

# CRITIQUE AND COMMENT

## CONCERN ABOUT JUDICIAL METHOD

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*[Sir Owen Dixon's judicial method is misunderstood if it is taken to deny any role for judges in changing the common law. But it did espouse gradual rather than abrupt change, and it downplayed the impact of values and policy considerations on the choices left open by competing legal arguments. Social and other changes in the external environment since Sir Owen delivered his famous address 'Concerning Judicial Method' at Yale University in 1955 may go some of the way towards explaining why both aspects of this approach came under pressure. In any event, the High Court from the mid-1980s onwards both embraced more extensive change and more openly discussed and balanced competing policy considerations, of which the maintenance of certainty and stability was but one. Yet this more progressive and more transparent approach brought its own assortment of problems, including intense criticism from those who disagreed with its methodology and its outcomes — especially the latter. This article looks at 'judicial activism' in the context of the imperatives of the judicial process, and finds the phrase wanting as a useful analytical tool. The article also begins to explore a number of 'why' questions: why is there such strong disagreement; why do some judges favour one approach and some another; and can there be a reconciliation?]*

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## I INTRODUZIONE

Ladies and gentlemen, this is my most intimidating assignment — ever! I have played soccer at the Sydney Cricket Ground in front of 50 000 people (admittedly as part of a celebrated undergraduate student prank);<sup>1</sup> I have become a father again in my 50s — twice (courting Lady Bracknell's famous observation about Mr Worthing's loss of two parents);<sup>2</sup> and in September 2005 endeavoured to persuade the law student body at the Australian National University that they should be deliriously happy to pay a 25 per cent increase in their fees. But my task here — a task, moreover, given to a one-time scholar now totally consumed by the neurone-devouring duties of being a Dean — is to say something new and fresh about an age-old and vastly explored subject, before four of the world's leading exponents of the judicial process;<sup>3</sup> four fellow paper-givers who are not only renowned scholars in their own right, but who live and breathe the issues surrounding the contentious subject of judicial activism every day of their working lives.

What to do in these circumstances? I suppose that, as I am not quite yet in my 60s (unlike the sexagenarian quartet), I could go for the brashness or cheekiness of youth. Or, because I know what they think (they have all written prolifically on the subject),<sup>4</sup> I could go for something different, something really out of left field. However, I have decided to take a much more modest course. I would like to wrestle a little with *why* there are so many different perspectives on this subject; whether one perspective is better than another, or can lay a good claim to being 'right', and how one might go about answering that question; whether one can narrow the points of contention by identifying a range of propositions that might be said to command common consent, and, by implication, a further set of propositions that must remain simply as different world views; and how one might define what is 'progress' in the elaboration of this fascinating topic.

That there are different perspectives on judicial method is not in doubt, nor is it surprising. We all look at the world in different ways. Consider these two descriptions of one of the world's greatest concentrations of people (and I choose this example in deference to our American visitors). First:

New York is a Catherine wheel of a city, revolving and sparking with the ebb and flow of life itself, humming and throbbing with the energy of an over-confident and brash young adult, a cosmopolitan mix of a hundred different nations, wonderfully rich in history and stimulating to the senses.<sup>5</sup>

<sup>1</sup> 'Flying Squad on the Job', *The Sun-Herald* (Sydney), 3 May 1964, 1.

<sup>2</sup> Oscar Wilde, *The Importance of Being Earnest* (First performed 1895, 1994 ed) act 1 pt 2.

<sup>3</sup> Scalia and Breyer JJ of the United States Supreme Court and Kirby and Heydon JJ of the High Court of Australia. Moreover, each pairing is a striking study in high contrast.

<sup>4</sup> Apart from their judicial decisions, see especially Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997); Justice Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005); Justice Michael Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (2004); Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47(1) *Quadrant* 9.

<sup>5</sup> This and the three succeeding quotations are a compilation from many sources, synthesised for pedagogical purposes for a colloquium in 1997 with the Australian National University political

Second:

New York is the sewer of the world: loud, aggressive and vulgar; rude, unpleasant and crass — a manic and lawless free-for-all that could easily be the empirical basis for Hobbes' observation that life in the state of nature is nasty, brutish, and short.

Or, to shift the ground a little, consider these contrasting descriptions of the harmless pursuit of the game of golf. First:

Golf is a magnificent test of character — a noble contest of skill and imagination which demands the virtues of patience, honesty, integrity, and determination. Success is exhilarating, failure humbling, the line between them tantalisingly fickle, and the transition from one to the other alarmingly sudden. Golf encapsulates all the struggles of the inner self.

Here is the second:

Golf is a silly, trivial game, in which otherwise intelligent people chase a little white ball into a hole and then take it out and do it again. It has no socially or intellectually redeeming value, and is a self-indulgent distraction from higher and more worthwhile pursuits.

Of course, none of these descriptions is simply a description of fact, although descriptions of this kind often purport to state eternal truths. Rather, they are evaluative and subjective constructions of reality, a little like the brilliantly contrasting introductions to the *conversazione* by Sir John Young<sup>6</sup> and Professor Ronald Dworkin<sup>7</sup> that provide, in their very juxtaposition, such a marvellous gateway to the vexed question of judicial activism. (As they are introductions to a *conversazione*, I shall refer to them as *introduzioni!*) I ask myself, with half an eye to the subjectivity of how one perceives the rather different and admittedly more mundane phenomena of a great city and an ancient game, *can they both be right?*

## II 'CONCERNING JUDICIAL METHOD': DIXON AT HIS ENIGMATIC BEST

Sir John Young quotes at some length from Sir Owen Dixon's notable address, 'Concerning Judicial Method',<sup>8</sup> originally given as a speech at Yale University on the occasion of the award to Sir Owen of the Henry Howland Memorial Prize for distinction in the science of government, and subsequently published, as

science honours students enrolled in Professor John Warhurst's seminar, 'The Ten Best Books on Australian Politics'. I also used the quotations in Michael Coper, 'The Seven Habits of a Highly Effective High Court' (2003) 28 *Alternative Law Journal* 59, 59.

<sup>6</sup> Sir John Young, 'Chairman's Introduction' in Benjamin Kiely (ed), *Judicial Activism — Power without Responsibility?: The Boston, Melbourne, Oxford Conversazioni on Culture and Society* (2006) 9.

<sup>7</sup> Ronald Dworkin, 'Introduction' in Benjamin Kiely (ed), *Judicial Activism — Power without Responsibility?: The Boston, Melbourne, Oxford Conversazioni on Culture and Society* (2006) 11.

<sup>8</sup> Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468.

notable addresses often are, in a number of different places.<sup>9</sup> (Such is the fascination, for example, with Heydon J's critical address on judicial activism that, at last count, it had been published in at least four different locations.)<sup>10</sup>

Sir John Young's reference to Sir Owen's essay is appropriate for at least three reasons. First, 2005 was the 50<sup>th</sup> anniversary of the occasion on which Sir Owen delivered his address, and anniversaries like that are worth celebrating. Second, Sir Owen's judicial method, although often summarised and refined to the point of caricature, has probably been the single most important point of reference in Australia for opponents and defenders alike of the notion of judicial activism. Third, Sir Owen as the reference point for debate is no accident. He was a giant amongst lawyers, and his views deserve attention, even 50 years after his enigmatic speech.

I say enigmatic, because Sir Owen's prose is characteristically dense, the structure complex, and the style distinctly of a different era. Yet, like some of my other favourite legal essays, such as Justice Oliver Wendell Holmes' 'The Path of the Law',<sup>11</sup> it repays rereading. Thanks to Philip Ayres' excellent biography,<sup>12</sup> we now know a lot more about Sir Owen the man, and there is much to admire as well as much that gives pause, although in many instances attitudes are revealed that were not uncharacteristic of their time. But Sir Owen's judicial work, and especially his theory of the judicial process — as revealed by, inter alia, the essay 'Concerning Judicial Method' — remains, for me, richly enigmatic, not a little elusive,<sup>13</sup> and much deeper than either his admirers or his detractors often appear to realise or are prepared to concede.

'Concerning Judicial Method' was the mature work of a 69-year-old Chief Justice at the height of his powers and reputation. It appears to have been aimed at Lord Denning, though Lord Denning later noted, perhaps mischievously, that he agreed with every word of it.<sup>14</sup> It was delivered to an American audience, familiar with the conservative laissez faire activism of the Supreme Court from the 1890s to the 1930s, and with the American legal realist movement (indeed, Yale had been at the heart of it),<sup>15</sup> though an audience only just on the threshold

<sup>9</sup> Ibid; Sir Owen Dixon, 'Concerning Judicial Method' in Judge Severin Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (1<sup>st</sup> ed, 1965) 152.

<sup>10</sup> Heydon, 'Judicial Activism', above n 4; Justice J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110; Justice J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 14 *Australian Intellectual Property Journal* 78; Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10 *Otago Law Review* 493.

<sup>11</sup> Justice Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, also published in Justice Oliver Wendell Holmes, *Collected Legal Papers* (1920) 167. See further Michael Coper, 'The Path of the Law: A Tribute to Holmes' (2003) 54 *Alabama Law Review* 1077.

<sup>12</sup> Philip Ayres, *Owen Dixon* (2003).

<sup>13</sup> One sympathises with Sir Daryl Dawson's delightfully frank admission that, when he was a student at Yale in 1955 and had the privilege of hearing Sir Owen's address in person, he found it 'very hard to follow' and 'didn't understand the lecture at all', realising only in subsequent years, after much reading and rereading, 'how deep it was': see *ibid* 359; Geoff Lindsay, 'Owen Dixon: A Biography' (2003) 23 *Australian Bar Review* 198, 205–6.

<sup>14</sup> See Ayres, *Owen Dixon*, above n 12, 253.

<sup>15</sup> Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 582.

of the radical, individual rights activism of the Warren Court, which had decided *Brown v Board of Education of Topeka*<sup>16</sup> in the previous year. Just before his famous and much quoted reference to Maitland's celebrated phrase 'strict logic and high technique', Sir Owen noted that '[d]uring the forty-five years of my working life in the law I have been conscious of a revolution in the conception of law that is taught.'<sup>17</sup> He went on: 'the signs are many that the strict logic and the high technique of the common law have fallen into disfavour'.<sup>18</sup> (Remember that this was more than 30 years before the commencement of the Mason Court, so purposefully targeted by Heydon J in his provocative address). Sir Owen tentatively attributed this to procedural reforms and the shift, interestingly, in legal education from professional apprenticeship to university-based instruction,<sup>19</sup> but mainly to the intellectual climate of the age. He said:

It is not an age in which men would respond to a system of fixed concepts logical categories and prescribed principles of reasoning. In the exact sciences the faith is gone which the nineteenth century is reputed to have held in the immutability of ascertained and accepted truths. The conclusions of physical science are now held as provisional but workable hypotheses. Even more tentative are the fundamental explanations of bacteriology and virology. Philosophy appears to have foregone the search for reality and seldom speaks of the absolute. History concedes the validity of a diversity of subjective interpretations. The visual arts tend to discard form as an expression of aesthetic truth. Clearly the intellectual climate is unfavourable to the high technique of the common law, to say nothing of strict logic.<sup>20</sup>

Then, after a delightful reference to the old form of pleadings, he concluded:

We have turned in other directions. We think about the law in a way which may have an analogy in the attitude ascribed to those who pursue the exact sciences towards the more basal concepts of the knowledge their predecessors won and organised. The possession of fixed concepts is now seldom conceded to the law. Rather its principles are held to be provisional; its categories, however convenient or comforting in forensic or judicial life, are viewed as unreal. They are accommodated with a place, it is true, but only as illusory guides formerly treated with undue respect. The technique of the law cannot or should not now, so it is thought, exercise any imperative control over the minds of those whose lot it is to engage day by day in the judicial process.<sup>21</sup>

It is hard to judge at this point whether Sir Owen's utterances, so often like those of the oracle at Delphi, are about to become a lament for a long gone past, or are simply a resigned acceptance of the contingency and uncertainty of legal principle and the subjective element in judicial choice. To complicate matters, he moves then, almost imperceptibly, from the relatively uncontroversial, if unsettling, notions of contingency, uncertainty and subjectivity, to the more extreme versions of American legal realism, which he summarises in this way:

<sup>16</sup> 347 US 483 (1954).

<sup>17</sup> Dixon, 'Concerning Judicial Method', above n 8, 469.

<sup>18</sup> *Ibid.*

<sup>19</sup> Cf Heydon, 'Judicial Activism', above n 4, 14.

<sup>20</sup> Dixon, 'Concerning Judicial Method', above n 8, 469.

<sup>21</sup> *Ibid.* 469–70.

‘in the end it is what the courts choose to say ... that determines the substance of the law. That is the underlying assumption. It has become possible accordingly to describe or even to define law in terms of predictability.’<sup>22</sup>

Despite the partial truth of this Holmesian insight, Sir Owen unsurprisingly demolished it, at least in its bare form. In a characteristically Dixonian paragraph, which runs for three double column pages in the *Australian Law Journal* and which contains the long passage quoted by Sir John Young in his introduction to the *conversazione*,<sup>23</sup> Sir Owen rightly said:

All this seems peculiarly unreal and certainly unsatisfying to one who has passed much of his life attempting to administer justice according to law ... Predictability means nothing to a judge in that situation ... a knowledge that what his court will say ... is regarded by others as part of a general question of predictability does not help him decide what to do.<sup>24</sup>

Sir Owen went on:

courts do in fact proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision of the court will be ‘correct’ or ‘incorrect,’ ‘right’ or ‘wrong’ as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness.<sup>25</sup>

It is significant, I think, that Sir Owen put the words ‘correct’, ‘incorrect’, ‘right’ and ‘wrong’ in inverted commas. That accords, perhaps, with the modern view that those descriptions are really shorthand for the question of which view, in a disputed question of law, is the better one, having regard to the accepted criteria of interpretation.<sup>26</sup> It is significant, also, that Sir Owen observed that constitutional interpretation was not ‘capable of the objective treatment characteristic of the administration by courts of private law.’<sup>27</sup> But even in relation to the general law, the Benthamite view that judicial development of the law amounted to usurpation was, Sir Owen said, misconceived. Such development was perfectly appropriate, although it had occurred in the 19<sup>th</sup> century not by ‘abandonment’ but by ‘apt and felicitous use’ of strict logic and high technique.<sup>28</sup> Moreover, individual judicial minds could differ — so long, at least, as it was accepted that ‘the conclusion of the judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard.’<sup>29</sup>

<sup>22</sup> Ibid 470.

<sup>23</sup> Young, above n 6, 9.

<sup>24</sup> Dixon, ‘Concerning Judicial Method’, above n 8, 470.

<sup>25</sup> Ibid.

<sup>26</sup> Cf *Queensland v Commonwealth* (1977) 139 CLR 585, 603 (Stephen J), 606 (Mason J).

<sup>27</sup> Dixon, ‘Concerning Judicial Method’, above n 8, 471.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

Today, Sir Owen said, the technique was no longer high, nor the logic very strict, but change had been ‘gradual and evolutionary’.<sup>30</sup> Courts, he went on,

are much more conscious than of old of the formative process to which their judgments may contribute. They have listened, perhaps with profit, to the teachings concerning the social ends to which legal development is or ought to be directed. But in our Australian High Court we have had as yet no deliberate innovators bent on express change of acknowledged doctrine.<sup>31</sup>

Then follows the passage cited by Sir John Young in his introduction,<sup>32</sup> as well as an endorsement by Sir Owen of a model statement by Lord Parke from 1833, also cited with approval by Heydon J,<sup>33</sup> of how the common law appropriately develops.<sup>34</sup> (I cannot help observing here that Lord Parke speaks of applying the rules of law derived from principle and precedent ‘where they are not plainly unreasonable and inconvenient’.<sup>35</sup> I have not seen any discussion of what to make of this interesting qualifier.)

All this is a prelude to what Sir Owen himself describes as an ‘extended and technical discussion’<sup>36</sup> of how the common law, with strict logic and high technique (and not a little creative use of the doctrine of estoppel), might overcome the unsatisfactory rule that payment of a smaller sum accepted in satisfaction of a larger is not a good discharge of the debt. Sir Owen concludes:

it is an error, if it is believed that the technique of the common law cannot meet the demands which changing conceptions of justice and convenience make. The demands made in the name of justice must not be arbitrary or fanciful. They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice. Impatience at the pace with which legal developments proceed must be restrained ... abrupt change of conceptions according to [a judge’s] personal standards or theories of justice and convenience ... would seem to [place the Anglo-American system] at risk.<sup>37</sup>

In summary, this great essay is misunderstood if Sir Owen’s allusion to ‘strict logic and high technique’ is taken at face value, whether it is lampooned by his detractors or romanticised by his champions.<sup>38</sup> He acknowledged the generally sceptical intellectual climate of the age;<sup>39</sup> he held, nevertheless, to an ‘external

<sup>30</sup> Ibid 472.

<sup>31</sup> Ibid.

<sup>32</sup> Young, above n 6, 9.

<sup>33</sup> Heydon, ‘Judicial Activism’, above n 4, 11.

<sup>34</sup> *Mirehouse v Rennell* (1833) 1 Cl & F 527, 546; 6 ER 1015, 1023.

<sup>35</sup> Ibid.

<sup>36</sup> Dixon, ‘Concerning Judicial Method’, above n 8, 476.

<sup>37</sup> Ibid.

<sup>38</sup> Although in the context of robust criticism, the depth and subtlety of Sir Owen’s understanding and application of the judicial method is well recognised in Frank Carrigan, ‘A Blast from the Past: The Resurgence of Legal Formalism’ (2003) 27 *Melbourne University Law Review* 163, less so in John Gava, ‘Another Blast from the Past or Why the Left Should Embrace Strict Legalism: A Reply to Frank Carrigan’ (2003) 27 *Melbourne University Law Review* 186. See also Sir Daryl Dawson and Mark Nicholls, ‘Sir Owen Dixon and Judicial Method’ (1986) 15 *Melbourne University Law Review* 543.

<sup>39</sup> Dixon, ‘Concerning Judicial Method’, above n 8, 469–70.

standard' for judicial decision-making,<sup>40</sup> but as a riposte to the provocative idea of law as mere prediction,<sup>41</sup> and in any event not as part of any mechanical jurisprudence but rather with some self-consciousness about the terminology of correctness and with a concession that individual decision-makers could reasonably differ; he saw constitutional law as more open and less susceptible to strict logic and high technique than the common law; he explained carefully how the common law could develop, citing with approval a passage from Lord Parke that itself appeared to contain the seeds of a more openly creative approach if the laws in question were 'plainly unreasonable and inconvenient'.

In truth, Sir Owen's elegant, nuanced, complex and allusive essay boils down to a preference for change that is gradual and evolutionary rather than abrupt. I will return to this theme in a moment.

### III NO DESICCATED LEGALIST

I want to go next to Professor Dworkin's contrasting approach, but before leaving Sir Owen, will briefly recall some of the aspects of Sir Owen's decision-making record on the High Court that confound any narrow stereotyping based on a one dimensional notion of 'strict logic and high technique', or, to invoke the even better known but equally misunderstood counterpart of that notion in a constitutional context, 'strict and complete legalism'.<sup>42</sup> Without in any way attempting to be exhaustive, may I mention the following: Sir Owen's general injunction for a broad and generous reading of federal power rather than a narrow and pedantic one;<sup>43</sup> his determined restoration of implied limits on federal power,<sup>44</sup> notwithstanding the hostile precedent of the landmark *Engineers' Case*; his little-noticed openness to implications from the structure of government, in particular to an implication of freedom of movement and access to the institutions of national government, argued but left undecided in a case in 1958;<sup>45</sup> his stirring invocation of the rule of law to invalidate the legislative ban on the Communist Party in 1950;<sup>46</sup> his preparedness to overrule earlier decisions where he thought they were plainly wrong;<sup>47</sup> and the crowning achievement in his last year as Chief Justice of breaking the habit of necessarily following British precedent.<sup>48</sup>

Certainly, many of these instances come from constitutional law, which Sir Owen had himself distinguished from the common law in his Yale address<sup>49</sup> and which Heydon J similarly excepts from his essay.<sup>50</sup> Yet they reveal a judge of

<sup>40</sup> Ibid 471.

<sup>41</sup> Ibid 470.

<sup>42</sup> *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi, xiv.

<sup>43</sup> See *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 85.

<sup>44</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, revisiting *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').

<sup>45</sup> *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 540.

<sup>46</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

<sup>47</sup> See, eg, *Victoria v Commonwealth* (1957) 99 CLR 575.

<sup>48</sup> *Parker v The Queen* (1963) 111 CLR 610.

<sup>49</sup> Dixon, 'Concerning Judicial Method', above n 8, 471.

<sup>50</sup> Heydon, 'Judicial Activism', above n 4, 11.



subtlety, sensitivity and depth, prepared to balance the competing considerations of certainty and flexibility, and anything but the desiccated version of the strict and complete legalist that his own words have conjured up for so many. Even in relation to the common law, where precedent has traditionally been thought to play a greater role than in constitutional law, Sir Owen embarked creatively on attempts to synthesise and rationalise, as in the case of occupiers' liability in the law of torts.<sup>51</sup> This was very much in the spirit of *Donoghue v Stevenson*,<sup>52</sup> itself a bold leap to general principle, perhaps underlining Sir Owen's important point about the capacity of judge-made law to develop, however inaptly and misleadingly the process of development was described by that lovely but unfortunate phrase 'strict logic and high technique'.

#### IV THE 'ACTIVISM' TAG: UNPACKING THE BAGGAGE

I turn then to Professor Dworkin's *introduzione* — a brief, two-page distillation from a lifetime of reflection and writing on this subject.<sup>53</sup> I take two things from Professor Dworkin's comments.

First, the phrase 'judicial activism' (*attivismo giudiziario!*) is not really helpful. I suspect that most of us would agree with that — even if we do not go quite so far as Tony Blackshield, who described the phrase at a conference in 2004 as 'really no more than a vulgar term of mindless abuse'.<sup>54</sup> As Professor Dworkin says, it is usually code for disagreement with a judge's legal method or interpretive principles,<sup>55</sup> especially when that method or those principles accelerate the pace of change beyond the gradual and evolutionary so much favoured by Sir Owen in his Yale address. I would add that it is also often code for simple disagreement with substantive outcomes,<sup>56</sup> whether those outcomes be radically conservative or radically progressive, and indeed the choice of method or principle is often seen as outcome-driven. But the terminology of activism is so loaded, and carries so much baggage, that it does not advance the debate unless it is carefully unpacked.

The second thing I take from Professor Dworkin's comments is that a judge's choice of legal method or interpretive principle is, in the end, inescapably political, in the broadest sense of that term.<sup>57</sup> As he points out, even the philosophy of positivism rests on assumptions about the appropriate distribution of power amongst the different branches of government, or, in other words, about our conception of democracy.<sup>58</sup> Again, the sharp end of this is, I suggest, the

<sup>51</sup> *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274.

<sup>52</sup> [1932] AC 562.

<sup>53</sup> Dworkin, above n 7.

<sup>54</sup> Tony Blackshield, 'Judicial Activism and Judicial Restraint: Where Does the Balance Lie?' (Paper presented at the 2004 Constitutional Law Conference, Sydney, 20 February 2004) 7 <[http://www.gtcentre.unsw.edu.au/publications/papers/docs/2004/59\\_TonyBlackshield.doc](http://www.gtcentre.unsw.edu.au/publications/papers/docs/2004/59_TonyBlackshield.doc)>.

<sup>55</sup> Dworkin, above n 7, 11.

<sup>56</sup> Cf the comments of United States Supreme Court Justice Ruth Bader Ginsburg during her Honour's 1993 confirmation hearings: Donald H Zeigler, 'The New Activist Court' (1996) 45 *American University Law Review* 1367, 1367–8.

<sup>57</sup> See also Carrigan, above n 38, 163; Allan C Hutchinson, 'Heydon' Seek: Looking for Law in All the Wrong Places' (2003) 29 *Monash University Law Review* 85.

<sup>58</sup> Dworkin, above n 7, 12.

respective roles of the courts and the legislatures in responding to and effecting change.

If one were to unpack the baggage surrounding the term activism, one would find many items.<sup>59</sup> One persistent thread has been the very exercise of power by the courts to invalidate duly passed legislation — yet in Australia and the US, this is the mere consequence of the well-established power of judicial review. The justification given for this awesome power by Marshall CJ in *Marbury v Madison*<sup>60</sup> was (whatever the politics of the decision) legalistic enough to satisfy the most ardent Dixonian.<sup>61</sup> Another thread has been the controversy over so-called ‘originalism’ in constitutional interpretation (with non-originalists, of course, being tagged as the activists) — yet, in Australia as in the US, there are many competing criteria of interpretation, including, for example, the text and structure of the constitution, and, as Professor Dworkin points out, accusations framed in terms of activism are but a gateway to, and soon resolve themselves into, a debate about theories of interpretation. A further, and obvious, thread is of course the proper place of precedent — yet again, if the application of precedent is not to be automatic and mechanical, this touchstone of the judicial process must compete with a number of others, especially in constitutional law, where a sacred text perhaps makes more insistent calls for a ‘right answer’ than does the inchoate mass of earlier judicial decisions that constitute the common law. And, in yet another thread, the tag of activism sometimes reduces simply to an accusation of base ‘result orientation’, involving not merely consistent application of a progressive approach, or consistent relegation of precedent to a subordinate position, but creative, and perhaps inconsistent, manipulation of the available tools to produce a desired outcome.

One thread I have not yet mentioned is one of the most popular, and is the one most associated, I think, with simplistic notions of the judicial process. This is the idea that legislatures make the law, whereas the courts merely ascertain what it is and apply it. Activism, needless to say, is departure from this principle.

I am almost embarrassed to pause to mention this furphy, but like many half-truths it has had a powerful rhetorical appeal, especially amongst non-lawyers. It is an absolute commonplace today that judges ‘make’ law in a number of important and non-trivial senses, even in situations falling short of overruling a precedent or otherwise making a sharp break with the past: for example, in applying and thus extending the law to new fact situations, in refining principles by distinguishing earlier precedents, in developing new principles to govern novel situations, and generally in exercising creative choice between competing principles, precedents and interpretations. The critical question, clearly, is not whether judges make law, but *how* the acknowledged choices should be made, and, particularly, in cases involving clear choices

<sup>59</sup> See especially Keenan D Kmiec, ‘The Origin and Current Meanings of “Judicial Activism”’ (2004) 92 *California Law Review* 1441.

<sup>60</sup> 5 US (1 Cranch) 137 (1803).

<sup>61</sup> See Michael Coper, ‘*Marbury v Madison*’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 453.

between preserving the status quo and implementing change, the extent to which judges should undertake the task of change or leave it to the legislature.<sup>62</sup>

Although this is, to my mind, the critical question, I do not propose to discuss it further here, except to draw your attention to the fact that, in recent times, some very eminent jurists have closely engaged with it — most recently Sir Anthony Mason,<sup>63</sup> perhaps in partial response to Heydon J's shot across the bows. These jurists have sought, valiantly and by way of concrete example, to identify with some specificity the circumstances in which judicially-led change is appropriate. Of course, there is no simple answer to this question, either in theory (as the legislature may equally be seen as the preferred agent of change or as a safety valve to correct judicial misadventure) or in practice (as individual judges will continue to differ, both amongst themselves and in their own views from case to case). But this is a healthier debate than that of earlier times, which, despite the subtleties and nuances of Sir Owen's judicial method, was cast in much more black and white terms and which tended to deny the judicial law-making function altogether rather than engage with the question of how it might best be exercised, or, to put it another way, how it might best be limited or its appropriate boundaries identified.

## V FROM LEGALISM TO PRAGMATISM AND BACK

I move, then, to my series of interesting 'why' questions. Why was the judicial law-making function once virtually denied? Why was this pretence abandoned? Why has there been such a vociferous reaction to that abandonment? Why do the protagonists and the antagonists take the particular stances that they do? Is there any prospect of a Hegelian-like synthesis of the thesis and antithesis?

It is not so difficult to understand the attachment to legalism, strict logic and high technique. As Sir Owen himself pointed out, 'strict and complete legalism' was necessary in great constitutional conflicts to maintain the confidence of all parties.<sup>64</sup> 'Strict logic and high technique' was necessary in the explication of the common law to reconcile development of the law with continuity with the past. Democratic theory looked to elected legislatures for major change. Judges had to apply an external standard, not a personal one; that was the very nature of judging, and otherwise there was no anchorage point.

The pressures to relax or modify the attachment to legalism were many. In Australia they reached their peak in the late 1980s, around the time of the early Mason Court. Sir Owen had already observed the unsettling intellectual climate of his age. Justice Michael McHugh, in his inaugural Sir Anthony Mason Lecture

<sup>62</sup> See especially Sir Daryl Dawson, 'Do Judges Make Law? Too Much?' (1996) 3 *Judicial Review* 1; Justice Ronald Sackville, 'Why Do Judges Make Law? Some Aspects of Judicial Law-Making' (2001) 5 *University of Western Sydney Law Review* 59.

<sup>63</sup> Sir Anthony Mason, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' (2003) 24 *Adelaide Law Review* 15; Sir Anthony Mason, 'Law Reform and the Courts' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 314. See also Michael Coper, 'The High Court and the Parliament: Partners in Law-Making or Hostile Combatants?' in Kay Walsh (ed), *The Distinctive Foundations of Australian Democracy* (2004) 13.

<sup>64</sup> *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi, xiv.

in November 2004, noted the force of political, economic and social changes in Australia in the 1980s<sup>65</sup> — the impact of globalisation, financial and economic deregulation, closer engagement with Asia, agitation for a republic — and concluded that these changes were reflected in the greater willingness of the Mason Court to adapt and update the common law, though, interestingly, less so in relation to constitutional law, despite, in that area too, more open attention to policy considerations and a preference for substance over form.

But it was not just the upheaval of social change (which, incidentally, I would perceive, through the personal lens of my own youth as perhaps all of us tend to, as having commenced with The Beatles in the 1960s). It was also the coalescence in the 1980s of a remarkable number of critical developments:<sup>66</sup> the end of Privy Council appeals, which transformed the High Court into a truly ultimate court of appeal; the introduction of the necessity for special leave to appeal in all cases, which ensured a relentless flow of difficult and evenly balanced cases at the cutting edge of legal uncertainty; the move to Canberra, and into the parliamentary triangle no less, which placed the Court symbolically and perhaps substantively, certainly visibly, right in the heart of Australian public and political life; the catalytic effect of the unprecedented radicalism of Justice Lionel Murphy, who pushed doctrine beyond the limits of what had hitherto seemed possible and thus — whatever one may think of that approach — enabled others to be relatively bold and yet appear, by comparison, to be relatively restrained; and perhaps some other more amorphous developments, such as the continuing growth of Australian nationhood, the greater prominence of human rights issues, and the steady maturation and increasing reflection of a number of powerful intellects on the High Court, some of whom had a direct line to the American realists through the teachings of Professor Julius Stone at the University of Sydney.<sup>67</sup>

Yet all this is really background. However explanatory the factors outlined above may be, there is nothing in them that made inevitable the changes that occurred. Moreover, there are often differences in style or tone from court to court that may exaggerate the differences in what is happening below the surface. McHugh J makes this point powerfully in relation to the alleged, but in his view overstated, differences between the Mason Court and the Gleeson Court in their constitutional jurisprudence.<sup>68</sup> I was also very much struck by the clever transformation by Lord Rodger in an article in the *Otago Law Review* (which

<sup>65</sup> Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989–2004' (Speech delivered at the Inaugural Sir Anthony Mason Lecture in Constitutional Law, Sydney, 26 November 2004) <[http://www.hcourt.gov.au/speeches/mchughj/mchughj\\_26nov04.html](http://www.hcourt.gov.au/speeches/mchughj/mchughj_26nov04.html)>.

<sup>66</sup> See also Justice Michael Kirby, 'A F Mason — From Trigwell to Teoh' (1996) 20 *Melbourne University Law Review* 1087.

<sup>67</sup> See especially 'Symposium To Mark the 50<sup>th</sup> Anniversary of the Publication of *Province and Function of Law* by Professor Julius Stone' (1997) 20 *University of New South Wales Law Journal* 215; Anthony R Blackshield, 'The Legacy of Julius Stone' (1997) 20 *University of New South Wales Law Journal* 215; Justice Michael Kirby, 'Julius Stone and the High Court of Australia' (1997) 20 *University of New South Wales Law Journal* 239; John Goldring, 'Remarks at the Julius Stone Symposium' (1997) 20 *University of New South Wales Law Journal* 247; Michael Coper, 'Julius Stone — A Personal Reflection on His Influence Today' (1997) 20 *University of New South Wales Law Journal* 253.

<sup>68</sup> McHugh, 'The Constitutional Jurisprudence of the High Court', above n 65.

also published Heydon J's polemic and Kirby J's riposte)<sup>69</sup> of the lengthy minority reasoning in the recent wrongful birth case of *Cattanach v Melchior*<sup>70</sup> into a single paragraph that captures beautifully the crispness, the confidence and the certitude of a hypothetical judge of 'yesteryear'.<sup>71</sup>

As McHugh J did in relation to Australia, so Lord Rodger identifies social and other changes in the UK that have led to a general climate of less certitude in the law. 'By contrast', he says,

if one looks at the portraits of the great judges of the past, say, Lord Mansfield in the eighteenth century, or Lord Watson in the nineteenth, they are men who exude confidence. Having servants, not to mention respectful wives and children, around them, judges of those days were used to having their commands obeyed without question. This carried over into their work in the courts where their judgments were the confident statements of men who did not expect to be corrected.<sup>72</sup>

Be that as it may — and one does not necessarily detect a marked lack of self-confidence in Australia today in the counterpoised judicial statements on the opposite sides of a disputed question — the general point remains that the phenomenon of social change that Sir Owen acknowledged even in the 1950s has gathered pace. This in turn has accelerated the rate of legal change, and has thus put irresistible pressure on concepts like 'strict logic and high technique' or 'strict and complete legalism' to hold up as either a complete description of the judicial process or as a plausible explanation for the growth and development of the common law.

Dixonian legalism was instrumental in two ways. First, although far from static, it favoured gradual over overt or abrupt change. Second, it did so in order to maintain public confidence in the judges, by presenting their decision-making as detached from their own personal values, policy preferences and other idiosyncrasies. The so-called activists who departed from the tenets of Dixonian legalism did not do so merely by accepting more frequently the need for overt or abrupt change. By also recognising that, even in cases falling short of overt or abrupt change, answers were not *compelled* by the authoritative legal materials, they turned the spotlight to what Stone had called the 'leeways of choice',<sup>73</sup> and to the inevitable impact, in the exercise of that choice, of values and policy considerations. This did not mean that questions were at large<sup>74</sup> — choices were guided, if not compelled, by the strictly legal considerations — but the Dixonian approach was less open about the influence of broader factors.

<sup>69</sup> Heydon, 'Judicial Activism', above n 10; Justice Michael Kirby, "'Judicial Activism'?: A Riposte to the Counter-Reformation" (2005) 11 *Otago Law Review* 1, 13.

<sup>70</sup> (2003) 215 CLR 1 ('*Cattanach*').

<sup>71</sup> Lord Rodger, 'What Are Appeal Courts for?' (2004) 10 *Otago Law Review* 517, 534.

<sup>72</sup> *Ibid* 533.

<sup>73</sup> Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985) 4.

<sup>74</sup> See, eg, Hayne J's eloquent case, notwithstanding that judges 'make' law, for judicial reticence and intellectual rigour: Justice Kenneth Hayne, 'Letting Justice Be Done without the Heavens Falling' (2001) 27 *Monash University Law Review* 12. For an eloquent account from an earlier time of the informal constraints on judges confronted with theoretically wide choices, see (the later High Court Justice) Kenneth Jacobs, 'Lawyers' Reasonings: Some Extra-Judicial Reflections' (1967) 5 *Sydney Law Review* 425.

This is all rather passe, but in the context of my ‘why’ questions, it is worth observing that the so-called activism of the Mason Court in part lay in its readiness to rationalise the law by reference to general principles, even if this involved overruling earlier decisions or departing from earlier understandings, and in part rested on its more open recognition of the role of values and policy.<sup>75</sup> Stability in the law was not thrown aside — it was just one of the policy considerations jostling for recognition. The Mason Court perceived the judicial function in a rather different way from the High Court of the Dixon era, although who knows how the judges of the Dixon Court would have responded to the pressures of the 1980s and 1990s?

Yet honesty about the impact of values and policy considerations brought its own bag of problems. Why should the judicial choice of particular values and policies persuade those who would make a different choice? How could the judges be confident that they were apprised of all of the information relevant to making these choices?<sup>76</sup> Would not honesty bring in its wake criticism of the kind that could damage the institution, criticism from which the Court was sheltered by its disavowal of the relevance of anything other than strictly legal considerations?<sup>77</sup>

These are hard questions. Just as one could understand the attraction of Dixonian legalism at the time, one can understand a desire even today to avoid these choices, or at least to disguise them. But it seems to me that they are unavoidable, and that reference to broader considerations is not inconsistent with the use of standards, touchstones or reference points that are not purely personal but are external to the decision-maker. The recent focus, to which I referred earlier, of attempting to identify more closely the circumstances that might be thought to be either particularly conducive or particularly inimical to judicial rather than legislative change, is a constructive step in the right direction, even if that exercise can never be prescriptive or comprehensive.<sup>78</sup>

## VI HARBINGERS OF CHANGE

The changes wrought by the Mason Court did not come out of the blue. Changes in judge-made law rarely do. They almost always have a clear and strong lineage, and frequently a discernible connection to the social change I adverted to earlier. True, which view prevails by a close majority in a hotly disputed question can be a matter of chance — and again I was struck by Lord

<sup>75</sup> See especially Sir Anthony Mason, ‘Policy Considerations’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 535; Sir Gerard Brennan, ‘Values’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 695.

<sup>76</sup> For an excellent critical perspective on the important, difficult and neglected question of the Court’s use of ‘social facts’, see Kylie Burns, ‘The Way the World Is: Social Facts in High Court Negligence Cases’ (2004) 12 *Torts Law Journal* 215; Kylie Burns, ‘Reflecting Social Change: The High Court and Social Facts’ (Paper presented at the Australian Lawyers and Social Change Conference, Canberra, 23 September 2004) <<http://law.anu.edu.au/alsc/KylieBurns.pdf>>.

<sup>77</sup> Leslie Zines, ‘Judicial Activism and the Rule of Law in Australia’ in Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (2000) 391, 408.

<sup>78</sup> Cf Kirby, *Judicial Activism*, above n 4, 79; Kirby, ‘“Judicial Activism”?: A Riposte to the Counter-Reformation’, above n 69, 13.

Rodger's 'what if' question in relation to *Donoghue v Stevenson*: what if, he asks, Viscount Dunedin had presided instead of Lord Atkin?<sup>79</sup> — and post-hoc explanations can give outcomes an air of inevitability that they do not deserve. But think of just a few examples.

*Mabo v Queensland [No 2]*<sup>80</sup> was years in the making, and much of the groundwork had been done in *Milirrpum v Nabalco Pty Ltd*<sup>81</sup> some 20 years earlier, despite Blackburn J's adverse conclusion in that case.

The implied freedom of political communication unveiled in *Australian Capital Television Pty Ltd v Commonwealth*<sup>82</sup> had a strong lineage in the general methodology of constitutional implications, antecedents not just in implications from federalism but in the notion of representative government, and an arguable, if at first blush counter-intuitive, justification in democratic theory, by establishing the prerequisites for democracy to thrive<sup>83</sup> (however they might properly have applied in that case).

The revolution in *Cole v Whitfield*<sup>84</sup> that introduced a new interpretation of the guarantee of freedom of interstate trade in s 92 of the *Australian Constitution* was a response to an unsustainable build-up of incoherent and much criticised precedents.

All of these developments were predictable. And if you think that to say this is merely to be wise after the event, may I say, though with little hope of not seeming to be self-serving, that I anticipated all of them in my book *Encounters with the Australian Constitution* in 1987.<sup>85</sup> (I could balance this rosy picture with counter-examples of wrong predictions and dashed hopes, but let us not muddy the waters with such inconveniences.)

## VII THE CHALLENGE OF JUDICIAL CHOICE

These examples also underscore how problematic the tag of judicial activism remains. *Cole v Whitfield* overturned around 140 earlier decisions in a single stroke and without mentioning most of them. Yet it purported to be no more than a restoration of the original intent, and by narrowing the scope of s 92, it paid more deference to the political process than did the earlier law. Interestingly, it was largely the law developed by Sir Owen that was overturned, and it might be argued that his approach had been the more activist: it had cut a swathe through government regulation, including a dramatic veto with a huge political impact on the attempted nationalisation of major industries in Australia in the 1940s. These political consequences have given rise to suggestions that, rather than being the accidental consequence of the neutral application of legal principle, the outcome

<sup>79</sup> Lord Rodger, above n 71, 518–19.

<sup>80</sup> (1992) 175 CLR 1 ('*Mabo*').

<sup>81</sup> (1971) 17 FLR 141.

<sup>82</sup> (1992) 177 CLR 106.

<sup>83</sup> See especially Justice Ronald Sackville, 'Continuity and Judicial Creativity — Some Observations' (1997) 20 *University of New South Wales Law Journal* 145, 168–9. This was a published version of a paper also presented at a conversazione.

<sup>84</sup> (1988) 165 CLR 360.

<sup>85</sup> Michael Coper, *Encounters with the Australian Constitution* (1987) 52, 353–7, 312–14 respectively.

was driven by (or at least a reflection of) the personal policy preferences of the judges of the time for laissez faire economics and individual economic freedom.<sup>86</sup>

As far as I am aware, there is no direct evidence for such suggestions (though this is a different matter, of course, from whether or not the proposition they embody is true). I would prefer to regard all of the competing interpretations of s 92, and indeed all of the diverse views in the various examples I mentioned, as within the acceptable boundaries of judicial choice. As I have said, that choice is rarely compelled by strictly legal considerations and, correspondingly, is endemically influenced by broader considerations including values and policies so far as they are amenable to argument and capable of expression and vindication in legal form. But these values or policy considerations are broader than the immediate political outcome of particular litigation, and have long-term consequences for subsequent litigation.<sup>87</sup>

At the risk of oversimplification, the Court in *Cole v Whitfield* gave effect to the policy of preventing parochial protectionism in the interest of national economic unity — not as a personal policy choice but as a vindication of the choice made by the framers of the *Australian Constitution* — and gave that policy priority over the policy of fidelity to earlier decisions, although that was relatively easy as those earlier decisions had not achieved the certainty and stability that might otherwise have made the case for their acceptance. The Court of the Dixon era had preferred a relatively literal, or at least more abstract, reading of the text.<sup>88</sup> Whether, in either case, these choices were outcome-driven is a matter for speculation. In the absence of evidence from, say, the true confessions of secret diaries,<sup>89</sup> we cannot even be sure of whether the choices were harmonious or discordant with their preferred outcomes, or whether the judges had outcome-oriented views at all. Indeed, a genuine intellectual conviction that a disputed question of interpretation could be resolved by reference only to the abstract meaning of words and phrases could render a judge quite indifferent to outcomes.

This reinforces the point made earlier that the issue of ‘activism’ in constitutional law really resolves itself into a familiar debate about methods of interpre-

<sup>86</sup> This is how Ayres reads Geoffrey Sawer, *Australian Federalism in the Courts* (1967); Brian Galligan, *Politics of the High Court* (1987); Michael Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983); Ayres, *Owen Dixon*, above n 12, 65, 319 fn 33. See also Carrigan, above n 38, 172–3. However, it is often difficult to distinguish whether an author is using the term ‘political’ to describe accidental or intended consequences. For an attempt at greater clarity, see Michael Coper, ‘Political Institution, Court as’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 539.

<sup>87</sup> A good example is *Commonwealth v Tasmania* (1983) 158 CLR 1 (*‘Tasmanian Dams Case’*), where a broad or narrow view of Commonwealth power, based on principles transcending the particular case, could produce a variety of politically attractive or unattractive outcomes in different circumstances.

<sup>88</sup> On the potentially erratic consequences of literalism, see Michael Coper, ‘Currents, Cross-Currents, and Undercurrents in the Turbulent Waters of Constitutional Interpretation in the High Court’ (2003) 77 *Australian Law Journal* 673, 676–7.

<sup>89</sup> I am not aware of any such material in relation to Sir Owen Dixon: see Ayres, *Owen Dixon*, above n 12; Philip Ayres, ‘Dixon Diaries’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 222.



tation, and the relative merits of a range of external reference points — text, structure, history, precedent, and so on — as well as the interconnections between them and the consistency of their deployment over time.<sup>90</sup> In relation to the common law, the issue of activism reduces to a cleaner, less cluttered and more transparent juxtaposition or tension between precedent and innovation, between individualised justice<sup>91</sup> and general law-making, between legalism and pragmatism, between judicial and legislative change, and between overarching goals or philosophies: for example, personal versus collective responsibility, or freedom of action versus protection of the vulnerable. Yet values and policy considerations are no less insistent, perhaps even more so, though in different forms.

It is perhaps unfair to single out an atypical case raising novel issues, but the wrongful birth case of *Cattanach*<sup>92</sup> again demonstrated the inaptness of the simplistic tag of activism.<sup>93</sup> The majority in that case allowed a damages claim in respect of the cost of bringing up a child who had been born after negligent advice on sterilisation. Many of the commentators saw this view as more in line with existing principle than the minority view,<sup>94</sup> which balked at treating the birth of a healthy child as harm or damage rather than a blessing and, indeed, thought that to allow recovery in these circumstances would not only be contrary to the duty of parents to nurture their children but could even do positive damage to the child and the parent–child relationship.<sup>95</sup> Critics of Heydon J’s *Quadrant* broadside against the activists delighted in pointing out that his minority opinion in the case was not only the stronger candidate for the label of activist but was also laden with moral and social judgements.<sup>96</sup> This criticism, however, obscured the endemic impact of policy considerations on the development of the common law as a whole. Tort law has always had to set boundaries to the extent to which a wrongdoer must make reparation. These boundaries are rarely to be found in strict legal principle; indeed, it is the logical consequences of legal principle that

<sup>90</sup> Michael Coper, ‘Interpreting the *Constitution*: A Handbook for Judges and Commentators’ in Tony Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (1983) 52, engaged by Stone, *Precedent and Law*, above n 73, 32, 89–92.

<sup>91</sup> The potential unfairness of judicially-effected change to individual litigants who rely on the existing law (or their legal advisers’ perception of it) is one of the strongest arguments of the anti-activists: see especially Heydon, ‘Judicial Activism’, above n 4, 17–20, and, with characteristic pristine clarity, the late Sir Harry Gibbs, ‘Judicial Activism and Judicial Restraint: Where Does the Balance Lie?’ (Paper presented at the 2004 Constitutional Law Conference, Sydney, 20 February 2004) <[http://www.gtcentre.unsw.edu.au/publications/papers/docs/2004/59\\_Harry\\_Gibbs.doc](http://www.gtcentre.unsw.edu.au/publications/papers/docs/2004/59_Harry_Gibbs.doc)>. Yet interesting questions arise as to the capacity, if not the obligation, of legal advisers to do their best to anticipate change.

<sup>92</sup> (2003) 215 CLR 1.

<sup>93</sup> Amongst the voluminous commentary, see especially David Hamer, ‘*Cattanach v Melchior*: Principle, Policy and Judicial Activism’ (2004) 1 *University of New England Law Journal* 225.

<sup>94</sup> See, eg, Coper, ‘The High Court and the Parliament’, above n 63, 22; but see Peter Cane, ‘The Doctor, the Stork and the Court: A Modern Morality Play’ (2004) 120 *Law Quarterly Review* 23. Generally on judicial versus legislative law-making in this area, see Peter Cane, ‘On the Division of Law-Making Labour’ (2005) 7 *Judicial Review* 211; Peter Cane, ‘Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law’ (2005) 25 *Oxford Journal of Legal Studies* 393.

<sup>95</sup> *Cattanach* (2003) 215 CLR 1, 74–5 (Hayne J), 136–45 (Heydon J).

<sup>96</sup> Notably Kirby J in his Honour’s majority opinion in the case itself: *ibid* 59.

so often challenge the boundaries. Those boundaries are mainly to be found in policy.

### VIII WHY DO WE DISAGREE?

The subject of judicial method remains hotly contested, and in terms that suggest a wide and unbridgeable gulf. Heydon J in his *Quadrant* article was scathing about judges who dared to venture beyond incremental change.<sup>97</sup> In style, tone and substance, he has soul mates in the academy.<sup>98</sup> Unsurprisingly, however, his article provoked more than the fairly measured responses of Sir Anthony Mason<sup>99</sup> and Kirby J,<sup>100</sup> two of his primary targets. A visiting academic from Canada left little doubt about what he thought of Heydon J's theory of the judicial process, describing it in turn as 'fundamentalist', 'audacious', 'improbable', 'unachievable', 'disingenuous', 'preposterous', 'incendiary', 'disturbing', 'a mockery', 'wrong', 'misleading', 'insulting', 'ludicrous', and 'all talk'.<sup>101</sup> (Apart from that, of course, it was fine.) But pushing through the heavy curtain of style and tone (if one can), why do the warring factions differ so widely on this question? Why does each hold the view they do? Is there a possibility of a reconciliation?

I am sure it is trite to say that it is diversity of opinion that makes the world go around, and that it would be very boring if we all thought the same way. No doubt it would also impede progress if we all thought the same way; and it may be — although I concede this reluctantly, as it is not my style — that human knowledge, insight and understanding is better advanced by the head-on collision of opposing viewpoints, the spike of action and reaction, than it is by fair, balanced, and humble acknowledgement of the merit of theories and opinions other than one's own. It is interesting, nonetheless, to speculate about how we form our views — why, for example, one judge is more prone to embrace change than another, or why one commentator is fiercely critical and another unequivocally supportive. I mentioned earlier the external pressures for change that bore down upon the Mason Court, but the real explanations that underlie the choices of individual judges and the reactions of individual commentators no doubt lie deep in factors of psychology, personality, and whole-of-life experience. I am constantly astonished that this is a field of intellectual endeavour that has not been more thoroughly explored,<sup>102</sup> although it would of course be bedevilled by competing theories of free will and determinism and the dangerous attraction of turning explanation into prediction.

<sup>97</sup> Heydon, 'Judicial Activism', above n 4, 16–17.

<sup>98</sup> Greg Craven, 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22 *University of New South Wales Law Journal* 216; John Gava, 'The Rise of the Hero Judge' (2001) 24 *University of New South Wales Law Journal* 747.

<sup>99</sup> Mason, 'Legislative and Judicial Law-Making', above n 63; Mason, 'Law Reform and the Courts', above n 63; Sir Anthony Mason, 'The Centenary of the High Court of Australia' (2002) 5 *Constitutional Law and Policy Review* 41.

<sup>100</sup> Kirby, *Judicial Activism*, above n 4.

<sup>101</sup> Hutchinson, above n 57, 86, 87, 88, 90, 91, 96.

<sup>102</sup> For one of the very few attempts, see Justice Michael Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 18 *Australian Bar Review* 4.

At the end of the day, it is not surprising that a field of human endeavour as complex as the nature of judicial choice in final appellate courts has produced, and continues to produce, such a wide array of theories, viewpoints, and opinions. The judicial process struggles to satisfy conflicting demands: to achieve simultaneously constancy and change, to honour tradition yet allow transformation, to promote stability without losing flexibility, and, perhaps most challengingly, to achieve individualised justice while promulgating general rules. Moreover, it endeavours to do all of these things at once while perched uncomfortably on the horns of a nasty dilemma: legalism invites a serious loss of credibility, yet its abandonment invites a serious loss of legitimacy.<sup>103</sup> And the grass is always greener on the other side: had the Mason Court not embraced transparent change and thus become tarred with the brush of activism, it would undoubtedly have been pilloried for failing to keep the law up-to-date. Only the brave would regard this as a field of single theories or right answers, good for all time, all judges, and all kinds of decisions.

### IX COMMON GROUND?

I asked at the outset of this article whether one can identify a range of propositions that might be said to command common consent.

This is far too large a task to undertake comprehensively here, but the seeds of such propositions might include that it is unhelpful to assert that final appellate courts do not ‘make’ law,<sup>104</sup> that in ‘making’ law within the confines of the judicial process their decisions are rarely compelled by the authoritative legal materials but involve hard choices between competing principles and their underlying policy considerations,<sup>105</sup> that the need for certainty and stability is an important, but not the only relevant, policy consideration; and that in weighing these competing considerations, judges may honestly and reasonably — with no lack of probity<sup>106</sup> — differ.

By contrast, I doubt that agreement is achievable in relation to the further proposition that, once the role of judicial choice is acknowledged, choice should

<sup>103</sup> I expand on this dilemma in Coper, *Encounters with the Australian Constitution*, above n 85, 422 and preceding. I must be right; through the wonders of Google Scholar <<http://scholar.google.com>>, I recently discovered that the relevant passage was cited with approval in 1989 by the Royal Court of Jersey: *A-G (Jersey) v Foster* [1989] JLR 70, 94 (Bailiff Crill and Jurats Vint, Baker, Gruchy and Le Ruez).

<sup>104</sup> That judges make law is now an ancient insight, but amongst the more modern literature see especially the many fine extrajudicial excursions into the subject by McHugh J, including: Justice Michael McHugh, ‘The Law-Making Function of the Judicial Process’ (Pt 1) (1988) 62 *Australian Law Journal* 15; Justice Michael McHugh, ‘The Law-Making Function of the Judicial Process’ (Pt 2) (1988) 62 *Australian Law Journal* 116; Justice M H McHugh, ‘The Judicial Method’ (1999) 73 *Australian Law Journal* 37. See also Sackville, ‘Continuity and Judicial Creativity’, above n 83, 149–50.

<sup>105</sup> This insight both precedes and postdates the work of Julius Stone, but his detailed and convincing demonstrations of it repay revisiting: see especially Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control* (1946); Julius Stone, *Legal System and Lawyers’ Reasonings* (1964); Stone, *Precedent and Law*, above n 73.

<sup>106</sup> The contrary assertion by Heydon, ‘Judicial Activism’, above n 4, 14–15, must be taken to be either undue certitude or rhetorical overstatement, the latter to be understood, perhaps, in its context as part of an after-dinner speech to a sympathetic audience.

be made as openly, honestly, and transparently as possible.<sup>107</sup> The proponents of this view do not advocate honesty simply as an ethical position. It is rather seen as necessary to avoid the danger of legalism as a cloak for undisclosed, yet influential, values and policy considerations — even though, as I have said, candour exposes the preferencing of those considerations to the full glare of public scrutiny and the gauntlet of intense criticism. However, the pull of formal legal reasoning, not merely as a traditional and, to a large extent, necessary (if not sufficient) ingredient of the judicial process, but also as a measure of self-protection, remains strong.<sup>108</sup>

Moreover, some judges will, as a general rule, prefer cautious, gradual and incremental change to bolder, less constrained and more transparent change. Neither of these approaches, it seems to me, can be said to be demonstrably right or demonstrably wrong, and the tag of activism has, as Professor Dworkin suggested, outlived its usefulness as an analytical tool.<sup>109</sup> There are different conceptions of the role of the courts, and these different conceptions need to be debated in the context of competing theories of democracy.

#### X A DILEMMA FOR LEGAL EDUCATION

Before concluding, I want to comment briefly on the implications of all of this for legal education.

The intractable dilemma of the judicial process translates directly into a dilemma for legal educators. In my experience, to confront first-year law students with the realist truth that judges have choices that are not compelled by the legal materials inhibits the students' capacity for rigorous analysis and encourages a frame of mind in which legal argument is just an elaborate smokescreen. Yet to focus on legal analysis — to achieve, perhaps, the honoured status of 'thinking like a lawyer' — hypnotises them into a trance-like state of fascination with the internal logic, formal validity, and elegance of argument for its own sake, causing them to lose sight of the ends and purposes that the law is intended to serve.<sup>110</sup> We have to work hard at achieving a sophisticated, nuanced, balanced, and undogmatic understanding of the nature of the judicial process, and of course there will, at the end of the day, be as many legitimately diverse views

<sup>107</sup> See, eg, Kirby, *Judicial Activism*, above n 4, 29–30, 88; Justice A F Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5; Sackville, 'Continuity and Judicial Creativity', above n 83, 161. The idea of candour in judicial decision-making should not be taken to suggest, however, that there is some simplistic 'reality' behind the reasons actually given. The 'real' reasons will remain an elusive mix of doctrinal and wider considerations, known even to the decision-maker only in varying degrees.

<sup>108</sup> Even judges generally in favour of the broader approach may on occasion relish the opportunity to rely more closely on legal principle, especially by way of highlighting and criticising a policy choice with which they disagree. This is how some of the commentators have seen the majority view in *Cattanach* (2003) 215 CLR 1: see Hamer, above n 93, 237; Cane, 'The Doctor, the Stork and the Court', above n 94, 25.

<sup>109</sup> Dworkin, above n 7.

<sup>110</sup> See also Michael Coper, 'Law Reform and Legal Education' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 388.

amongst the students (some of whom will be future judges) as there are amongst ourselves.

## XI ACCOUNTABILITY

Penultimately, I should address the question posed in the latter part of the title of the conversazione: is judicial activism ‘power without responsibility’?

For all of the reasons given earlier, that question cannot be answered without unpacking the unhelpful notion of activism. If the question is code for, ‘is anything more than incremental change through the judicial process acceptable?’, then I have discussed it already. But if it may be taken to ask, ‘how are judges, in the exercise of their law-making function, to be regarded as accountable?’, then there are many answers.<sup>111</sup> How persuasive you find them again relates back to competing notions of democracy. There are answers that reside in the ultimate power of the legislature to override decisions of the courts in relation to the common law or statutory interpretation. There are answers that reside in the ultimate power of the electorate, voting in a referendum, to override constitutional decisions. To these powers may be added the ability of the legislature to remove judges in extreme cases for misbehaviour or incapacity. There are answers that reside in the judges’ own internal sense of integrity, professional responsibility and self-restraint. And for those who find the power to override or remove as theoretical as the sense of self-restraint is amorphous, there are answers that reside in the simple fact that the courts conduct their business in open court and publish their reasons for decision.

This last point is, I think, the key. The judges’ reasons are open to scrutiny, appraisal and criticism, and that criticism may have a discernible impact over time. *Cole v Whitfield*<sup>112</sup> is a good example of the impact over time of informed, constructive and sustained criticism of earlier doctrine. The High Court’s arguable retreat in subsequent cases from the confident boldness of *Mabo*<sup>113</sup> and *Wik Peoples v Queensland*<sup>114</sup> may illustrate the impact of more strident criticism. In any case, the dialogue is, I suppose, a form of public conversazione.

## XII ARE WE GETTING ANY BETTER AT THIS?

Finally, may I leave you with a question? We like to think that civilisation advances in a linear fashion, with steady improvements in all areas of human endeavour: not only in the obvious cases of medical science, technology, and sporting achievements, but generally in our enhanced knowledge and understanding — reflected in our scholarship — not only of the natural world but also of the disciplines of the humanities and social sciences. One not entirely desirable aspect of this may be the widespread belief in many academic circles (and government funding agencies) that only recent scholarship is valuable. But have

<sup>111</sup> See Michael Coper, ‘Accountability’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 3.

<sup>112</sup> (1988) 165 CLR 360.

<sup>113</sup> (1992) 175 CLR 1.

<sup>114</sup> (1996) 187 CLR 1.

we made a like linear ‘progress’ in our knowledge and understanding of judicial method? Are judges today ‘better’ than they were in times past? Have the insights of Justice Holmes and Sir Owen Dixon been superseded by the insights of today’s jurists? Is the past the custodian of wisdom or obsolescence? Will our conversazione advance the sum total of human knowledge, or merely recycle the wisdom of the ages? I look forward very much to your engagement on this subject, even if, in the words of Michael Oakeshott quoted in the conversazione’s papers, and as may be inevitable, an excellent conversation ‘has no conclusion, but is always put by for another day.’<sup>115</sup>

<sup>115</sup> Michael Oakeshott, *The Voice of Liberal Learning* (1989), quoted in Benjamin Kiely (ed), *Judicial Activism — Power without Responsibility: The Boston, Melbourne, Oxford Conversazioni on Culture and Society* (2006) 5.