Chapter Two

Can Judges resuscitate Federalism?

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In a recent article Greg Craven has argued that we are in the "midst of an ideological struggle for the Constitution's soul",[1] and that it would be appropriate to appoint an "Australian Scalia"[2] to the High Court. Indeed, Craven argues that a conservative government would be "downright derelict in its duty"[3] if it failed to make such an appointment. For Craven, the High Court has consistently, at least from 1920, interpreted the Australian Constitution with such a centralist bias that the original conception of a federation has been distorted.[4] Craven has argued that by going down this centralist path the High Court has departed from the expectations of the founders of the Constitution, and that the role of putative Australian Justice Scalias would be to interpret our Constitution in light of the intentions of those founders.

In this paper I carry out the equivalent of a thought experiment and consider what would happen if Craven were to get his wish of a High Court composed of judges willing to interpret the Constitution in the way in which he advocates—i.e., by giving effect to the original intentions of the founders, who conceived of a robust federation rather than the unbalanced, centrally dominated one that we have today. I will do this by analysing the dissenting judgments of Justices Kirby and Callinan in the *Work Choices Case*[5] to show that both judges decide the constitutional issue before them, the validity of the Commonwealth's Work Choices legislation, with an eye to reviving federalism as a substantive feature of the Constitution. If their judgments are understood in this fashion, we are then able to consider the question raised by my title—can judges resuscitate federalism? Of course, in a conference paper I will not be able to give a comprehensive answer to this question, but an examination of the implications of the federalist position adopted by Justices Kirby and Callinan will suggest that the hope that Australia's federal structure can be resuscitated by judges is misplaced. My argument will be made as follows.

First, I will argue that such a move would run counter to the principled judging that lies at the heart of the common law tradition (and which has been strongly supported by The Samuel Griffith Society). Second, I will show that the High Court is poorly equipped as an institution to reform the federal structure. Third, I will suggest that doing so would politicize the High Court with disastrous effects on its legitimacy.

In this paper I will not make a defence of federalism. I support federalism unreservedly as one of the best ways of preserving liberty. Rather, when discussing the state of federalism in Australia today one needs to ask, with apologies to Lenin—What is to be done?[6] If that is the right question, the wrong answer would be that judges can resuscitate federalism.

The *Work Choices Case*

In *New South Wales v. The Commonwealth*[7] (the *Work Choices Case*) the States and Territories challenged the validity of the *Workplace Relations Amendment (Work Choices) Act* 2005. As is well known, the amended Act broadened the reach of the Commonwealth's control of industrial relations by relying on the Commonwealth's power under s. 51(xx) of the Constitution, which allows it to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". In doing so, the constitutional basis for the Commonwealth's legislation was shifted from its former reliance on s. 51(xxxv), which gave the Commonwealth the power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

By a majority of 5-2 (Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan), the High Court held that the legislation was valid. Justices Kirby and Callinan, in dissent, found that the amending Act was invalid.

Justice Kirby as an activist federalist judge

Justice Kirby adopted a succinct and straightforward strategy in answering the constitutional question before him: whether the amendments to the *Workplace Relations Act* 1996 effected by the *Workplace Relations Amendment (Work Choices) Act* 2005 were supported by s. 51(xx) of the Constitution.

> "[T]he central issue for consideration in these proceedings is not whether, in the course of its elaboration, especially in the 35 years since the decision in *Strickland v. Rocla Concrete Pipes Ltd*. . . understandings of the ambit of s. 51(xx) of the Constitution have expanded so as to enhance the federal legislative power in that respect. Of course they have. I have myself acknowledged such expansion and called attention to it. The real question now directly presented is whether this expansion of the ambit of para (xx), however large it might otherwise grow, is subject to restrictions or reservations, including those expressed or implied in para (xxxv)".[8]

In other words, Justice Kirby is not blind to the course of authority after the High Court examined its pre-*Engineers*'[9] decisions on s. 51 (xx) in light of the *Engineers' Case* in the pivotal *Concrete Pipes Case*.[10] As will be remembered, in the *Concrete Pipes Case* the High Court overruled and re-interpreted earlier decisions which had limited the scope of Commonwealth legislative power under s. 51(xx).[11] These pre-*Engineers'* decisions had held that particular legislative powers were reserved to the States, with the consequence that s. 51 grants of power to the Commonwealth were correspondingly restricted. Justice Kirby does not question the line of authority that followed the *Concrete Pipes Case.*[12] Instead, he engages in a fundamental reassessment of the High Court's analysis of the powers granted to the Commonwealth, and the interpretative method that has been adopted by the High Court since the *Engineers' Case* in 1920.

While Justice Kirby acknowledges that none of the plaintiffs challenged the approach stated in the *Engineers' Case,* he is careful to note that if the Work Choices amendments were held to be validly enacted by recourse to s. 51(xx), this would amount to a "potentially radical shift of governmental responsibilities from the States to the Commonwealth".[13] He adds that:

> "States, correctly in my view, pointed to the potential of the Commonwealth's argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal governmental activities".[14]

So, despite not expressly indicating a wish to overrule the *Engineers' Case*, Justice Kirby is willing to interpret the Constitution in a way that sidesteps the effect of that decision by, in effect, reserving to the States particular areas of legislative power.

Justice Kirby claims that all that he is doing is interpreting the *Engineers' Case* in line with other decisions, notably *Melbourne Corporation v. The Commonwealth*,[15] *Victoria v. The Commonwealth* (the *Payroll Tax Case*)[16] and *Austin v. The Commonwealth*,[17] but it is difficult to accept that he genuinely believes that these cases stand for the proposition that the *Engineers' Case* is to be read in the following way:

> "In applying the doctrine in the *Engineers' Case* this Court has repeatedly given effect to reasoning that has confined the ambit of express grants of federal legislative power so that they could not be used to control or hinder the States in the execution of their central governmental functions. Once such an inhibition on the scope of federal legislative powers is acknowledged, derived from nothing more than the implied purpose of the Constitution that the States should continue to operate as effective governmental entities, *similar reasoning sustains the inference that repels the expansion of a particular head of power (here, s. 51(xx)) so that it would swamp a huge and undifferentiated field of State lawmaking*, the continued existence of which is postulated by the constitutional language and structure".[18]

The problem with such reasoning is that those cases do not support the proposition that the exception to the *Engineers' Case* described in *Melbourne Corporation*,[19] and the cases that have applied it, extend to protecting *the range of legislative powers* extending to the States at any particular time. They certainly do protect the existence of the States and their governmental structures, but it is a generous reading of these decisions that suggests that they protect an undefined (by Justice Kirby) range of legislative powers.

Justice Kirby's reasoning so far can be summed up as follows. First, the line of authority emanating from the *Concrete Pipes Case*,[20] if considered in isolation, would support the Commonwealth's Work Choices legislation. Second, while not expressing a wish to overrule the *Engineers' Case*, he reads it and subsequent cases as subject to a proviso that the federal structure of the Constitution requires that the grants of legislative powers under s. 51 of the Constitution are to be read as harmonious with each other and subject to an underlying protection of significant State legislative power. Third, this means that Commonwealth laws dealing with industrial relations, which traditionally have been based on s. 51(xxxv) and which have thus retained for the

States significant legislative power over industrial relations, are not to be expanded in scope by the use of the Commonwealth's legislative power under s. 51(xx).

Why does Justice Kirby do this? Why is he willing to overturn the *Engineers' Case* in substance, if not in form? He is quite explicit in arguing that not to do so would gravely weaken the federal nature of the Australian Constitution:

> "No doubt viewed strictly from an economic perspective. . . [the federal] features of the Australian constitutional design may sometimes result in inefficiencies. Doubtless they import certain costs, delays and occasional frustrations. Yet such divisions and limitations upon governmental powers have been deliberately chosen in the Commonwealth of Australia because of the common experience of humanity that the concentration of governmental (and other) power is often inimical to the attainment of human freedom and happiness.
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> "Defending the checks and balances of governmental powers in the Constitution is thus a central duty of this Court. . . Just as the needs of earlier times in the history of the Commonwealth produced the *Engineers' Case*, so the present age suggests a need to *rediscover the essential federal character of the Australian Commonwealth*".[21]

This is why Justice Kirby can be described as an *activist federalist* judge.

Justice Kirby all but admits that, if one looked at the authorities dispassionately, the decision was clear—the High Court's previous decisions were consistent with a view that the Commonwealth does indeed have the power to legislate for the industrial conditions of the employees of corporations that come within s. 51(xx). But, rather than applying the case law to the question before him, Justice Kirby applies his pre-existing federalist belief that, in this case, the legislative power of the States in industrial relations should be preserved for the greater goal of maintaining some form of substantial federal balance of legislative power between the States and the Commonwealth. This explains why he can be described as a *federalist* judge.

Justice Kirby is an *activist federalist* judge because he is willing to *change* the existing understanding of the Constitution, and the existing approach of the High Court to interpreting the Constitution, in line with his federalist inclinations. As noted above, Justice Kirby is quite frank in advocating a judicial role that will "rediscover the essential federal character of the Australian Commonwealth".[22] While he is less frank in his attitude to the *Engineers' Case*, the effect of his analysis is that that case would be read down considerably in line with his federalist views. This would amount to a dramatic change to the prevailing judicial interpretation of the Constitution since 1920 when the *Engineers' Case* was decided.[23] He is *activist* because he admits that he would be prepared to change the law, and the way in which the Constitution is interpreted, to give effect to his views about the Constitution.

Justice Callinan as an activist federalist and originalist judge

Justice Callinan devotes a lengthy part of his judgment in the *Work Choices Case* to an analysis of the *Engineers' Case* and the restrictions imposed on it that are derived from *Melbourne Corporation*[24] and subsequent cases that applied it,[25] to support his general contention that previous case law does support a federal balance of legislative powers between the States and the Commonwealth. But he is happy to admit that if his analysis were shown to be wrong he would be prepared to overturn the *Engineers' Case.* He explains first his attitude to precedent in the High Court:

> "No doubt careful deference should be paid to the doctrines of the Court as and when they can be identified and can be seen to be consistent, but it is not right for a judge to seek refuge in those doctrines to avoid the undertaking of an independent analysis, informed by the past, of the Constitution".[26]

Would this independent analysis extend to a reconsideration of the *Engineers' Case*? Justice Callinan is quite clear that it would:

> "The Commonwealth has conceded that no other case governs this one. That must mean that not even that monument to the demolition of State power, the *Engineers' Case*, does so. If, however, I am wrong about that, the cases to which I have referred in this section of my reasons would provide precedents entitling me to depart from it".[27]

What is driving Justice Callinan's attitude to the *Engineers' Case*, and to constitutional interpretation more generally? In his words, it appears to be a mixture of two "basal considerations", the "ascertainment of founders' intent" and "maintenance of the federation established by the Constitution".[28]

In other words, for Justice Callinan, originalism—the discovery and application of the founders' intent—and federalism—the maintenance of a proper balance between the States and the Commonwealth—

justify overturning "venerable"[29] decisions, even cases as important and influential as the *Engineers' Case*. In these circumstances it is appropriate to describe Callinan J as both an *activist originalist* and as an *activist federalist* judge. He openly advocates a role for a High Court Justice that arrogates to such a judge the role of determining and applying what *each particular judge* thinks is the appropriate meaning of the Constitution, *irrespective* of the 103 years of decisions made by his predecessors.

The High Court: born in a vacuum or a common law Court?

How does activism of the federalist or originalist type fit into the role of the High Court? If we remember that the High Court was not created in a vacuum the answer is clear. In the words of Chief Justice Latham:

> "The Commonwealth of Australia was not born into a vacuum. It came into existence within a system of law already established".[30]

While debate can be had about the extent to which the common law controls or affects the Australian Constitution, there can be no doubt that in 1901 the new Commonwealth of Australia was created within the British constitutional tradition. In other words, it was a common law country with common law courts. The federal courts that were to be created in accordance with the Constitution would be common law courts, staffed by common law judges deciding cases according to the common law method. It went without saying that the High Court was not to be, for example, a Koranic or Rabbinical or Civil Law Court. The High Court was to be the final court of appeal (in Australia) for common law matters from the States. Could anyone doubt that in deciding such cases the High Court would act as anything other than a court in the common law tradition?

Of course, the High Court was also to be, in effect, the ultimate arbiter of disputes arising under the Constitution, and such disputes were not, directly, common law matters in the way that contract or tort cases would be. But, while the content was clearly new, the method of deciding cases was to be familiar—indeed, given the Privy Council's interpretation of the *British North America Act* (the Canadian Constitution for all practical purposes), and the US Supreme Court's century of interpreting the US Constitution from which the Australian Constitution drew so many of its features, there was also much actual constitutional case law for the High Court to draw upon. Novel issues raised by the Constitution were going to be resolved by a High Court made up of common law judges, the matters were to be argued by common law barristers, and the judgments handed down would be common law judgments, displaying the reasoning of the common law based on authority, legal principles and the accepted methods of statutory interpretation.

It is not surprising that Justice Callinan acknowledges all of this, and he cites with approval Justice Mason's celebrated espousal of the common law method in *Trigwell*,[31] with the comment that what was said there was "of relevance to constitutional law also".[32] His quotation of Cardozo on judging is to the same effect:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'. Wide enough in all conscience is the field of discretion that remains".[33]

The problem with activism sourced in either fidelity to federalism or originalism (or anything else for that matter) is that it is the negation of the common law method. The *Engineers' Case*, however badly reasoned it was and however badly it distorted the original conception of the Australian Constitution, is so embedded in the case law surrounding the interpretation of the Constitution that it now forms part of it in ways that are similar to the fundamental role that *Marbury v. Madison*[34] plays in United States constitutional interpretation. Whilst *in theory* it must be possible for the US Supreme Court, for example, to revoke the power of judicial review that was recognised (or, for its opponents, created) in *Marbury v. Madison*, could this really happen? Could a court realistically even conceive of overturning a decision that underpins almost the whole of the judicial, indeed, political, understanding of the US Constitution? The centrality of the *Engineers' Case* to Australian constitutional law raises similar issues here, and one wonders whether any High Court would deliberately give effect to the revolutionary change that such a departure would import.

Like it or not, the Constitution is an instrument of governance which has been changed and developed by over a century of judicial interpretation. It was inevitable and expected that the bare text of the Constitution would be engrafted with meanings from the cases that would be decided in interpreting it, even if the result of these cases would transform the Constitution in ways that likely would have been surprising (and unpalatable)

to its founders. After all, much the same happens to ordinary legislation which, with the passage of time and the hearing of cases, has a meaning that is to be found as much in the words of the cases applying and interpreting it as in the words of the legislation itself.[35]

The result of a century of interpretation by the High Court might not be to the taste of all—it certainly is not to mine. But, the approach taken by Justices Kirby and Callinan amounts to saying that the constitutional tradition in which the Constitution was created, and the judicial method which formed part of that tradition, have produced results that they do not like, and that they are thus willing to ditch that judicial method and tradition to achieve their own goals.

I have read many papers emanating from The Samuel Griffith Society that strongly, and justly in my view, criticise the judicial activism of the Mason court.[36] Is the approach of Justices Kirby and Callinan in the *Work Choices Case* different from the activism that has been criticised? It is not, of course, and deserves exactly the same criticism. Indeed, as Justice Callinan noted before his elevation to the High Court:

> "A Court that reserves the right to pick and choose upon wholly unpredictable bases those settled arrangements which it would, and others that it would not disturb. . . is, on any view, a body of enormous, indeed unparalleled power in society".[37]

Perhaps the last word on this matter should be left to two celebrated supporters of the common law method.[38] In 2006 Justice Heydon cited part of the judgment of Justice Gibbs in the *Second Territorial Senators Case*[39] as follows:

> "No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of the decision did not survive beyond the rising of the Court. . . . It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court".[40]

The gradual but inexorable dilution of the federal character of our Constitution is one of the most important political issues of our time. Something needs to be done about this. But assuming a judicially activist role to overcome this problem would be an unprincipled decision which would, even if it could work, merely replace one problem with another.

The worst possible body to resuscitate Federalism?

What are "all the circumstances" that need to be considered before judges can overrule decisions in order to achieve the goals sought by activist federalist and activist originalist judges?

As indicated in my introduction, I am considering the hypothetical situation of a High Court composed of activist federalist/originalist judges. Thus, we would need to be clear about the implications that flow from the judgments of Justices Kirby and Callinan, since I have argued that their judgments fit the mould of my hypothetical High Court. If their positions became the majority view on the High Court, they could not expect their arguments to be limited to the *Work Choices Case*. The first obvious implication of their positions is that the *Engineers' Case* would be overruled. This, in turn, would mean reconsidering the High Court's treatment of every grant of power given to the Commonwealth by s. 51 of the Constitution.

But, of course, activist federalism and originalism demand more than this. Activist federalists and originalists would look to overrule *all* the decisions which they see as having distorted the fundamental federal character of the Constitution that they discern from its very structure and from the intention of its founders. This would mean overturning decisions that affect the representation of the States in the Parliament, decisions which have had a deleterious impact on the financial and economic independence of the States (ss 90, 92 and 96), and even such provisions as s. 117.

Is this claim taking the views of Justices Kirby and Callinan too far? I do not think so. First, the logical implication of suggesting that the High Court needs to take into account the fundamentally *federal* nature of the Constitution, and of the centrality of the founders' original intent when deciding constitutional questions before the Court, leads inevitably to a root and branch overhaul of the Constitution.

Justices Kirby and Callinan are quite clear that they are not *passive* federalists or originalists. They are *not* arguing that we should accept the presently existing centralist interpretation of the Constitution, but that the centralizing tendency in Australian constitutional decision-making should stop. Justice Kirby expressly indicates that *absent* his belief that the federalist nature of the Constitution determines its meaning, he would accept that the trend of decisions following the *Concrete Pipes Case* would have led him to find that the Work Choices legislation was valid.[41] In other words, he wants to unwind the effect of previous decisions. Justice

Callinan expressly indicates that he would overrule the *Engineers' Case*. This is not a passive acceptance of what has gone before with a determination to say "no further". It is a *rejection* of the past.

A rejection of the High Court's century of constitutional interpretation in favour of the federal and originalist imperatives discerned by Justices Kirby and Callinan would, necessarily, invite litigation to overturn High Court decisions which have established the demarcation lines between the Commonwealth and State legislative powers. For example, if the High Court followed Justice Callinan's lead and overruled the *Engineers' Case*, the stage would be set for litigation involving virtually every placitum in s. 51. That would, in turn, involve the High Court in setting new, federally "appropriate" boundaries between Commonwealth and State legislative powers. When the new, federally appropriate understandings of ss 90, 92 and 96 were added to the mix, it would become obvious that the High Court would be reformulating the Australian federation in the most fundamental ways.

Is the High Court the appropriate body to carry out such a task? I think that the answer is "No", for two reasons.

First, even if all present and future High Court Justices adopted an activist federalist attitude to the Constitution, the constraints operating on the Court would make the recasting of the Australian Constitution a lengthy process. Constitutional cases don't happen overnight. And the large number of cases needed to reconsider the interpretation of virtually the entire Constitution would ensure that the process would take many years, perhaps decades, to complete. In the meantime, of course, both Commonwealth and State governments would be trying to govern while not knowing which powers would next be litigated, and what the final legislative framework would look like. I cannot imagine a less attractive proposition.

But, of course, unanimity amongst the judges is extremely unlikely. What is more likely is that some judges will be activist federalists, that some won't be, and that even those that are will have different notions of what that would mean. So the process of recasting the Constitution would be messy and unpredictable, with oscillations between more and less federalist decisions adding to the uncertainty. Again, one would have to ask whether this would aid the cause of good governance in Australia.

If, however, we ignore this concern, we are still left with the issue of whether the High Court has the institutional capacity to redesign the Australian Constitution. In his pre-activist days Sir Anthony Mason had some wise words to say about the capacity of judges to act as law reformers and *de facto* legislators:

> "The Court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts found. The Court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The Court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the Court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the Court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature".[42]

Exactly the same constraints would apply to the High Court if it were to embark on the long road of litigation designed to reform our existing constitutional arrangements to give effect to federalist or originalist imperatives. Could anyone really believe that the High Court would be an appropriate, let alone desirable, institution for the reshaping of Commonwealth and State legislative powers? Would it be the body that one would choose to redesign the financial relationships and responsibilities of the Commonwealth and the States? For all the very good reasons that Sir Anthony gave for not wanting to see the High Court as a roving law reform commission, one would not want to see the High Court as a long term constitutional convention armed with the power to implement its decisions.

Despite his occasional call for activist originalists to be appointed to the High Court, even Greg Craven notes the incongruity of the High Court being involved in such decision-making:

> "Even if one accepts that there is no democratic impropriety in judges assuming a political and legislative function, why would we believe that relatively elderly and cloistered male barristers, sequestered all their lives from the making of any policy decision larger than that concerning the purchase of office stationery, should upon elevation to the High Court bench become qualified for the taking of the most fundamental political decisions in our society".[43]

The end of the High Court?

If the High Court were to go down the path of recasting the Constitution to reflect federalist imperatives via the mechanism of essentially endless litigation, it would be unlikely to emerge unscathed. In fact, such a development would be catastrophic for the Court and for the country.

Can it really be expected that the Commonwealth and State governments would patiently and stoically sit aside and govern while the High Court entered upon a lengthy process of refashioning the Constitution in ways that would impact upon the powers of each tier of government? Would the Australian people, for that matter, rest quietly while immensely controversial political questions about which tier of government should be responsible for passing laws, and raising and spending tax money, were litigated and decided by unelected barristers and judges?

Would the Commonwealth government especially—given that it is most likely to lose most out of such a process—see this as a political challenge and respond in kind? Can anyone imagine a Prime Minister such as John Howard, for example, peacefully accepting successive High Court decisions which continually reduced his power to legislate for Australia? Of course not. If the High Court were to go down this path, the Commonwealth would respond by appointing politician lawyers to the Court in order to defend its interests. As Greg Craven notes:

> "Finally, there is the obvious point that if judges are to behave as politicians, then politicians will be appointed as judges. Once the executive is convinced that the occupants of the bench intend to behave as political rather than legal creatures, it is a short step to ensuring that only those persons thoroughly amenable to the programme of the governing party will be appointed to the judiciary. Consequently, the politicisation of the judiciary through judicial activism may be expected to be a self-perpetuating process. . . This culminating disaster will set the seal on the loss of independence and prestige inherent in the pursuit of the course of judicial activism".[44]

This, of course, would totally destroy any popular belief about the independence of the judiciary and its importance in our mixed and balanced Constitution.

Conclusion

In the *Work Choices Case* Justice Kirby adopts a position to the precedents contained in High Court decisions over one hundred years that amounts to what I have described as an activist federalist position. Justice Callinan, in the same case, adopts a similar method but adds to it an activist originalist program. What are the implications of these positions if they were to become the ruling orthodoxy on the High Court?

The application of an activist federalist/originalist judicial method would see the High Court adopt the role of immediately entering into a protracted storm of litigation with the ultimate aim of recasting the Australian Constitution in light of federalist and originalist views. This would be achieved by setting aside the traditional methods of the common law judge, and the deference to authority and disinclination to enter into political questions commonly associated with such judges, in favour of an openly aggressive program of reforming the legislative, taxing and spending powers of the Commonwealth and the States.

This would amount to the greatest attack on common law judging and its place in our constitutional framework that Australia has ever seen. If, however, one ignores the matter of principle, one can ask whether anyone really believes that the High Court is anything other than the least appropriate public body to undertake a dedicated program aimed at fundamentally recasting our constitutional and political structure. For good reasons it does not have the political legitimacy to undertake such a role. On a more practical level, the resources and skills of High Court judges are patently unsuitable for such a role. Finally, if the High Court did embark on this path it would amount to a one way ticket to self-destruction. An openly activist federalist and/or originalist High Court would quickly become immersed in political battles with both Commonwealth and State governments (which it would lose), as well as losing all respect from the Australian people. That is a catastrophe that we do not need.

Given the parlous state of federalism in Australia it is not surprising that some might look to the High Court for a remedy. But such a course would be as wrong in principle as it would be unwise in practice. Federalism can only be rescued if the Australian people can be convinced that it is worth reviving, and it can only be resuscitated through political action.

Endnotes:

* I would like to thank members of the Law School Brown Bag Discussion Group at the University of Adelaide for their many helpful comments on an earlier version of this paper.

1. Greg Craven, *Judicial Activism: The Beginning of the End of the Beginning*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 16 (2004), pp. 153-172, at 162. The reference here is to Justice Antonin Scalia, a noted and controversial Justice of the United States Supreme Court who has argued trenchantly for an "originalist" interpretation of the United States Constitution in the cases brought before that Court.

2. *Ibid.*, at 163.

3. *Ibid.*.

4. See, for example, Greg Craven, *Reforming the High Court*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 7 (1996), pp. 21-65; Greg Craven, *The High Court and the States*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 6 (1995), pp. 65-104; Greg Craven, *The Engineers' Case: Time for a Change?,* in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 8 (1997), pp. 73-124. Geoffrey Walker has given a detailed description of the way in which the High Court has systematically, although not uniformly, increased the powers of the Commonwealth at the expense of the States. See Geoffrey Walker, *The Seven Pillars of Centralism: Federation and the Engineers' Case*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 14 (2002), pp. 1-102.

5. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 (*Work Choices Case*).

6. V Lenin, *What is to be Done?*, in *Lenin, Collected Works* (Foreign Languages Publishing House, 1961, Moscow), Volume 5, pp. 347-530. (Originally published 1902). Accessed at http://marxists.org/archive/lenin/works/ 1901/witbd/index.htm

7. *Loc. cit.*.

8. *Ibid.,* at 118 per Kirby J (internal footnote omitted).

9. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (*Engineers' Case*).

10. *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 (*Concrete Pipes Case*).

11. *Ibid.*.

12. *Ibid.*.

13. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 147 per Kirby J.

14. *Ibid.*, at 146 per Kirby J.

15. (1947) 74 CLR 31.

16. (1971) 122 CLR 353.

17. (2003) 215 CLR 185.

18. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 149 per Kirby J (internal footnotes omitted, emphasis added).

19. (1947) 74 CLR 31.

20. (1971) 124 CLR 468.

21. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 150-51 per Kirby J (internal footnotes omitted, emphasis added).

22. *Ibid.*.

23. In technical terms it can be argued that certain aspects of the *Engineers' Case* have already been discarded by the High Court. The rhetorical device of claiming that literalism is the correct approach to interpreting the Constitution is an example of a "doctrine" from that case that has been displaced. One can agree with Nicholas Aroney that the "resilient core" of the *Engineers' Case* "is the proposition that primary and virtually exclusive attention is to be given to the interpretation of federal legislative power, without regard to the impact on State legislative capacity", and yet note that the *Engineers' Case* is also symbolic of a systematic and comprehensive centralist attitude towards interpreting the Constitution by the High Court. Overturning the *Engineers' Case* involves more, I would argue, than simply overturning particular technical doctrines associated with that case. The quotation is from Nicholas Aroney, *The Ghost in the Machine: Exorcising* Engineers, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 14 (2002), pp. 103-140 at 122.

24. (1947) 74 CLR 31.

25. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 226-34 per Callinan J.

26. *Ibid.*, at 219 per Callinan J.

27. *Ibid.*, at 220 per Callinan J.

28. *Ibid.*, at 218 per Callinan J. See also pp. 186-7 and 225-6 for further discussions by Callinan J of the importance of originalism and federalism as basal considerations in the interpretation of the Australian Constitution.

29. *Ibid.*, at 219 per Callinan J.

30. *Re Foreman & Sons Pty Ltd; Uther v. FCT* (1947) 74 CLR 508 at 521 per Latham CJ, noted by Callinan J in *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 167, footnote 698.

31. *State Government Insurance Commission v. Trigwell* (1979) 142 CLR 617 at 633 per Mason J.

32. *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 211 per Callinan J.

33. B Cardozo, *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921), p. 141, cited in *New South Wales v. The Commonwealth* (2006) 231 ALR 1 at 215 per Callinan J.

34. (1803) 5 US 137.

35. Greg Craven, a proponent of what I have called activist originalism, nevertheless notes that "there is nothing to suggest that the Founders intended that the High Court should operate outside the construct of the traditional mode of proceeding by a British Court". See Greg Craven, *Reforming the High Court*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 7 (1996), pp. 21-65 at 25.

36. Greg Craven is both succinct and blunt about this. "In relation to statutory and constitutional interpretation, judicial activism is entirely illicit and must be stigmatised as such". Greg Craven,

Reflections on Judicial Activism: More in Sorrow than in Anger, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 9 (1997), pp. 187-208 at 208.

37. Ian Callinan, QC, *An Over-Mighty Court?*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 4 (1994), pp. 81-118 at 113.

38. I have written at length elsewhere about the nature of common law judging in response to claims that it amounts to a form of mechanical jurisprudence or, even worse, a myth perpetuated by cynical judges who really knew better. For the sake of brevity of argument, I will refrain from repeating myself on why Dixon's notion of strict legalism, for example, encapsulated a sophisticated analysis of common law judging, one that recognised the creative role of judges within a bounded form of reasoning which aimed to give effect to a judge's genuine attempt to apply the law as he or she understood it. See, for example, *Another Blast from the Past or why the Left should embrace Strict Legalism: A Reply to Frank Carrigan* (2003) 27 *Melbourne University Law Review* 186-98; *Law Reviews: Good for Judges, Bad for Law Schools?* (2002) 26 *Melbourne University Law Review* 560-76; *The Rise of the Hero Judge* (2001) 24 *University of New South Wales Law Journal* 747-759 and *Unconvincing and Perplexing: Hutchinson and Stapleton on Judging*, forthcoming, *University of Queensland Law Journal*.

39. *Queensland v. The Commonwealth* (1977) 139 CLR 585.

40. *Ibid.*, at 599 per Gibbs J, cited by Justice Dyson Heydon, *Chief Justice Gibbs: Defending the Rule of Law in a Federal System*, *The Inaugural Sir Harry Gibbs Memorial Oration*, in *Upholding the Australian Constitution,* Proceedings of The Samuel Griffith Society, Volume 18 (2006), xv-lvii at xxx-xxxi.

41. Apart from the majority in the *Work Choices Case* which explained why this was the case, even Greg Craven seems to accept that on the present law the Work Choices legislation is within the Commonwealth's legislative capacity. Greg Craven, *Industrial Relations, the Constitution and Federalism: Facing the Avalanche* (2006) 29 *University of New South Wales Law Journal* 203 at 208-11.

42. *State Government Insurance Commission v. Trigwell* (1979) 142 CLR 617 at 633 per Mason J.

43. Greg Craven, *The Engineers' Case: Time for a Change?*, *loc. cit.*, at 111.

44. Greg Craven, *Reflections on Judicial Activism: More in Sorrow than in Anger*, *loc cit.*, at 207.