

# The High Court on Constitutional Law: the 2002 Term

## Justice Susan Kenny<sup>1</sup>

### INTRODUCTION

Well over two hundred years ago, Lord Mansfield observed that “[m]ost of the disputes in the world arise from words”.<sup>2</sup> In the 2002 term of the High Court, the disputes in constitutional cases invariably arose from the words of the constitutional text.

In reflecting on the work of the High Court in constitutional law in the last term, I focus today on the interpretive analyses that the Court has employed in the constitutional cases that were decided last year.<sup>3</sup> I have chosen to make this my focus for a number of reasons. First, in the time allowed me, it would be difficult, if not dull, to attempt an exhaustive analysis of the Court’s constitutional work. Secondly, it is plain enough that the High Court has, in the last term, employed a number of different interpretive modes in resolving constitutional issues, and that the individual members of the Court have differed in their approaches to interpretation. Indeed, in the last term, two Justices expressly stated contrary views about the correct approach to the interpretation of a constitutional text. These differences raise important questions.

What modes of interpretation has the Court used? Has the Court preferred one mode of interpretation to another, or accorded priority to some modes rather than to others? What, if any, is the constitutional relevance of the Court’s choice of interpretive mode? Does the choice really matter? What factors contribute to the interpretive mix of the Court? These are questions I would consider today.

The debate about the importance of modes of constitutional interpretation is not new. It has attracted the attention of eminent scholars and judges in this country and elsewhere. In the United States over many years, scholars and judges have written a very great deal on the subject.<sup>4</sup> Compare, for example, the approaches of Robert Bork in *The Tempting of America*<sup>5</sup> and Cass Sunstein in *The Partial Constitution*.<sup>6</sup> On the one hand, Bork has contended that “only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy”.<sup>7</sup> On the other hand, Sunstein has argued that the meaning of the constitutional text is “inevitably and

always a function of interpretive principles” and that these principles are “a product of substantive commitments” of constitutional relevance.<sup>8</sup> So far as Sunstein is concerned, the basis for all interpretive principles is a commitment to “deliberative democracy”.<sup>9</sup> In Australia too there has been a thoughtful discussion.<sup>10</sup>

In the 2002 term, Justices Gummow and Kirby turned specifically to theories of interpretation in the decision in *SGH Ltd v Commissioner of Taxation*<sup>11</sup> (“*SGH*”). In *SGH*, the majority held that *SGH Limited*, which was a form of building society, was not to be regarded as “the State” for the purposes of s 114 of the Commonwealth Constitution.<sup>12</sup> Justice Michael Kirby dissented. Justice Kirby maintained that his difference with the majority arose out of a difference about the proper approach to constitutional interpretation.<sup>13</sup>

In his dissenting judgment, Justice Kirby affirmed a view that he has previously stated, when he said:

*It is a serious mistake ... to attempt to construe any provision of the Constitution, including a prohibition such as that contained in s 114, from a perspective controlled by the intentions, expectations or purposes of the writers of the Constitution in 1900.*<sup>14</sup>

According to his Honour, s 114, which was to be given “a broad and not a narrow meaning”,<sup>15</sup> was “to be construed in a way harmonious with its purposes that lie deep in the nature of a federal polity”.<sup>16</sup> “When those purposes are fully appreciated”, then, so his Honour said, “it will be realised that the section speaks to succeeding generations in a way that adapts to the significantly altered manner in which the political units of the Australian federation manifest themselves today when compared, say, with the equivalent manifestations of 1901 or of 1950, 1980 or even of 1990”.<sup>17</sup>

What are the differences in approaches to constitutional interpretation to which Justice Kirby refers? In a separate concurring judgment, Justice William Gummow expressly rejected the notion that questions of constitutional construction were to be answered by “any particular, all-embracing revelatory theory or doctrine of interpretation”.<sup>18</sup> A theoretical approach was unsatisfactory, so his Honour said, because it did not accommodate the complexity and diversity of the issues that arose under the Constitution. According to Justice Gummow,

*[t]he state of the law of the Constitution at any given time is to be perceived by study of both the constitutional text and of the Commonwealth Law*

*Reports. Decisions of this court dealing with the text and structure of the Constitution but not bearing directly upon a particular provision nevertheless may cast a different light upon that provision and so influence its interpretation.*

*This indicates ... that questions of constitutional interpretation are not determined simply by linguistic considerations which pertained a century ago. Nevertheless, those considerations are not irrelevant; it would to be pervert the purpose of judicial power if, without recourse to the mechanism provided by s 128 and entrusted to the parliament and the electors, the Constitution meant no more than what it appears to mean from time to time to successive judges exercising the jurisdiction provided for Ch III of the Constitution.<sup>19</sup>*

So far as Justice Gummow was concerned, constitutional interpretation proceeded primarily from the text, including textual structure, and the authorities.

Is it possible to explain acts of constitutional interpretation in this way? So far as Justice Gummow was concerned, a decision about constitutional meaning can be made by reference only to those commitments, values or principles that are necessarily embedded in the constitutional text and the authorities. For Justice Kirby, on the other hand, constitutional interpretation proceeds from an evolutionary interaction of the constitutional text with the contemporary institutions of government. That is to say, whilst the judges agreed that they owed a duty of fidelity to the Constitution, they disagreed on the way in which the duty was to be discharged. Put another way, they disagreed on the source of the interpretive commitments, values and principles that give meaning to the constitutional text.

It may be recalled that this is not the first time that current members of the Court have disagreed about the preferred approach to constitutional interpretation.<sup>20</sup> These disagreements continued last term. The judges differed on how best to explain what they do in construing a constitutional text. But do these differences affect the outcome of cases, as Justice Kirby maintains? The answer to this question is not straightforward.

To answer the questions I have raised thus far, I look at the modes of interpretation adopted by the Court in four cases from last term. They are *Luton v Lessels*<sup>21</sup>; *SGH*; *Mobil Oil Australia Pty Ltd v Victoria*<sup>22</sup> (“*Mobil Oil*”); and *Roberts v Bass*<sup>23</sup>. Before going further, however, let me set some parameters. First, one may accept that, in some places, the words of the Commonwealth (or of a State) Constitution will speak for themselves. If there is any process of interpretation, it is subliminal. In none of the four cases just mentioned, however,

was the meaning and application of the constitutional text clear. If the meaning was unclear, how then did the Court settle it? The Court relied on matters in and out of the text to settle upon a preferred understanding. This is unremarkable. But upon what kind of matters did it rely? An examination of the four cases mentioned indicates that, in the 2002 term, there were, roughly speaking, five principal modes of interpretation employed by the Court in resolving questions of construction. They were, broadly speaking, (1) textual; (2) historical; (3) structural; (4) doctrinal; and (5) prudential-ethical.<sup>24</sup>

I interpolate here that these terms are intended to be no more than broadly descriptive. They are inevitably imprecise and non-exhaustive descriptors of the sometimes very complex styles of interpretive analysis used by the Court. What do the terms mean? I discuss each of them in relation to the interpretive modes used in the particular cases under study.

In using the word “textual”, I mean an approach that begins with the words of the text and attributes to them the meaning they naturally bear. Until relatively recently, this mode was regarded as the preferred mode of interpretation in constitutional cases in the High Court. The adoption of “literalism” (a form of textualism) is usually attributed to the decision in the *Engineers’ Case*<sup>25</sup>. In a well-known passage in that case, the Court settled upon the “golden rule” or “universal rule” that the express words of the Constitution should be given their “natural” or “ordinary” meaning.<sup>26</sup> As others have noted, the command of this approach has much diminished over the last decade or so.<sup>27</sup>

This is not to say, however, that textualism has disappeared entirely. Indeed, what may be called a textual approach may be simply the description of an activity that commences every enquiry into a constitutional question.<sup>28</sup> When the High Court began each constitutional enquiry in the last term, it began with the constitutional text, but in no case did the natural meaning of the text resolve the matter at hand. Thus, for example, the terms of s 114 are plain enough, but they could not answer the question in *SGH*, as to whether a particular building society was the State for the purposes of the provision.

In *Luton v Lessels*, a question arose concerning s 55 of the Commonwealth Constitution. This relevantly states that “[l]aws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect”. The drafters of today might admire the simplicity and directness of the language of

this provision. Did it, however, render the provisions of the Commonwealth's child support legislation invalid? The answer turned on whether the statutory creation of a debt due from Mr Luton to the Commonwealth constituted "the imposition of taxation". Neither s 55 nor any other part of the constitutional text could of itself supply the entire answer.

In *SGH* and *Luton v Lessels*, the textual approach, which began the Court's enquiry, collapsed into an historical or structural analysis. The reason for this is plain enough, since, in the last term, the form of textualism used by the Court relied less on the literal meaning of the words of the text and more on the meaning of the words viewed historically and by reference to the rest of the text read as a whole.

What do I mean by the term "historical" in relation to the work of the Court last term? I put aside for the moment much of the scholarship in the United States. In that country, the term "originalist" is used to refer to scholars and judges who hold that the United States Constitution should only (or principally) be interpreted according to the intentions of its drafters and ratifiers. The debate between originalists and non-originalists in the United States has not, however, been reiterated in Australia with the same intensity. In the United States, the debate has been affected by anxieties about the authority of the Constitution and doubts about the legitimacy of judicial review. For various reasons arising from our constitutional traditions, these anxieties and doubts have surfaced in this country relatively infrequently compared with the United States. In connection with the work of the High Court, I use the term "historical" to refer to a mode of interpretation that relies upon the purpose or understanding of the Constitution's framers and ratifiers to assist in the interpretive process.

Consistently with what I have said, although Justice Kirby has rejected "originalism" as a form of "ancestor worship"<sup>29</sup>, he has not done so on the ground that there is no such thing as historical truth. Current judges of the High Court accept that "we can tell the difference between truth and lies in history", as Richard J Evans has so graphically illustrated in his book *Telling Lies about Hitler*.<sup>30</sup> No member of the Court is apparently infected by the school of thought that would deny that we can know historical truth.

As it so happens, if there were a history prize for the work of the last term, it might well have been awarded to Justice Kirby. It was he who, in *Luton v Lessels*, made express

mention of the significance of taxation in 17<sup>th</sup> century English constitutional history and in the constitutional history of the United States and of the likely importance attached to these matters by the framers and ratifiers of the Commonwealth Constitution.<sup>31</sup> The historical knowledge that Justice Kirby attributed to the framers provided the basis for the inferences he drew from the structure of the constitutional provisions on taxation (especially as to the relationship between ss 53 and 55). Subsequently, in *SGH*, his Honour relied on an historical analysis to support the proposition that s 114 of the Constitution was to be given a broad application, “with attention focussed on objects and purposes rather than on form and on particular arrangements that are bound to vary over time and as between different institutions established as emanations of the polity concerned”.<sup>32</sup>

In the last term, however, Justice Kirby was not alone in his reliance on history. For reasons that will appear, the assumption that the original purpose and understanding of a constitutional provision is relevant to the Court’s enquiry is implicit in the joint judgment of Justices Gaudron and Hayne in *Luton v Lessels*. References to historical understandings are also evident in the judgments of the majority in *SGH*.

Whilst the prevalence of historical enquiry in constitutional cases in the High Court has waxed and waned over the years, there is nothing novel about the approach, which can be traced to the beginnings of the Court.<sup>33</sup> Whatever may have been the case in the first decade of the Court, however, in this last term, none were true originalists. That is, when an historical enquiry was undertaken, the outcome of the enquiry did not determine the meaning of the text. Historical knowledge was but one of a number of matters used to elucidate meaning.

Structural analysis (that is, drawing inferences from a combination of provisions) was favoured last term not only by Justice Kirby in *Luton v Lessels* but also, in the same case, by Justices Gaudron and Hayne. In their joint judgment, these justices concentrated upon the significance of the fact that, under the child support legislation, monies collected by the Commonwealth were paid into the Consolidated Revenue Fund in accordance with s 81 of the Constitution. This fact was significant because of an observation in *Australian Tape Manufacturers Association Ltd v Commonwealth*.<sup>34</sup> Acceptance in this joint judgment of the fact that the mere payment into the Fund did not make an exaction a tax rested very largely on a structural analysis of the interrelationship of ss 53 to 56 and ss 81 to 83 of the

Constitution. Upon the basis of this analysis, Justices Gaudron and Hayne concluded that s 81 was “both the consequence of, and a necessary step in the effecting of, parliamentary control over taxation”.<sup>35</sup>

In this way, their analysis, like other structural analyses, depended upon the validity of the claim that a particular principle was implicit in the structure of government and in the relationships created by the constitutional text. Having determined that a principle of parliamentary control over monies was to be inferred from these structures and relationships, it was open to Justices Gaudron and Hayne to conclude, as they did, that, whilst every tax must be paid into the Consolidated Revenue Fund, not every payment made into the Fund was necessarily a tax.<sup>36</sup>

Referring to matters of structure, as well as to the history of intergovernmental immunities, Justice Gummow observed in *SGH* that s 114 “no longer replicates any fundamental considerations of federalism which inform a present understanding of the Constitution”.<sup>37</sup> This observation draws attention to the inevitable dependence of a structural analysis on the validity of the inferences that may be drawn from structures and relationships. As Professor Sunstein has commented in the context of the US Constitution, “[i]nferences from constitutional text and structure sometimes involve a large measure of discretion. In using these sources of law, we must often resort to ideas external to text and structure”.<sup>38</sup> It was, after all, a form of structural analysis that supported the doctrine of the States’ “reserved powers”, which was rejected in the *Engineers’ Case* in 1920.<sup>39</sup>

The merits of a structural analysis are clear enough. Structural analysis is necessarily anchored in the Constitution. It calls for a consideration of the text as a whole. As the work of the Court last term shows, however, structural analysis remains simply a helpful approach to interpretation: it rarely provides a complete answer to an enquiry. As the history of the Court shows, sometimes the inferences from structure are strong and the answer they support recommends itself to the entire court, whilst at other times, especially where the bases for inferences are unclear, differences between members of the Court may arise from differences about the inferences that should be drawn.

What may be termed the “doctrinal” approach depends on the claim that principles may be derived from the Court’s previous authorities relevant to the resolution of the

constitutional question at hand. This may be termed the common law constitutional method. It joins the Constitution to the common law, which is part of our distinctive tradition as a common law country.<sup>40</sup>

In the last term, the common law constitutional method took priority over other interpretive approaches. Thus, in *Luton v Lessels*, Chief Justice Gleeson (with whom Justice McHugh agreed) focussed on the significance of the decision in *Australian Tape Manufacturers* for Mr Luton's case. Employing a part of the common law method, the Chief Justice distinguished the earlier case in a material particular from the case before him. In the earlier case, the revenue was, so his Honour observed, designed to compensate a group who had no prior legal entitlement to compensation, whereas in *Luton v Lessels* the debt that became due to the Commonwealth simply replaced a debt that had been due to the eligible carer. Accordingly, the claimed "taxation" was, in his Honour's view, "no more than a mechanism for the enforcement of a pre-existing private liability".<sup>41</sup> Similarly, the joint judgment of the Chief Justice, and Justices Gaudron, McHugh and Hayne in *SGH* placed greatest reliance on the earlier decision in *Deputy Commissioner of Taxation v State Bank of New South Wales*.<sup>42</sup> The joint judgment explicitly declined to enter upon what it termed "the troubled waters of more general questions about the preferable approach to constitutional interpretation"<sup>43</sup>, observing that the argument in *SGH* preceded from an acceptance of the *State Bank Case*. A close analysis of the authorities and their significance for the case at hand was also critical in the reasoning of Justice Gummow in *SGH*.

In *Mobil Oil*, all the Court, except perhaps Justice Ian Callinan, again rested heavily on the authorities<sup>44</sup> to elucidate the relationship which must exist between State legislation and the State, and to reject the contention that the group action provisions of the *Supreme Court Act 1986* (Vic) exceeded the territorial limits on the State's legislative power. The critical point in each majority judgment was that the group action provisions operated only in relation to claims in respect of which the Supreme Court would ordinarily have jurisdiction. That is, if the defendant company were served within the jurisdiction, then any requirement for a territorial nexus was satisfied.<sup>45</sup>

Although more complex than *Mobil Oil*, the judgments in *Roberts v Bass* are mostly held together by an adherence on the part of the Court to a common law constitutional method. One may recall that the intermediate appellant court had decided the case on the

basis of the common law defence of qualified privilege, but on appeal to the High Court, the appellants sought to raise the extended form of qualified privilege outlined in *Lange v Australian Broadcasting Corporation*.<sup>46</sup>

Employing a method of reasoning well accepted in the common law, the Chief Justice held that, by virtue of the case's procedural history, the appeals provided "an unsuitable occasion for the development of the law"<sup>47</sup>, and left consideration of the extended form of the privilege for another day. Justice Hayne adopted a similar course.<sup>48</sup> Although the joint judgment of Justices Gaudron, McHugh and Gummow took a different path, the path lay in the common law field. Their Honours accepted the authority of the decision in *Lange*, but confined its application to the publication to the general public by the general media in governmental and political matters. It followed from this that the extended form of qualified privilege in *Lange* was inapplicable in *Roberts v Bass*, since *Roberts v Bass* was concerned with statements "by electors, candidates and their helpers" to the electors of a State electorate concerning a candidate for election to a State parliament.<sup>49</sup> In this situation, the common law doctrine of qualified privilege did not, so the joint judgment held, trespass into the constitutionally protected freedom of communication in matters of government and politics.<sup>50</sup> That is, adapting the *Lange* analysis to the present, the joint judgment held that the common law rules governing qualified privilege were reasonably appropriate and adapted to serve a legitimate end compatible with representative and responsible government.

The virtues of what may be called the doctrinal mode are largely the virtues of the common law. In interpreting the constitutional text by reference to prior authorities, the Court promotes the values of continuity, stability and predictability. By promoting these values, the Court enhances its own institutional legitimacy. As Philip Bobbitt observed in Constitutional Fate, an approach of this kind promotes "adherence to traditional standards of dispassion and disinterest, the elaboration of convincing reasons for deciding one way or the other, the mutual opportunity for persuasion".<sup>51</sup> These values are, furthermore, important to the institutional well-being of the other arms of government. That is, although they are the virtues of the common law, they are also constitutionally relevant values.

By saying this, I do not intend to suggest that adherence to the common law constitutional method need promote rigidity, or an unimaginative application of the decisions of the past to the questions of the present. As the work of the Court last term shows, the

method permits the evolution of constitutional principle, although commonly on a gradual or incremental basis and sometimes in a not entirely rational and satisfactory way. Further, it may be said that the assumption of the common law method by the High Court is more deliberate and self-conscious than in other courts, since it is open to the High Court in an appropriate case to depart from and overrule previous authorities when it is persuaded that, for some sufficient reason, the principles embodied in them should no longer govern.

I have left to last the most complex of the interpretive modes used last term. This is the “prudential-ethical” mode. The mode is a constitutional argument that relies on economic, social or political considerations attending the case.<sup>52</sup> It is a self-consciously evaluative style.

The mode is not new. It has a long pedigree. Alexander Bickel was once one of the mode’s best-known proponents. Thus, for example, a part of Bickel’s thesis, as expressed in *The Least Dangerous Branch*, was that a function of the United States Supreme Court justices was “to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law” and extract from this study “fundamental presuppositions” about government and society.<sup>53</sup>

In the last term, most of the Court at one time or another adopted a prudential-ethical mode of interpretation. In *Mobil Oil*, for example, there was some evidence of this approach, used as a secondary mode, in the judgment of the Chief Justice and in the joint judgment of Justices Gaudron, Gummow and Hayne.<sup>54</sup> Similarly, Justice Kirby’s affirmation that implications “derived from the language, structure and purpose of the Constitution” “include that the several parts of the federal polity will operate with a high level of cooperation with the other parts that make up the governmental organs of the one nation”<sup>55</sup> is in part an argument in the prudential-ethical mode.

Further, as the joint judgment in *Roberts v Bass* indicates, there are occasions when a prudential-ethical mode of interpretation is difficult to avoid. Having accepted *Lange*, the authors of the joint judgment had to consider whether, notwithstanding its “chilling effect”, the common law was reasonably appropriate and adapted to serve a legitimate end. This called for an argument in the prudential-ethical mode. The gist of the argument in this mode in the joint judgment was that, since “[t]he Australian electoral process works and can only

effectively work, with the help of the thousands of volunteers who at election time, and sometimes earlier, provide services to the candidates and political parties”, “[t]o hold such persons liable in damages for untrue defamatory statements ... would be to impose a burden that is incompatible with the constitutional freedom of communication”.<sup>56</sup> Justice Kirby adopted a similar prudential-ethical mode of constitutional interpretation.<sup>57</sup>

I have until now said little of the work of Justice Callinan. His Honour was, so it seemed to me from reading the cases decided last term, the leading practitioner of the prudential-ethical mode in this period. In *Mobil Oil*, Justice Callinan, dissenting, held that the group action provisions were to be read down to confine them in accordance with constitutional principle.<sup>58</sup> Amongst other things, his Honour adopted a structural interpretive approach<sup>59</sup> and a prudential-ethical mode of argument. After noting that an expansive reading of State constitutions had “the capacity to cause ... conflicts of jurisdiction, and forum poaching”,<sup>60</sup> his Honour opined that “[t]he Victorian legislature, by the Victorian Act, has attempted to make the Supreme Court of Victoria a national court for the conduct of class actions”.<sup>61</sup> This was so because the group action provisions had the potential to draw “residents of other places into proceedings in Victoria as plaintiffs in circumstances in which their claims have no necessary connexion with Victoria”<sup>62</sup>, and “they might wish, for perfectly valid reasons, to bring proceedings in jurisdictions other than Victoria”.<sup>63</sup> It was his Honour’s view that other States would perceive Victoria’s legislation as “a pre-emptive grab for national ascendancy in class actions”.<sup>64</sup> Besides the confusion that would ensue if other State parliaments enacted similar legislation, there was also “the increasingly competitive entrepreneurial activities of lawyers undertaking the conduct of class or group actions”<sup>65</sup> to be considered. His Honour held that these (and other matters) were “to be taken into account in resolving the issues” in the case.<sup>66</sup>

In *Luton v Lessels*, Justice Callinan discussed and distinguished the principal authorities<sup>67</sup> from the case at hand by another form of prudential-ethical interpretive argument. After referring to the “field of discourse” as one of “high moral, social and, in modern times, legal obligations owed to children by parents” and observing that “not all of the language used in cases concerned with the payment of money to the Commonwealth by income earners and commercial enterprises has a necessary application”, his Honour affirmed:

*A person assessed under this scheme may have no ultimate choice but to pay*

*the assessment to the Commonwealth, but the compulsion to pay only arises, if, and only if, the payer has not otherwise discharged the obligation that a parent owes to his or her child or children. It is parenthood that is, and continues to be the source of the obligation.*<sup>68</sup>

Like the rest of the Court, his Honour went on to hold that the legislative scheme did not impose a tax within the meaning of s 55 of the Constitution.<sup>69</sup>

In rejecting *Lange* as authoritative,<sup>70</sup> Justice Callinan opined, in *Roberts v Bass*, that “[f]reedom of speech is no more under threat today than it was when the Constitution was drafted”.<sup>71</sup> His Honour added that “[i]t will take years, years of uncertainty and diverse opinion for the court to reach a settled view of the elements of the [*Lange*] defence and the way in which it is to be applied”.<sup>72</sup> This is, so it seems to me, an argument in the prudential-ethical mode.

Unless tied firmly to the constitutional text and the commitments, values and principles embedded in the Constitution, the prudential-ethical mode is the most difficult of the interpretive modes to justify as part of the Court’s interpretive method. Let me take the celebrated case of *Buck v Bell*.<sup>73</sup> Since it was decided in another time and place it may most clearly illustrate my point. In this case, in April 1927, the US Supreme Court was called upon to determine whether a sterilisation statute passed by the legislature of the State of Virginia was constitutionally valid. A seventeen-year-old girl named Carrie Buck had been committed to the Virginia Colony for Epileptics and Feeble-minded. Pursuant to the statute, a judge ordered that she be sterilised as a “moral imbecile”.<sup>74</sup> Carrie’s mother had previously been certified to be feeble-minded. Carrie had borne a child, Vivian, before the sterilisation order was made. The Supreme Court was persuaded that not only Carrie Buck and her mother were “feeble-minded” but so too was Carrie’s baby daughter, upon the basis that “the feeble-mindedness was heritable”.<sup>75</sup> The Court held, amongst other things, that sterilisation on eugenic grounds was within the police power of the state, and that it did not constitute cruel and unusual punishment. Justice Oliver Wendell Holmes wrote the Court’s opinion. As Daniel J Kevles said *In the Name of Eugenics*, Holmes “managed to find a link between eugenics and patriotism”.<sup>76</sup> Reflecting the transient values of his time, this otherwise admirable judge declared that “[t]hree generations of imbeciles are enough”.<sup>77</sup> Interestingly enough, Carrie’s daughter, Vivian, “went through the second grade before she died of an intestinal disorder in 1932. Her teachers reportedly considered her very bright”.<sup>78</sup>

As I have said, the prudential-ethical mode of interpretation has a respectable pedigree and its adoption may, on some occasions, be unavoidable. Yet it is this mode which more than the other modes used last term can permit commitments, values and principles that lack constitutional foundation to permeate constitutional decision-making. Perhaps because the Court recognised the need for caution in its use, the mode was generally less evident than the other modes in the Court's work last term. If relied on at all, most members of the Court employed the prudential-ethical mode as a secondary mode of interpretation.

Did the Court prefer some modes of interpretation to others? Plainly, it did. Starting with the text, the principal mode of interpretation employed last term was doctrinal. That is, the Court relied upon the principles it discerned in its past decisions to construe the constitutional text. Structural and historical modes were also important. Did the choice of one mode over another really matter? Plainly, it did. The Court's reference to the authorities tended to promote continuity and stability. Structural analyses anchored an interpretation in the constitutional text. Each interpretive mode can, however, promote the constitutional values of the Australian system of government. Since the language of the prudential-ethical mode is not purely legal, reliance on this mode may expose the Court to wider and more vigorous debate than the other modes. In placing less reliance on the prudential-ethical mode than the other modes, the Court may have diminished the likelihood that its decisions last term would be tested by debate of this kind.

At an individual level, all the judges of the Court had occasion to employ each of the five modes of interpretation, although there were differences. Each had his or her preferred modes. In preferring one mode of interpretation to another, a judge contributed to the interpretive mix of the Court. Last term, the members of the Court were agreed upon a duty of fidelity to the Constitution, although each had his or her understanding of what that meant. It is in this mix of understandings that the Court remains faithful to the law that is the Constitution.

<sup>1</sup> Judge of the Federal Court of Australia.

<sup>2</sup> *Morgan v Jones* (1773) Lofft 160 at 176; 98 ER 587 at 596.

<sup>3</sup> I follow the path laid down by Mr Stephen Gageler SC in his address on the 2001 term: see Stephen Gageler,

‘The High Court on Constitutional Law: the 2001 Term’ (2002) 25(1) *UNSW Law Journal* 194. On that occasion, Mr Gageler discussed the cases decided in the 2001 calendar year. In referring to “constitutional cases”, I mean the cases in which an issue arose involving the constitution of the Commonwealth of Australia or of an Australian State.

<sup>4</sup> For example, see: Francis Lieber, *Legal and Political Hermeneutics*, (first published 1839) reprinted in *Classics in Legal History, volume five*, Hein, New York, 1970; Charles Howard McIlwain, *Constitutionalism, Ancient and Modern*, Cornell University Press, Ithaca, New York, 1947; Alexander M. Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics*, (first published 1962) 2<sup>nd</sup> ed., Yale University Press, New Haven, 1986; Charles L. Black JR., *Structure and Relationship in Constitutional Law*, Louisiana State University Press, Baton Rouge, 1969; Philip Bobbitt, *Constitutional Fate: Theory of the Constitution*, Oxford University Press, Oxford, 1982; Ronald Dworkin, *A Matter of Principle*, Harvard University Press, Cambridge, Massachusetts, 1985; Mark Tushnet, *Red, White and Blue: a Critical Analysis of Constitutional Law*, Harvard University Press, Cambridge, Massachusetts, 1988; Sanford Levison and Steven Mailloux (eds), *Interpreting Law and Literature: a Hermeneutic Reader*, Northwestern University Press, Evanston, 1988; Sanford Levinson, *Constitutional Faith*, Princeton University Press, New Jersey, 1988; Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literature and Legal Studies*, Duke University Press, Durham and London, 1989; Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, Harvard University Press, Cambridge, Massachusetts, 1990; Earl M. Maltz, *Rethinking Constitutional Law: Originalism, Interventionism, and the Politics of Judicial Review*, University Press of Kansas, Kansas, 1994; Ronald Kahn, *The Supreme Court and Constitutional Theory, 1953-1993*, University Press of Kansas, Kansas, 1994; Philip Bobbitt, *Constitutional Interpretation*, Basil Blackwell, Oxford, 1991; Gregory Leh (ed), *Legal Hermeneutics: History, Theory and Practice*, University of California Press, Berkeley, 1992; Scott Douglas Gerber, *To Secure These Rights: the Declaration of Independence and Constitutional Interpretation*, New York University Press, New York, 1995; Gregory Bassham, *Original Intent and the Constitution: A Philosophical Study*, Rowman & Littlefield, Boston, 1992; William F. Harris II, *The Interpretable Constitution*, Johns Hopkins University Press, Baltimore, 1993; and a host of journal articles.

<sup>5</sup> Robert H Bork, *The Tempting of America. The Political Seduction of the Law*, The Free Press, N.Y., 1990.

<sup>6</sup> Cass R Sunstein, *The Partial Constitution*, Harvard University Press, Cambridge, Massachusetts, 1993.

<sup>7</sup> Bork, *op. cit.* at p 143.

<sup>8</sup> Sunstein, *op. cit.* at p. 8.

<sup>9</sup> *Ibid.*, at p 10.

<sup>10</sup> For example, see: Jeremy Kirk ‘Constitutional Implications (I): Nature, Legitimacy, Classification, Examples’ (2000) 24 *Melbourne University Law Review* 645; Jeffrey Goldsworthy ‘Interpreting the Constitution in its Second Century’ (2000) 24 *Melbourne University Law Review* 677; Jeffrey Goldsworthy ‘Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue’ (1997) 23 (2) *Monash University Law Review* 362; Jeffrey Goldsworthy ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1; Anthony Mason ‘The Interpretation of a Constitution in a Modern Liberal Democracy’ in Charles Sampford (ed.) *Interpreting Constitutions: theories, principles and institutions*, The Federation Press, N.S.W.,

1996, p 13; G. J. Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in G. J. Lindell (ed.) *Future Directions in Australian Constitutional Law*, The Federation Press, N.S.W., 1994 and Leslie Zines, 'The Present State of the Constitution' in A. Stone and G. Williams (eds) *The High Court at the Crossroads: Essays in Constitutional Law*, The Federation Press, N.S.W., 2000; Greg Craven, 'Cracks in the Façade of Literalism: Is there an Engineer in the House?', 18 (1992) *Melbourne University Law Review* 540.

<sup>11</sup> (2002) 188 ALR 241.

<sup>12</sup> Section 114 of the Commonwealth Constitution relevantly provides that "The Commonwealth [shall not] impose any tax on property of any kind belonging to a State".

<sup>13</sup> *SGH*, at [80].

<sup>14</sup> *SGH*, at [77].

<sup>15</sup> *SGH*, at [78].

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *SGH*, at [41].

<sup>19</sup> *SGH*, at [43]-[44].

<sup>20</sup> On approaches to constitutional interpretation, see for example *Re Wakim; Ex parte McNally* (1990) 198 CLR 511, at [49]-[53] per McHugh J; *Eastman v R* (2000) 203 CLR 1, at [140]-[158] per McHugh J; *Newcrest Mining (WA) Limited v Commonwealth of Australia* (1997) 190 CLR 513, at 657-661 per Kirby J; and *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337, at 399-401 per Kirby J.

<sup>21</sup> (2002) 187 ALR 529.

<sup>22</sup> (2002) 189 ALR 161.

<sup>23</sup> (2002) 194 ALR 161.

<sup>24</sup> This description of interpretive modes is not new: see Bobbitt, *Constitutional Fate*, pp 7-8, 93-94; Bobbitt, *Constitutional Interpretation*, pp 12-13, 31f.

<sup>25</sup> *Amalgamated Society of Engineers v Adelaide Steamship Company Limited* (1920) 28 CLR 129.

<sup>26</sup> (1920) 28 CLR 129, at 148-9.

<sup>27</sup> See, for example, Geoffrey De Q Walker 'The Seven Pillars of Centralism: Engineers' Case and Federalism'." (2002) 76 *The Australian Law Journal* 678, at 704.

<sup>28</sup> Robert C. Post, 'Theories of Constitutional Interpretation' in Robert C. Post (ed.), *Law and the Order of Culture*, University of California Press, Berkeley, 1991, p 14.

<sup>29</sup> Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1, at pp. 6, 14.

<sup>30</sup> Richard J Evans, *Telling Lies about Hitler. The Holocaust, History and the David Irving Trial*, Verso, London, 2002, at p 1. For a more theoretical discussion of this debate see Richard J. Evans, *In Defence of History*, Granta, London, 1997.

<sup>31</sup> *Luton v Lessels*, at [96] – [103].

<sup>32</sup> *SGH*, at [95], [82] – [90].

<sup>33</sup> For example, see, *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, at 1109 per Griffith CJ and

Barton and O'Connor JJ.

<sup>34</sup> Namely, “the fact that a levy is directed to be paid into the Consolidated Revenue Fund has been regarded as a conclusive indication that the levy is exacted for public purposes”: (1993) 176 CLR 480, at 503; 112 ALR 53, at 60.

<sup>35</sup> *Luton v Lessels*, at [57].

<sup>36</sup> *Luton v Lessels*, at [58]. The joint judgment went on to hold that the creation of a debt due to the Commonwealth was no more than the replacement of an obligation to make payment to an eligible (child) carer, the carer acquiring the benefit of a new right vis à vis the Commonwealth (at [60]).

<sup>37</sup> *SGH*, at [53].

<sup>38</sup> Sunstein, *The Partial Constitution*, at p 106.

<sup>39</sup> cf De Q Walker, *op cit*, at pp 678-682.

<sup>40</sup> cf Stephen M Griffin, *American Constitutionalism: from theory to politics*, Princeton University Press, Princeton, 1996, at p 150; Post, *op cit*, p 20; and David A Strauss, ‘Common Law Constitutional Interpretation’ (1996) 63(3) *The University of Chicago Law Review* 877, at 879.

<sup>41</sup> *Luton v Lessels*, at [14].

<sup>42</sup> (1992) 174 CLR 219; 105 ALR 161.

<sup>43</sup> *SGH*, at [14].

<sup>44</sup> Especially *Pearce v Florenca* (1976) 135 CLR 507 and *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.

<sup>45</sup> *Mobil Oil*, at [10] per Gleeson CJ; [55] per Gaudron, Gummow and Hayne JJ; [122]-[123] and [130] per Kirby J.

<sup>46</sup> (1997) 189 CLR 520

<sup>47</sup> *Roberts v Bass*, at [2].

<sup>48</sup> *Roberts v Bass*, at [213], [230].

<sup>49</sup> *Roberts v Bass*, at [73].

<sup>50</sup> *Roberts v Bass*, at [70].

<sup>51</sup> Bobbitt, *Constitutional Fate*, p 43.

<sup>52</sup> *Ibid* p 61.

<sup>53</sup> Bickel, *The Least Dangerous Branch* at p 236.

<sup>54</sup> cf *Mobil Oil*, at [16] per Gleeson CJ; and [52]-[53] per Gaudron, Gummow and Hayne JJ.

<sup>55</sup> *Mobil Oil*, at [105] per Kirby J.

<sup>56</sup> *Roberts v Bass*, at [102] per Gaudron, McHugh and Gummow JJ.

<sup>57</sup> *Roberts v Bass*, at [172]-[173] per Kirby J.

<sup>58</sup> *Mobil Oil*, at [190].

<sup>59</sup> *Mobil Oil*, at [177].

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Mobil Oil*, at [182].

<sup>65</sup> *Mobil Oil*, at [183].

<sup>66</sup> *Mobil Oil*, at [179].

<sup>67</sup> *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 and *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

<sup>68</sup> *Luton v Lessels*, at [179] per Callinan J.

<sup>69</sup> *Luton v Lessels*, at [180]. A prudential-ethical approach is also evident in this case in his Honour's judicial power analysis: see, for example, at [189] – [201] per Callinan J.

<sup>70</sup> His Honour adhered to the view that he had expressed in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [337] – [348], whilst noting that it was unnecessary for him to decide whether he should apply it in *Luton v Lessels*.

<sup>71</sup> *Roberts v Bass*, at [285].

<sup>72</sup> *Ibid.*

<sup>73</sup> 274 US 201 (1927)

<sup>74</sup> Daniel J Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity*, Harvard University Press, 1995, 4<sup>th</sup> Printing, 2001, pp 110-112.

<sup>75</sup> *Ibid.*, p 111.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Buck v Bell*, 274 US 205, 207 (1927).

<sup>78</sup> Kevles, *op cit*, p. 112.