraining" unwarranted intrusions by the national government on the domain of the States.[49] Professor Weschler opined that where hostility to the exercise of power by the central government existed it could be seen in practice to rest "far less on pure devotion to the principle of local government than on opposition to specific measures" and that federalism "would have few adherents were it not, like other elements of government, a means and not an end".[50] These sentiments quite clearly echoed those of Professor Partridge, whose paper (given in Australia three years earlier) Professor Weschler at this point cited in a footnote.[51]

Where Professor Weschler, as a lawyer, went further than Professor Partridge, as a political scientist, is that he drew an implication for the judicial review of legislative action. The Supreme Court, he said:[52]

> ... is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.

Expounded by an eminent lawyer at a time when the New Deal had produced what were regarded almost universally as beneficial outcomes through the exercise of congressional power on a hitherto unimagined scale, at a time when the judicial invalidation of legislative action had come to be associated with a bygone and regressive era epitomised by the striking down in Lochner v New York[53] of a law setting a maximum ten hour working day for labourers, at a time when legal realism had long since destroyed any faith in the determinacy of the constitutional

text, and at a time when academic legal thought in the United States was moving generally towards an attempt to explain the law in terms of process rather than outcome, Professor Weschler's thesis was quickly assimilated into the mainstream of constitutional thinking in the United States. The thesis came to be developed and expanded upon by later generations of legal scholars: most specifically and elaborately in relation to issues of federalism by Professor Jesse Choper in his book published in 1980 entitled "Judicial Review and the National Political Process"[54] but much more generally by Professor John Hart Ely in his much celebrated, much debated and justifiably influential book published in the same year entitled "Democracy and Distrust".[55] The thesis in its most generalised form is that the Constitution of the United States places its essential trust in the democratic institutions of government and that the role of the judicial power is appropriately to respect such outcomes as are rationally open to those democratic institutions save in those cases where the representative and majoritarian characteristics of those democratic institutions themselves give rise to a danger of abuse. A stricter form of judicial scrutiny is therefore warranted, for example, under the First Amendment where governmental action in any way affects participation in the political process and under the Fifth and Fourteenth Amendments where governmental action adversely affects a discrete and insular minority.

Professor Weschler's thesis had come by 1985 to be openly acknowledged in the Supreme Court of the United States as explaining and guiding its decision-making on issues of federalism. Writing in that year for the majority in Garcia v San Antonio Metropolitan Transit Authority,[56] Justice Blackmun cited both Professor Weschler's 1954 paper and Professor Choper's 1980 book in stating that it was then "no novelty to observe" that the composition of the national government was "designed in large part to protect the States from overreaching by Congress".[57] Justice Blackmun went on openly to embrace the notion that a choice was made in the design of the United States Constitution "to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the national government itself rather than in discrete limitations on the objects of federal authority".[58] Of course nothing is static and

nothing in the constitutional law of the United States is ever uncontroversial. The Supreme Court from the mid 1990s has been observed to have edged towards taking a more active role in the policing of federalism but not by much.

The open acknowledgement of the primacy of the political process and of its implications for judicial review in the constitutional system of the United States ought cause us at least to ask whether a similar acknowledgement of the primacy of the political process ought not be used to explain and to guide judicial review within our own constitutional system. Why shouldn't the underlying purpose of the Constitution continue to be seen, in the terms declared in 1897, as being to enlarge the powers of self-government of the people of Australia? Why shouldn't its establishment of institutions politically accountable to the people of Australia be seen as the primary mechanism by which the Constitution achieves that purpose? Isn't the existence of political accountability the theoretical justification actually given in the Engineers Case in setting the primary orientation which has in fact shaped the development of our constitutional doctrine since 1920? Aren't the observations made by Professor Partridge as to the division or overlap between Commonwealth and State responsibilities arising in practice not from any formal division of power but from the existence and interplay of the Commonwealth and the States themselves at least as true now as they were when they were uttered in 1951? Should not the exercise of judicial power take the essentially political nature of those institutions as its starting point and tailor itself to the strengths and weaknesses of the institutional structures which give them political accountability? Why should there not openly be judicial deference where, by virtue of those institutional structures, political accountability is inherently strong? And why should there not openly be judicial vigilance where, by virtue of those institutional structures, political accountability is inherently weak or endangered? In short, why is it not appropriate to see the Constitution as creating a political system whose ordinary constitutional working will be through the political process and to see the role of the judicial power within that political system as akin to that of a referee whose extraordinary constitutional responsibility is for the game itself rather

than a linesman whose only responsibility is to call in or out? These are not rhetorical questions. My answer to each of them is "yes".

V

Let me then try to deliver on providing a coherent conceptual explanation for the broad sweep of constitutional doctrine as it emerged from the Engineers Case in 1920 and particularly as it developed in the last quarter of the first century of our national existence. You start with the notion that the Constitution sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia. You recognise that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power. You see the judicial power as an extraordinary constitutional constraint operating within that system not outside it. You see the judicious use of the judicial power as tailoring itself to the strengths and weaknesses of the ordinary constitutional means of constraining governmental power. You see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is either inherently weak or endangered.

This will not give you the answer to a particular case: the possibilities are always richer, and the considerations which might legitimately be taken into account are always more varied, than could be explained or predicted by any one theory. But it can give you a framework for understanding at a very broad level why a great deal of modern constitutional doctrine might take the form that it does and how aspects of that doctrine might possibly develop in the future.

Take the broad reach of Commonwealth legislative power. Section 51 of the Constitution alone expressly confers power on the Commonwealth Parliament to make laws for the good government of the nation "with respect to" forty enumerated subject-matters. Within a system

for enlarging the powers of self-government of the people of Australia and in relation to an institution politically accountable to the whole of the people of Australia, there is no reason why that conferral of legislative power should generally operate narrowly and every reason why it should generally operate expansively. And so it does. Modern constitutional orthodoxy is first that each of the enumerated subject-matters is to be construed with all the generality that the words used admit and secondly that either the formal legal operation or the substantive factual operation of a law will be sufficient to allow that law to be described as one with respect to a subject-matter irrespective of the purpose of the law and irrespective of whether or not the law might equally be described as a law with respect to some other subject-matter.[59] The trade and commerce power can be used to stop a mine,[60] the external affairs power to stop a dam,[61] the taxation power to guarantee superannuation for all working Australians[62] and the corporations power to set up a system of industrial relations.[63] In a seldom-remembered statement made in 1926[64] and approved by the Privy Council in 1930,[65] Sir Isaac Isaacs, after stating that "the Constitution is for the advancement of representative government",[66] said this:[67]

> It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. … Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.

Modern constitutional doctrine has not yet moved so far as openly to embrace Sir Isaac's general approach to the judicial review of the exercise of Commonwealth legislative power but the outcomes in modern constitutional cases are not far from outcomes that general approach would have produced.

Take next the repeated rejection in modern constitutional doctrine of the notion that there might exist some exogenously imposed and judicially enforceable "federal balance". Paraphrasing its

most recent rejection in the Work Choices Case,[68] the notion is incapable of being reduced to a judicially manageable standard, "carr[ies] a misleading implication of static equilibrium",[69] gives insufficient weight to the position of the Commonwealth as "a government to which enumerated powers have been affirmatively granted" and gives insufficient weight to an understanding that the framers of the Australian Constitution "appear … to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them". The last two of those propositions are drawn from the judgment of Sir Owen Dixon in Melbourne Corporation.[70] Neither is simply a matter of logic nor of history. They are matters of perspective. Together they make irrelevant to the constitutional validity of an exercise of Commonwealth legislative power any question as to whether the Commonwealth may thereby be taking control of a subject-matter historically within State legislative control. They leave the particular question of where at any given time the balance between Commonwealth and State responsibilities might be struck entirely to the political forces identified by Professor Partridge in 1951 as stemming largely from the Commonwealth and the States as separately functioning governmental entities.

Take next the principle which emerged as a constitutional implication in 1947 in Melbourne Corporation itself: of which Sir Anthony Mason said in the Tasmanian Dam Case in 1983 "[s]o much and no more can be distilled from the federal nature of the Constitution and ritual invocations of 'the federal balance'."[71] Expressed in Austin in 2003 at its most general level, the principle is "that the Commonwealth's legislative powers do not extend to making a law which denies one of the fundamental premises of the Constitution, namely, that there will continue to be State governments separately organised".[72] The principle operates substantively to safeguard not the ability of the States to exercise any particular functions but rather their capacity to function institutionally as governments of those geographical sections of the Australian people to whom they are responsible. The political interplay of the States, as separately functioning governments of geographical sections of the Australian people, with the Commonwealth as the government of the whole of the Australian people can then be allowed by ordinary constitutional

means to produce the mix of legislative and executive responsibilities that will exist in practice any given point in time.

Take next the other great principle which emerged as a constitutional implication at the prompting of Sir Maurice Byers in the Political Advertising Case in 1992.[73] That principle is in a very real sense the critical underpinning of the political accountability which is itself the underpinning of the Engineers Case: because political accountability provides the ordinary constitutional means of constraining governmental power, where a process of communication by which that political accountability is maintained is burdened by law, judicial deference must give way to judicial vigilance. According to the Lange formulation in 1996[74] as refined in Coleman v Power in 2004,[75] the law - whether it be Commonwealth or State - will be invalid unless the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Constitution. A government which relies for the constitutional legitimacy of an exercise of legislative power on political accountability to the people of Australia cannot, in Sir Maurice's language, be allowed to commit a "fraud on the power". It is the crucial function of the judicial power to ensure that does not occur.

Take a related area in which deference has given way to vigilance in the judicial scrutiny the exercise of Commonwealth legislative power. It concerns the use of section 51(xxxvi) of the Constitution to alter the franchise in the face of the requirement of sections 7 and 24 of the Constitution that Senators and members of the House of Representatives be "directly chosen by the people". Despite leaving such scope for judgment as to warrant the epithet of a "category of indeterminate reference" those words were recently said in a joint judgment of three members of the High Court in Roach[76] to embody a "constitutional bedrock" requiring the existence of a "substantial reason" for denying to a member of the Australian community "a voice in the selection of … legislators".[77] A "substantial reason" in this context was said to be a reason that is

"reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government".[78]

Other areas in which in which deference might well give way to vigilance in the judicial scrutiny of the exercise of Commonwealth legislative power is in respect of the prohibition by section 51(ii) of the Constitution of discrimination between States or parts of States by a Commonwealth law of taxation or more generally in respect of the prohibition by section 99 of the Constitution of the giving of preference to one State or part of a State over another State or part of a State by a Commonwealth law of trade, commerce or revenue.[79] In the case of Commonwealth laws in the field of economic regulation which impact differently in different States, the ordinary mechanism of political accountability to the Australian people as a whole might arguably be seen to be a relatively weak restraint.

The problem of differential impact in the field of economic regulation is, of course more acute in the case of State laws which operate to impose a higher burden on out-of-State commercial operators than they do on competing in-State commercial operators. According to Cole v Whitfield, as applied in Betfair, such a law will only withstand judicial scrutiny under section 92 of the Constitution only if it is can be demonstrated to be reasonably necessary to achieve a competitively neutral objective. Commenting on the development of a similar doctrine limiting the exercise of State legislative power in the United States, the joint judgment in Betfair said this:[80]

> That development had been in response to an apparent, albeit at times inconvenient, truth. This is that legislators in one political subdivision, such as the States, may be susceptible to pressures which encourage decisions adverse to the commercial and other interests of those who are not their constituents and not their taxpayers.

They went on to quote from Professor Lawrence Tribe's standard text on American Constitutional Law:[81]

> That recognition reflects not a cynical view of the failings of statesmanship at a sub-federal level, but only an understanding that the proper structural role of state lawmakers *is* to protect and promote the interests of their own constituents. That role is one that they will inevitably try to fulfil even at the expense of citizens of other states.
>
> In this context, the rhetoric of judicial deference to the democratically fashioned judgments of legislatures is often inapposite. The checks on which we rely to curb the abuse of legislative power — election and recall — are simply unavailable to those who have no effective voice or vote in the jurisdiction which harms them. This problem is most acute when a state enacts commercial laws that regulate extraterritorial trade, so that unrepresented outsiders are affected even if they do not cross the state's borders.

VI

The original and advertised title of this lecture was "Beyond the text: the structure and function of the Constitution". Part way through writing it, I changed that title to "Beyond the text: a vision of the structure and function of the Constitution". The premise, of course, was and remains that the text is not determinative. I changed the title because, in going beyond the text and talking about the structure and function of the Constitution, I do not presume to tell it like it is but only as I see it. Constitutional law is not like a flower or a tree. It does not exist as a thing in nature. To borrow the language of Yorta Yorta, it does not have an existence that is independent of the society of which it forms part.[82] At any given time, it exists within the collective imaginations of those who practice and administer it. They are relatively few but they still cannot all be expected to see things exactly the same way. They are the custodians for the present of a constitutional tradition which they must interpret each for themselves in terms that are meaningful to them and for their own time. The constitutional issues with which they deal must be put in a long term perspective. The doctrine of precedent is a white-fella's version of respect for elders. It is not a matter of science. It is a matter of responsibility: to the past and for the future. Unless we are to reduce to the randomness of the single instance the lessons provided to us by the thousands of constitutional cases decided over what is now more than a century of our national development, we need some organising principle. We need at some level, explicitly or implicitly, to place them within a larger narrative and to give them some sense of purpose. We need to ask: not only how, but why? I have chosen to do so explicitly. What I

sought in part to do in 1987 and what I have sought to re-do today is to explain and defend constitutional orthodoxy by reference to my own conception of the function of the judicial power within the overall system of government established by our Constitution. I trust that my vision is true to the vision of Sir Maurice Byers but I doubt that he would mind if it admits of some genetic variation. This is my version of our story.

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* Solicitor-General of Australia. Sir Maurice Byers Memorial Lecture delivered 7 April 2009.

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