Griffith Country

The Hon Justice Robert Beech-Jones*

As I was preparing for this talk I was not really sure what to talk about. So I picked up the conference brochure and discovered that I was talking about contemporary issues and the High Court, which is not a bad place to start. I also realised that I was speaking at 9:00am on a Saturday morning after an organised gathering at a local bar. So I decided the best approach was to start you off gently but maybe wake everyone up with something a bit pointier towards the end.

Actually the gentle start works with the topic. You see the difficulty with talking about contemporary legal issues and the High Court is that it is, well, contemporary. If the topic is meant to refer to recent cases then I cannot be my usual sparkling and colourful self but instead I need to be careful, dare I say bland. Judges give reasons for their decisions but only "once".[1] Judges should not use public forums to have another attempt to regurgitate their reasons. If my judgment in a particular case was not sufficiently persuasive enough then I have to accept it, move on and not come back for another crack.

So I will start off by lightly running through three topics that have occupied the High Court's time recently, two of which involve constitutional implications and the other of which I suspect many of you are familiar with. I will then try and give all of this a Queensland flavour before waking everyone up with what I suggest is a truly "Capital C" contemporary issue at the end.

The implied freedom of political communication

Beginning in 1992 the High Court has repeatedly held that Commonwealth, State and Territory legislative (and executive) power is limited by the implied freedom of political communication. In contrast to the First Amendment to the United States Constitution,[2]

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* Justice of the High Court of Australia. This is a revised version of the Keynote speech delivered to the North Queensland Law Association on 16 May 2026 in Townsville.

[1] *Queensland v Stradford* (2025) 99 ALJR 396 at 424 [110]; 421 ALR 376 at 403, citing Gleeson, 'Current Issues for the Australian Judiciary', speech delivered at the Supreme Court of Japan, Tokyo, 17 January 2000 at 10.

[2] See *Unions NSW v New South Wales* (2013) 252 CLR 530 at 570 [101]; *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [29]-[30].

the implied freedom is not a personal right but a constitutional restriction on exercises of legislative (and executive) power burdening freedom of communication concerning political or governmental matters. The implied freedom derives from the text and structure of the Constitution, including those provisions of the Constitution that ensure that the Commonwealth Parliament is directly chosen by the people of Australia.[3]

Where there is a challenge to the validity of legislation on the basis that it is inconsistent with the implied freedom of political communication, three questions arise.[4]

First, does the law effectively burden freedom of communication about governmental or political matters in its terms, operation, or effect?

Second, if so, is the purpose or are the purposes of the law legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Third, if so, is the law reasonably appropriate and adapted to advance that legitimate purpose or those legitimate purposes?[5]

A law that operates directly on political communication, including laws restricting or limiting protests, will most likely directly burden freedom of political communication and engage those three questions. But a law can also indirectly burden the freedom of political communication. For example, while a donation to a political party or candidate has been held not to be a form of political communication, legislation regulating political donations has been held to indirectly burden freedom of political communication by effectively inhibiting parties and candidates in their communication with the electorate.[6] Recently, the Court unanimously struck down provisions of Victoria's electoral law regulating donations to candidates and parties, not because there is anything per se unconstitutional in regulating donations, but because,

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[3] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 558, 560, 561, 566-567; *Babet v Commonwealth* (2025) 99 ALJR 884 at 895 [38], 899-890 [67], 912 [132], 936 [241].
[4] *Hopper v Victoria* [2026] HCA 11 at [27].
[5] As to the role of "structured proportionality" in relation to the third question: see *McCloy v New South Wales* (2015) 257 CLR 178 at 201 [23], 215-216 [74], 217-219 [78]-[87]; *Babet* (2025) 99 ALJR 883 at 897 [49], 901 [72], 922-925 [174]-[184], 930 [210]-[212], 933 [226]-[229], 936 [242]; 423 ALR 83 at 97, 102-103, 130-134, 140-141, 144-145 and 148; and *Hopper* [2026] HCA 11 at [86]-[87].
[6] *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [36]-[38]; *Hopper* [2026] HCA 11 at [30].

according to six members of the Court, the State of Victoria could not justify the law's differential treatment of certain political parties compared to other parties and candidates[7] and because the invalid parts could not be disentangled from the rest of the legislative scheme.[8] The other judge, Justice Edelman, found that the purpose of the provisions was not compatible with the implied freedom. [9]

Last year in *Farmer v Minister for Home Affairs*[10] the Court unanimously upheld the validity of parts of the *Migration Act 1958* (Cth) that were relied on to exclude an American influencer from entering Australia. In *Farmer* four judges held that those provisions of the Migration Act burdened freedom of political communication but the burden imposed by the provisions was justified.[11] The other three judges held that the provision did not burden freedom of political communication.[12]

Some months previous in *Ravbar v Commonwealth*[13] the Court upheld the constitutional validity of statutory provisions that placed the building and construction division of the CFMEU under the control of an administrator. One of the grounds of challenge was that the legislation impermissibly burdened freedom of political communication because of its effect on the capacity of the members of the union to communicate through the union as their chosen form of association. All of the members of the Court rejected that and all the other bases of the challenge to the law. Five judges[14] held that the provisions burdened freedom of political communication but they were otherwise justified.[15] Two judges held that the provisions did not burden freedom of political communication.[16]

Like the next topic, the scope and application of the implied freedom often arises in charged political contexts and can arouse strong feelings. We apparently have more

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[7] *Hopper* [2026] HCA 11 at [49]-[52], [123], [164]-[166].
[8] *Hopper* [2026] HCA 11 at [53]-[68], [123], [168]-[171].
[9] *Hopper* [2026] HCA 11 at [105]-[115].
[10] *Farmer v Minister for Home Affairs* (2025) 99 ALJR 1408; 425 ALR 116.
[11] *Farmer* (2025) 99 ALJR 1408 at 1422-1423 [44]-[45]; 425 ALR 116 at 130 (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).
[12] *Farmer* (2025) 99 ALJR 1408 at 1432 [96]-[98] (Edelman J), at 1436 [119] (Steward J) and 1443 [164] (Gleeson J); 425 ALR 116 at 143-144, 149 and 159.
[13] *Ravbar v Commonwealth* (2025) 99 ALJR 1000; 423 ALR 241.
[14] Gageler CJ, Edelman J, Gleeson J, Jagot J and Beech-Jones J.
[15] *Ravbar* (2025) 423 ALR 241 at 257-258 [38]-[40], 263 [66], 309-311 [230]-[236], 330 [307], 332 [315], 347 [368], 358 [404]-[405], 371 [457]; 99 ALJR 1000 at 1019, 1023, 1057-1058, 1072 1085 and 1103.
[16] *Ravbar* (2025) 423 ALR 241 at 275-276 [110]-[115] and 328 [295]; 99 ALJR 1000 at 1032-1033 and 1070-1071.

cases in the pipeline. So I will shy away from any deeper discussion other than to note that, while the three cases I referred to reveal disagreements about aspects of the implied freedom, the result in all of them was unanimous.

Ch III and Lim

The other constitutional implication I will mention derives from the judiciary chapter of the Australian Constitution, Ch III. It would be fair to say that since the early 1990s there have been many developments relating to Ch III. I will touch on one of those developments with recent currency, concerning the developments which have followed from the conclusion that Ch III exclusively preserves to the courts the function of adjudging and punishing criminal guilt.[17]

The High Court's 1992 judgment in *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs*[18] has been taken as establishing that a law of the Commonwealth parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose.[19]

Lim has had a busy few years. I was asked to apply it in my first case on the Court. Two days after I was sworn in, in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs,*[20] a unanimous Court applied *Lim* to overrule its previous decision in *Al-Kateb v Godwin.*[21] We held that Ch III does not permit the executive detention of an alien who has failed to obtain permission to remain in Australia when there is no real prospect of their removal from the country becoming practicable in the reasonably foreseeable future.[22]

[17] See *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175; *The Queen v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1 at 11; *Brandy v Human Rights and Equal Opportunity Comm* (1995) 183 CLR 245 at 258, 269; *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 536, 609, 612, 646, 686, 721; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109.
[18] *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1.
[19] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 at 157 [39].
[20] *NZYQ* (2023) 280 CLR 137.
[21] *Al-Kateb v Godwin* (2004) 219 CLR 562.
[22] *NZYQ* (2023) 280 CLR 137 at 162 [55].

Six members of the Court in *NZYQ* reached that conclusion relying on the *Lim* principle and in doing so expressed the principle in terms that preclude a legislative attempt to confer on the executive a power to impose a detriment or burden that is "properly characterised as punitive".[23] This involves "a single question of characterisation" of the law, the answer to which requires an assessment of both the means of the law and the ends of the law, and the relationship between the two.[24] The other judge, Justice Edelman, took a different approach to reaching the same conclusion. His Honour treated the relevant question as being whether detention, where there was not a real prospect of the alien's removal from Australia becoming practicable in the reasonably foreseeable future, was disproportionate; that is, not reasonably capable of being seen as necessary for a legitimate purpose, such as making an alien available for deportation.[25]

I will mention two particular cases that followed *NZYQ*. After *NZYQ* a number of long-term immigration detainees were required to be released. The immediate legislative response to *NZYQ* was to enact a regime which, broadly speaking, required those released detainees who were assessed to pose a risk to wear an ankle monitoring device and observe a curfew. In *YFBZ v Minister for Immigration, Citizenship and Multicultural Affairs*[26] a 5-2 majority of the Court struck down that regime. The plurality judgment of Chief Justice Gageler, Justices Gordon, Gleeson and Jagot applied *Lim* as restated in *NZYQ* and held that the regime was punitive.[27] Justice Edelman applied his reasoning in *NZYQ*.[28] I dissented, applying *NZYQ* but concluding that the regime was not properly characterised as punitive in the relevant sense.[29] Justice Steward also dissented.[30]

After *YBFZ* the Commonwealth introduced a revised scheme for imposing ankle monitoring and curfews on released detainees. However, in March this year in *EGH19 v Commonwealth*[31] those provisions were also struck down in another 5-2 decision that reflected the same division that occurred in *NZYQ*.

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[23] *NZYQ* (2023) 280 CLR 137 at 158 [44].
[24] *NZYQ* (2023) 280 CLR 137 at 158 [44].
[25] *NZYQ* (2023) 280 CLR 137 at 160-162 [51]-[54].
[26] *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1; 419 ALR 457.
[27] *YBFZ* (2024) 99 ALJR 1 at 9 [5], 24 [87]; 419 ALR 457 at 464, 484.
[28] *YBFZ* (2024) 99 ALJR 1 at 38-42 [149]-[161]; 419 ALR 457 at 504-508.
[29] *YBFZ* (2024) 99 ALJR 1 at 54 [228]; 419 ALR 457 at 525.
[30] *YBFZ* (2024) 99 ALJR 1 at 52 [215]; 419 ALR 457 at 522.
[31] *EGH19 v Commonwealth* [2026] HCA 7.

The High Court and Queensland Crime

The last topic I wanted to mention was crime, specifically Queensland crime. Criminal appeals are a significant component of the High Court's appellate work.[32] On my count, since 2020 there have been 12 criminal appeals that have been decided by the High Court on appeal from the Queensland Court of Appeal.[33] To avoid getting in trouble I have not undertaken a count from the other jurisdictions, much less prepared a population-adjusted comparison. It suffices to state that that rate of appeal does not strike me as relatively high compared to elsewhere.

Many of those 12 appeals concern the so-called common form appeal provisions which are contained in the *Criminal Code Act 1899* (Qld) ("the Code") and largely correspond with the appeal provisions in most other Australian jurisdictions. Many of those appeals turned on assessments of whether the verdict was unreasonable and could not be supported having regard to the evidence.[34] However, one of these cases, *MDP v The Queen,*[35] may have settled some thorny issues about the so-called second limb of the common form appeal provisions, specifically what constitutes a decision by a trial judge on a question of law and when such a wrong decision will result in the appeal against conviction being allowed. In short, a wrong decision on a question of law is, or at least includes, a wrong determination or response by a trial judge to a question of law that has legal effect in the trial.[36] Such a decision will lead to the appeal being allowed where it amounts to a failure to observe the requirements of a fair trial in a fundamental respect, or where, subject to the proviso, the wrong decision could realistically have affected the reasoning of the jury to the verdict of guilty that was returned in the trial that occurred.[37]

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[32] In 2024 and 2025 approximately 26% and 17% of High Court cases concerned criminal appeals respectively.

[33] *Peniamina v The Queen* (2020) 271 CLR 568; *GBF v The Queen* (2020) 271 CLR 537; *Coughlan v The Queen* (2020) 267 CLR 654; *Strbak v The Queen* (2020) 267 CLR 494; *Orreal v The Queen* (2021) 274 CLR 630*; Huxley v The Queen* (2023) 98 ALJR 62; 416 ALR 359; *HCF v The Queen* (2023) 280 CLR 596; *Lang v The Queen* (2023) 278 CLR 323; *BDO v The Queen* (2023) 277 CLR 518; *Dayney v The King* (2024) 307 A Crim R 599; *MDP v The King* (2025) 99 ALJR 969; 423 ALR 204; *The King v HCZ* (B44/2025); *GBU v The King* (B29/2026).

[34] See, eg, *Coughlan v The Queen* (2020) 267 CLR 654; *Orreal v The Queen* (2021) 274 CLR 630; *Lang v The Queen* (2023) 278 CLR 323.

[35] *MDP* (2025) 99 ALJR 969; 423 ALR 204.

[36] *MDP* (2025) 99 ALJR 969 at 975 [3], 980 [30]-[31], 984 [56] and 992-993 [99]-[103]; 423 ALR 204 at 207, 214, 219, 230-231.

[37] *MDP* (2025) 99 ALJR 969 at 975 [3], 976 [9], 980-981 [33], 982 [44], 983 [46], 993 [106]-[107]; 423 ALR 204 at 207, 208, 215, 217, 218, 232. See also *Brawn v The King* (2025) 99 ALJR 87 at 876 [10]; 423 ALR 69 at 73-74.

Three of those 12 decided appeals I mentioned concerned the interpretation of the Code. In *Dayney v The Queen*[38] the Court dismissed an appeal about the construction of s 272 of the Code, *Peniamina v The Queen*[39] concerned s 304 of the Code, and *BDO v The Queen*[40] concerned s 29(2) of the Code.

At this point I wanted to mention one feature of the High Court's consideration of the Code in many of these and other cases. The judgment in *BDO* referred to an annotation made to a draft of the Code by its illustrious author,[41] to whom I will refer shortly. The draft of the Code and the author's marginal notes to the draft have been referred to in many High Court cases construing the Code,[42] as have the author's letters and extrajudicial ruminations about the Code.[43]

Griffith Country

The areas of the High Court's work that I have briefly sketched were, or reflect, the happy place of one Sir Samuel Griffith: they are "Griffith country". Sir Samuel Griffith's curriculum vitae exceeds even that of a modern High Court Associate. It only has Dr Evatt's curriculum vitae as a rival; Griffith was Premier of Queensland twice (1883 to 1888; 1890 to 1893),[44] Chief Justice of Queensland (1893 to 1903)[45] and then the first Chief Justice of the High Court of Australia (1903 to 1919).[46] He wore many other hats including KC, framer of the Constitution, Attorney-General and, as I will come to, economic radical.

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[38] *Dayney v The Queen* (2024) 418 ALR 512; 98 ALJR 857.
[39] *Peniamina v The Queen* (2020) 271 CLR 568.
[40] *BDO v The Queen* (2023) 277 CLR 518.
[41] *BDO* (2023) 277 CLR 518 at 523 [5], 526 [17].
[42] See, eg, *R v Falconer* (1990) 171 CLR 30 at 47; *Darkan v The Queen* (2006) 227 CLR 373 at 386-388 [38]-[40]; *CTM v The Queen* (2008) 236 CLR 440 at 445 [3]; *PGA v The Queen* (2012) 245 CLR 355 at 436 [220]; *Bell v Tasmania* (2021) 274 CLR 414 at 424 [21], 441-442 [84]; *O'Dea v Western Australia* (2022) 273 CLR 315 at 337 [59]; *Queensland v Stradford* (2025) 99 ALJR 396 at 432 [144]; 421 ALR 376 at 413-414.
[43] See, eg, *Ilich v The Queen* (1987) 162 CLR 110 at 135; *Walden v Hensler* (1987) 163 CLR 561 at 580, 598; *Thompson v The Queen* (1989) 169 CLR 1 at 25; *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309 at 318, 326, 346; *R v Barlow* (1997) 188 CLR 1 at 37; *Darkan v The* Queen (2006) 227 CLR 373 at 393 [63]; *CTM v The Queen* (2008) 236 CLR 440 at 444-445 [1]; *R v LK* (2010) 241 CLR 177 at 203-204 [52]; *Pickett v Western Australia* (2020) 270 CLR 323 at 362 [94], 364 [96]; cf *West Australian Newspapers Ltd v Bridge* (1979) 141 CLR 535 at 547.
[44] Burnside, 'Griffith, Isaacs and Australian Judicial Biography: An Evolutionary Development?' (2009) 18 *Griffith Law Review* 151 at 151.
[45] 'The Right Hon. Chief Justice Griffith' (1914) 14 *Journal of the Society of Comparative Legislation* 1 at 9.
[46] Burnside, 'Griffith, Isaacs and Australian Judicial Biography: An Evolutionary Development?' (2009) 18 *Griffith Law Review* 151 at 156.

So why do I say I was rummaging around in Griffith country?

Well that is partly because when you start talking about constitutional implications you start talking about Sir Samuel Griffith. As the first Chief Justice of the High Court, Griffith drew from what he referred to as the "essence"[47], "scheme"[48] or "scope"[49] of the Constitution two very large implications. The first was a type of implied freedom in the form of a doctrine of intergovernmental immunities which treated each of the Commonwealth and the States in their dealings with each other and within their own ambit as "sovereign State[s]", able to "exercise [their] legislative and executive powers in absolute freedom, and without any interference whatever" except that provided by the Constitution.[50]

The second of Griffith's implications also drew on the federal "scheme" or "spirit" of the Constitution,[51] this time to conclude that the Constitution should be interpreted as reserving certain exclusive legislative powers to the States.[52] Both of these doctrines were swept away by the *Engineers* case[53] decided after Griffith retired as Chief Justice.

And then there is the Code. Of course, Griffith was that illustrious author I referred to earlier. He prepared a draft of the Code in his "spare time" over 5 years as Chief Justice of Queensland between 1893 and 1897 before it was enacted in 1899.[54] It must have been a prodigious task. Apparently before Griffith set to work the criminal law of Queensland was spread over 96 statutes.[55] Leaving aside the provisions considered in *Dayney*, it's a much better read today almost 130 years later than the Commonwealth Criminal Code which came into force 30 years ago.[56] The Griffith Code was adopted in Western Australia in 1902 and influenced aspects of the Tasmanian Code, enacted in 1924, and Northern Territory's code enacted in 1983.[57]

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47 *D'Emden v Pedder* (1904) 1 CLR 91 at 110.
48 *Deakin v Webb; Lyne v Webb* (1904) 1 CLR 585 at 605.
49 *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 231.
50 Griffith CJ also referred to restrictions imposed by "the Imperial connection": see *D'Emden v Pedder* (1904) 1 CLR 91 at 109.
51 *R v Barger* (1908) 6 CLR 41 at 67 at 72.
52 *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 503.
53 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
54 See Wells, '"The Griffith Code" - Then and Now' (1994) 3 *Griffith Law Review* 2 at 206-207, 216 .
55 See Wells, '"The Griffith Code" - Then and Now' (1994) 3 *Griffith Law Review* 2 at 206.
56 *Criminal Code Act 1995* (Cth).
57 O'Regan, 'Griffith and the Queensland Criminal Code' in White and Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution* (2002) 77 at 80.

The Queensland Code was also adopted across the empire and then the Commonwealth. It became or significantly influenced the law in British New Guinea (later Papua New Guinea) (1903),[58] Northern Nigeria in 1904 (the Code still applies in parts of Southern Nigeria), Cyprus (1928), Kenya, Uganda, Tanganyika and Nyasaland (1930), Northern Rhodesia (1931), Zanzibar and The Gambia (1934), Fiji (1945), Seychelles (1955) and The British Soloman Islands (1963).[59] One intrepid Queensland silk has traced the adoption of the Code into the enactment of the Criminal Code Ordinance of Palestine in 1936 and its reenactment in Israel in an official Hebrew version in 1977.[60]

As I adverted to, so distinctive and perhaps unique is Griffith's role in drafting the Code that his annotations to the draft Bill and accompanying letter are referred to in a manner analogous to explanatory memoranda and second reading speeches.[61]

Griffith the Politician

In recent times Griffith has been remade and repackaged. Before I explain that I am going off on a tangent to mention two other things about him.

First, the period of Griffith's time in Queensland parliament was one of remorseless and relentless land expansion throughout Queensland with all the associated brutalities and injustices that entailed for the land's indigenous owners. One historian attributes to Griffith responsibility as Attorney-General for not taking action to protect the rights of Indigenous people under pastoral leases to remain on and use their traditional lands. That historian seeks a wholesale reconsideration of Griffith's legacy.[62] I am in no position to assess that claim. I am not a historian but a mere lawyer. Unlike where (say) historians attribute systemic responsibility to a State, when lawyers seek to attribute individual responsibility our approach is that, the more serious the allegation, the more exact the proof that is required.[63] The things I will talk about in the

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[58] O'Regan, 'Griffith and the Queensland Criminal Code' in White and Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution* (2002) 77 at 81.
[59] O'Regan, 'Griffith and the Queensland Criminal Code' in White and Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution* (2002) 77 at 81-82.
[60] O'Regan, 'Sir Samuel Griffith's Criminal Code' (1990) 7(2) *Australian Bar Review* 141 at 150.
[61] See above at footnotes 42 to 43.
[62] Reynolds, *Truth-Telling: History, Sovereignty and the Uluru Statement* (2021) at 223.
[63] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

rest of the speech are based on one form of exact (but not determinative) proof, specifically documents.

Second, the political environment during Griffith's time in politics in the late 19th century was very different to both the 20th century and even our more fragmented 21st century. One significant difference was the absence of a labour party or movement for much of the time that Griffith was a politician.[64] For most of Griffith's time in State politics, the political groupings were loose, with competition between urban and mercantile interests under a liberal grouping on the one hand and more conservative forces representing pastoral landholders on the other.[65] Griffith became a leading figure of the liberal grouping and pursued various social reforms such as free, secular and compulsory primary schooling.[66]

Griffith the Political Economist

However, Griffith was not just a liberal reformer. He was a radical, at least in his words if not his deeds. In the period leading up to the 1888 Queensland election, when it was clear that organised labour was the coming force, Griffith spoke up about wealth inequality.[67] Griffith lost that election and his arch conservative nemesis, Thomas McIlwraith, became Premier.[68] Undaunted, Griffith published articles decrying wealth inequality and the exploitation of wage labour.[69] In one of those articles Griffith gave as an example of exploitation a labourer being forced by competition to sell their labour for 5 pounds when the value of the product of their labour was 10 pounds.[70] While not doing so consciously,[71] in giving that example Griffith restated the central tenet of Marx's analysis of capitalism as published in Volume 1 of *Das Kapital*, namely "surplus

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[64] Brandis, 'Griffith and Early Colonial Liberalism in Queensland' in White and Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution* (2002) 111 at 116.
[65] Brandis, 'Griffith and Early Colonial Liberalism in Queensland' in Michael White and Aladin Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution* (2002) 111 at 116.
[66] See *State Education Act 1875* (Qld) referred to in Brandis, 'Griffith and Early Colonial Liberalism in Queensland' in Michael White and Aladin Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution* (2002) 111 at 118.
[67] Pannam, 'The Radical Chief Justice' (1964) 37 *Australian Law Review* 275 at 276.
[68] See Pannam, 'The Radical Chief Justice' (1964) 37 *Australian Law Review* 275 at 276.
[69] See Pannam, 'The Radical Chief Justice' (1964) 37 *Australian Law Review* 275 at 277 and 278, referring to articles titled "Wealth and Want" and "The Distribution of Wealth" that were published in 1888 and 1889 respectively.
[70] Griffith, 'Wealth and Want', *Boomerang* (17 December 1888) 1 at 2.
[71] Griffith's writing on this topic has been traced to the influence of so-called utopian writers: Schultz, 'Sir Samuel Griffith and Utopia: Characterising the Politician' in Green et al, *Cultural Legal Studies of Science Fiction* (2025) 174 at 186-189.

value", the idea that the worker's wage only corresponds to the value needed to support the worker but not the full value of the worker's production.[72] In another article, Griffith rejected the idea that a capitalist could acquire the labour of a worker for wages.[73] He said the only fair rule of division was for workers to receive the proportion of the value of their respective contributions.[74]

In July 1890 Griffith put these ideas into legislative form when he introduced into the Queensland Parliament a private members bill, the *Elementary Property Bill 1890* (Qld). This was the most radical legislation ever presented to an Australian parliament.[75] The bill described itself as a law "to declare the Natural Law relating to the Acquisition and Ownership of Private Property". The first operative provision[76] of the *Elementary Property Bill* declared that "all persons are, by natural law, equally entitled to the right of life, and to the right of freedom for the exercise of their faculties; and no person has, by natural law, any right superior to the right of any other person in this respect".[77] Land was declared, by natural law, to be the common property of the community[78] and all other property was declared to be the product or result of labour.[79] The net products of labour were declared to belong to the persons concerned in their production[80] and when labour was not applied directly or indirectly to property the whole product belonged to the labourer.[81] Natural law could be modified by the State making positive law (i.e. legislation) but only "so far as the common advantage of the community may require".[82]

Grifith's *Elementary Property Bill* imposed a duty on the State to make provision by positive law for the securing of the proper distribution of the net products of labour in

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[72] Marx, *Capital: A Critique of Political Economy*, tr Untermann (1909, 3rd edition) at Ch IX, 235-255; see also Downs, *Books that Changed the World* (1956) at 90-91.
[73] Griffith, 'The Distribution of Wealth' (1889) 1(12) *The Centennial Magazine* 833 at 838.
[74] Griffith, 'The Distribution of Wealth' (1889) 1(12) *The Centennial Magazine* 833 at 840.
[75] Pannam describes this bill and another bill prepared by Griffith to provide the machinery for this bill as the "most remarkable documents in the parliamentary history of Australia or any other Commonwealth country": Pannam, 'The Radical Chief Justice' (1964) 37 *Australian Law Review* 275 at 279.
[76] Sections 1-13 of the *Elementary Property Bill 1890* (Qld) provided definitions.
[77] *Elementary Property Bill 1890* (Qld), s 14.
[78] *Elementary Property Bill 1890* (Qld), s 16.
[79] *Elementary Property Bill 1890* (Qld), s 20.
[80] *Elementary Property Bill 1890* (Qld), s 22.
[81] *Elementary Property Bill 1890* (Qld), s 23. A labourer's wages were to be at least "sufficient to maintain the labourer and his family in a state of health and reasonable comfort": *Elementary Property Bill 1890* (Qld), s 21.
[82] *Elementary Property Bill 1890* (Qld), s 18.

accordance with the principles the bill declared.[83] Under the *Elementary Property Bill*, a worker could enforce their right to the net proceeds of any productive labour by bringing proceedings in a court of competent jurisdiction.[84] Privately, Griffith prepared another draft bill[85] which would have required employers to keep accounts of any undertaking of productive labour,[86] and declared void any agreement under which a person disposed of their share of the product of their labour for less than the full value of that contribution.[87] That latter provision would effectively invalidate almost all contracts of employment. In short, under Griffith's proposed *Elementary Property Bill*, all businesses and enterprises in Queensland would have become worker collectives.

If you were to use the language of recent times, Griffith was Australia's first ever parliamentary proponent of a legislated bill of rights and his proposal was for a bill of rights far more radical than anything seen since. Under Griffith's *Elementary Property Bill*, courts were to be empowered to oversee a large-scale redistribution of wealth[88] and to review[89] any subsequent attempts by the legislature to detract from the *Elementary Property Bill's* principles.[90]

As you probably guessed the *Elementary Property Bill* did not become law. The bill had its first reading[91] but Griffith postponed the second reading of the bill on three occasions over the next 6 months before the bill seems to have disappeared.[92] One possible explanation for the apparent change of heart is that weeks after first

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[83] *Elementary Property Bill 1890* (Qld), s 28.
[84] *Elementary Property Bill 1890* (Qld), s 27
[85] The other bill was entitled *A Bill to Make Provision for Giving Effect to the Rules and Principles Declared by 'The Elementary Property Law of Queensland'*. This bill was never introduced to Parliament. The text of the bill is found at Pannam, 'The Radical Chief Justice' (1964) 37 *Australian Law Review* 275 at 287-288 (Appendix II).
[86] *A Bill to Make Provision for Giving Effect to the Rules and Principles Declared by 'The Elementary Property Law of Queensland'*, s 6.
[87] *A Bill to Make Provision for Giving Effect to the Rules and Principles Declared by 'The Elementary Property Law of Queensland'*, s 8.
[88] Pursuant to *Elementary Property Bill 1890* (Qld), s 27.
[89] Pursuant, at least, to *Elementary Property Bill 1890* (Qld), s 18.
[90] Some writers describe the bill as "merely declaratory" (eg Graham, *The Life of the Right Honourable Samuel Walker Griffith* (1938) at 49) or "essentially declaratory" (Brandis, 'Griffith and Early Colonial Liberalism in Queensland' in White and Rahemtula, *Sir Samuel Griffith: The Law and the Constitution* (2022) 111 at 120). However by providing for curial enforcement of the *Elementary Property Bill*'s substantive provisions, the bill went beyond being declaratory only.
[91] Queensland, Senate, *Parliamentary Debates* (Hansard), 22 July 1890 at 306.
[92] The second reading speech was postponed on 26 September 1890 (Queensland, Senate, *Parliamentary Debates* (Hansard), 26 September 1890 at 688), 7 November 1890 (Queensland, Senate, *Parliamentary Debates* (Hansard), 7 November 1890 at 1329) and 3 December 1890 (Queensland, Senate, *Parliamentary Debates* (Hansard), 3 December 1890 at 1756).

presenting the bill Griffith reached a shock deal with McIlwraith that saw Griffith return for his second stint as Premier. It seems unlikely that his new coalition partners would agree to his bill.[93] One article describes the conservative press's response to Griffith's *Elementary Property Bill* as "splenetic".[94]

Three years later Griffith resigned the Premiership to become Chief Justice of Queensland after negotiating a 40% pay increase for himself.[95] Presumably he thought the new salary reflected the full value of the product of his labour. McIlwraith succeeded him as Premier. Make of that what you will. Even so, and even though Griffith fell out with organised labour after he sided with the pastoralists during the 1891 shearer's strike,[96] he maintained his beliefs about wealth redistribution and the net products of labour belonging to the persons concerned in their production.[97] He said so publicly after he retired as Chief Justice of the High Court in 1919.[98] Like many others then and since Griffith arrived at many of the same conclusions about capitalism as Marx but developed different solutions. He was not Marxist but he was more than Marx curious; Marx adjacent if you like.[99] Whatever Griffith was, the relevant point is that Griffith does not fit into 21st century pigeonholes.

Appropriating Griffith

But why does this matter? Well it matters because Griffith is currently more than a historical figure whose private letters provide us with insight into the workings of the Code or curious puzzles for historians to ponder. An organisation which bears his name, the Samuel Griffith Society, has turned Griffith into a warrior in the 21st century

[93] See Pannam, 'The Radical Chief Justice' (1964) 37 *Australian Law Review* 275 at 280.
[94] Pannam, 'The Radical Chief Justice' (1964) 37 *Australian Law Review* 275 at 278.
[95] From 2,500 pounds to 3,500 pounds: Fricke, 'Damn Sam Griffith: The Renaissance Man' in Fricke, *Judges of the High Court* (1986) 13 at 16.
[96] Pannam, 'The Radical Chief Justice' (1964) 37 *Australian Law Review* 275 at 281-282; Schultz, 'Sir Samuel Griffith and utopia: Characterising the politician' in Green et al, *Cultural Legal Studies of Science Fiction* (2025) 174 at 190-191.
[97] Pannam, 'The Radical Chief Justice' (1964) 37 *Australian Law Review* 275 at 281; Graham, *The Life of the Right Honourable Sir Samuel Walker Griffith* (1939) at 49-50.
[98] Griffith, "The Social Problem. A Fundamental Error. The Solution", *The Daily Mail* (1 November 1919), where Griffith described the *Elementary Property Bill 1890* (Qld) as expressing "in the form of legislation certain propositions which appeared to me to be almost self-evident". See also Schultz, 'Sir Samuel Griffith and utopia: Characterising the politician' in Green et al, *Cultural Legal Studies of Science Fiction* (2025) 174 at 188-189.
[99] Schultz, 'Sir Samuel Griffith and utopia: Characterising the politician' in Green et al, *Cultural Legal Studies of Science Fiction* (2025) 174 at 187-188.

culture wars. To use postmodern language, Sir Samuel Griffith has been culturally appropriated; specifically, appropriated for the ideological and political ends of others.

The Samuel Griffith Society's website states that its objectives include undertaking and supporting research about the Constitution and promoting discussion of constitutional matters, which sounds entirely reasonable and fairly innocuous.[100] The Society's website also reveals that it seeks to promote the formation of student chapters on universities[101] which, as will become clear, is perhaps a little more ominous than first appears.

The papers delivered to and then published by the Samuel Griffith Society reveal a strong opposition to constitutional implications of the kind I referred to earlier[102] and a sustained push to have originalism adopted as the definitive Constitutional interpretive theory, specifically the form of originalism practised in the United States which contends that the Constitution should be strictly interpreted according to the original intentions of the Constitution's framers.[103]

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[100] 'About us', The Samuel Griffith Society <https://www.samuelgriffith.org/about>.

[101] 'Campus Law and Liberty Chapters Program', The Samuel Griffith Society <https://www.samuelgriffith.org/campus>.

[102] Craven, 'Reforming the High Court' (1996) *Proceedings of the Seventh Conference of the Samuel Griffith Society* 23 at 27-28; Craven, 'Judicial Activism: The Beginning of the End of the Beginning'' (2004) *Proceedings of the Sixteenth Conference of the Samuel Griffith Society* 72 at 73; Allan, 'Implied Rights and Federalism: Inventing Intentions while Ignoring Them' (2008) *Proceedings of the Twentieth Conference of the Samuel Griffith Society* 12; Allan, 'All You Need is Love' (2020) *Griffith Society: Online Speaker Series*; Stoker, '"Mr McGowan, Tear Down this Wall!": Section 92 after Palmer v Western Australia' (2021) *Griffith Society: Online Speaker Series* at 8-9; Allan, 'Reasonable, Proportional, Legitimate, Necessary and Appropriate' (2022) *Proceedings of the Thirty Second Conference of the Samuel Griffith Society* 152 at 158; Henskens, 'Democracy and Free Speech in Contemporary New South Wales' (2022) *Proceedings of the Thirty Second Conference of the Samuel Griffith Society* 115 at 119-120; Allan, 'Today's Lawyerly Caste: She Ain't What She Used to Be' (2024) *Proceedings of the Thirty Fourth Conference of the Samuel Griffith Society*.

[103] Gisonda, 'Work Choices: A Betrayal of Original Meaning?' (2007) *Proceedings of the Nineteenth Conference of the Samuel Griffith Society* 27; McGinniss, 'An Opinionated History of the Federalist Society' (2008) *Proceedings of the Twentieth Conference of the Samuel Griffith Society* 57 at 59; Allan, 'Implied Rights and Federalism: Inventing Intentions while Ignoring Them' (2008) *Proceedings of the Twentieth Conference of the Samuel Griffith Society* 12 at 16-17; Allan, 'Until the High Court Otherwise Provides – Electoral Law Activism' (2011) *Proceedings of the Twenty Third Conference of the Samuel Griffith Society* 21 at 21; Allan, 'Judicial Appointments: Need for a Policy' (2015) *Proceedings of the Twenty Seventh Conference of the Samuel Griffith Society* 98 at 103-104; Stoker, 'All's Fair in Love and War: The High Court's Decision in Love & Thoms' (2020) *Griffith Society: Online Speaker Series* at 17; Paterson, 'The High Court Love Decision' (2020) *Griffith Society: Online Speaker Series* 7-8; see also Cooray 'The High Court: The Centralist Tendency' (1992) *Proceedings of the First Conference of the Samuel Griffith Society* 62 at 68; Weis, 'Originalism in Australia' (2016) *Proceedings of the Twenty Eighth Conference of the Samuel Griffith Society* 46.

The opposition to implications is curious for an organisation that bears the name of Sir Samuel Griffith. As I indicated earlier, when it comes to the Australian Constitution Griffith was the father of all implicators.

I am going to talk about the form of originalism contended for in more detail but the important thing to bear in mind is that the sting with such theories is how they can be weaponised for ideological ends through systems of judicial selection and appointment.

Generally over its history the High Court had adopted an approach to constitutional interpretation which ranges from and between the "strict and complete legalism"[104] articulated by Sir Owen Dixon to a pragmatic or realist approach that takes account of policy considerations which are exposed by the Court's reasons.[105] Without traversing that range I will just state what it has not done. In *Commonwealth v Australian Capital Territory*, the entire Court noted earlier comments by Justice Gummow denying the utility of adopting any single all-embracing theory of constitutional interpretation[106] which vanquishes its rivals and is placed "upon a high ground occupied by the modern, the enlightened and the elect".[107] In *Commonwealth v Australian Capital Territory*, the term "marriage" as used in s 51(xxi) of the Constitution was construed as being a "topic of juristic classification"[108] rather than being construed as a reference to the only form of marriage which could be entered at the time of federation, specifically marriage between a man and a women.[109]

In some contexts, a consideration of history and the position at the time of federation can play an important and potentially determinative role in the interpretation of a constitutional provision.[110] If you stand on one leg, bend backwards and move your

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[104] Dixon, 'Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952' in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1965) at 247.
[105] See generally Stellios, *Zines and Stellios's The High Court and the Constitution* (2017, 7th ed) at Ch 17, 719-789 (esp 744-764).
[106] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 455 [14] citing *SGH Limited v Commissioner of Taxation* (2002) 210 CLR 51 at 75 [41]-[42].
[107] *SGH Limited v Commissioner of Taxation* (2002) 210 CLR 51 at 75 [41].
[108] That is, a head of power with no "fixed" or "concrete" meaning, but whose meaning depends on Parliamentary enactment: *Attorney-General (NSW) v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 611.
[109] *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 456 [16], 459 [23].
[110] See, eg, with respect to s 92, *Cole v Whitfield* (1988) 165 CLR 360 at 385, 392; with respect to s 80, *Cheatle v The Queen* (1993) 177 CLR 541 at 550-552; with respect to Ch III, *White v Director of Military*

head to the side you might see something out of the corner of your eye that potentially looks like originalism, but it is not. In 1988, a unanimous High Court observed that the history of a constitutional provision may be referred to "not for the purpose of substituting for the meaning of words ... [what] the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which the language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged".[111]

Ironically, it was not the original intent of those who framed the Constitution that their original intent would determine its meaning. Richard O'Connor was one of those framers and along with Griffith was one of the first three judges appointed to the High Court. In one of the most oft cited passages in the Commonwealth Law Reports, in 1908 Justice O'Connor observed that "[w]e are interpreting a *Constitution* broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve".[112] Griffith said something similar.[113]

The Original Intent of the Samuel Griffith Society

But let's just stick with original intent for a moment. What was a primary original intention, or at least gripe, of the organisation that bears Griffith's name, the Samuel Griffith Society? This brings me to a North Queensland icon. The High Court's decision in *Mabo v Queensland [No 2]*[114] was handed down on 3 June 1992, just one month before the Samuel Griffith Society's first conference in July of that year. There were thirteen papers delivered at that first conference and three of the authors found the

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Prosecutions (2007) 231 CLR 570 at 596-598 [53]-[58]; with respect to s 51(xxiiA), *Wong v The Commonwealth* (2009) 236 CLR 573 at 582-592 [18]-[55] (esp 583 [23]), 623-627 [174]-[191]; with respect to s 51(vi), *Thomas v Mowbray* (2007) 233 CLR 307 at 361 [140]; with respect to s 61, *Williams v Commonwealth* (2012) 248 CLR 156 at 179 [4], 194-206 [40]-[61] and *Williams v Commonwealth* (2014) 25 CLR 416 at 468-469 [80]-[81].

[111] *Cole v Whitfield* (1988) 165 CLR 360 at 385.

[112] *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368. The case has been cited in 60 High Court judgments since.

[113] In *Federated Amalgamated Governmental Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 at 534, Griffith CJ would say that "it must be remembered that the Constitution was intended to regulate the future relations of the Federal and State Government, not only with regard to then existing circumstances, but also with regard to such changed conditions as the progress of events might bring about".

[114] (1992) 175 CLR 1.

time to take aim at *Mabo [No 2]*.[115] One author felt compelled to mention that the decision can "benefit at most 1.53% of the population ... upon whom *we* already spend upwards of a billion dollars in public money annually".[116] Statements like that say nothing about Indigenous people or the decision in *Mabo [No 2]* but a lot about the author.

The following year, in 1993, the Samuel Griffith Society received and published on my count no less than 10 papers attacking or strongly criticising *Mabo [No 2]*.[117] Some of them were virulent. Two of them were passionate about the correctness of terra nullius,[118] some were generally abusive, describing *Mabo [No 2]* as "pitiful",[119] "mischievous"[120], "stupid",[121] "scar[y]",[122] and involving "ducking and weaving".[123] One article attacked the late Chief Justice Mason for not writing separately in *Mabo [No 2]* and simply agreeing with Justice Brennan.[124] That's a turn up, a High Court decision being criticised for having too few separate judgments. Abuse of the High Court,

115 Connelly, 'Right according to law' (1992) *Proceedings of the First Conference of the Samuel Griffith Society* 11 at 12-13; Morgan, 'The Australian Constitution: a Living Document' (1992) *Proceedings of the First Conference of the Samuel Griffith Society* 17 at 19, 24-25; Howard, 'When external means internal' (1992) *Proceedings of the First Conference of the Samuel Griffith Society* 77 at 83.

116 Howard, 'When external means internal' (1992) *Proceedings of the First Conference of the Samuel Griffith Society* 77 at 83 (emphasis added),

117 From 1993, *Proceedings of the Second Conference of the Samuel Griffith Society*: (1) Waterford, 'Australia's Aborigines and Australian Civilization', 24 at 29; (2) Hassell, 'Mabo and Federalism: The Prospect of an Indigenous Peoples' Treaty', 35 at 40; (3) Connolly, 'Should the Courts Determine Social Policy', 45 at 46; (4) Hulme, 'The High Court in Mabo', 60 at 72; (5) Howard, 'Australia's Diminishing Sovereignty', 93 at 93. From *Proceedings of the Third Conference of the Samuel Griffith Society*: (6) Court, 'Western Australia and the Federal Compact', 7 at 9; (7) Howard, 'The Racial Discrimination Act 1975 and Mabo', 16 at 16; (8) Campbell, 'The Social and Economic Realities of Mabo in the Federal Electorate of Kalgoorlie', 23 at 26; (9) Meagher, 'Address Launching the Upholding the Australian Constitution, Volume 1', 75 at 76; and (10) Medcalf, 'Address Launching Upholding the Australian Constitution, Volume 2', 87 at 89.

118 See Hassell, 'Mabo and Federalism: The Prospect of an Indigenous Peoples' Treaty' (1993) *Proceedings of the Second Conference of the Samuel Griffith Society* 35 at 40, describing terra nullius as "grossly misrepresented" and Hulme, 'The High Court in Mabo' (1993) *Proceedings of the Second Conference of the Samuel Griffith Society* 60 at 66, suggesting that pre-colonisation, "the soil was the property of no one" because "the nomadic and hunting life of those who were from time to time present had never created a need for such a concept".

119 Connolly, 'Should the Courts Determine Social Policy', (1993) *Proceedings of the Second Conference of the Samuel Griffith Society* 45 at 52.

120 Campbell, 'The Social and E33conomic Realities of Mabo in the Federal Electorate of Kalgoorlie' (1993) *Proceedings of the Third Conference of the Samuel Griffith Society* 23 at 25.

121 Campbell, 'The Social and Economic Realities of Mabo in the Federal Electorate of Kalgoorlie' (1993) *Proceedings of the Third Conference of the Samuel Griffith Society* 23 at 25.

122 Hulme, 'The High Court in Mabo' (1993) *Proceedings of the Third Conference of the Samuel Griffith Society* 60 at 72.

123 Campbell, 'The Social and Economic Realities of Mabo in the Federal Electorate of Kalgoorlie', (1993) *Proceedings of the Third Conference of the Samuel Griffith Society* 23 at 26.

124 Hulme, 'The High Court in Mabo', *Proceedings of the Second Conference of the Samuel Griffith Society* 60 at 72.

specifically Sir Gerard Brennan and Sir Anthony Mason, infused many of these papers.[125]

This anti-*Mabo [No 2]* theme, bordering on obsession, continued over many years. On my count from 1992 to 2002 the Society received and published at least 33 apers[126] attacking or criticising *Mabo [No 2]* or what followed, such as the *Native Title Act 1993* (Cth) and the decision in *Wik Peoples v Queensland.*[127] The point is not that judicial decisions cannot be criticised; it's the tenor, tone and uniform direction of these criticisms that is telling. One of the papers compared *Mabo [No 2]* to a disease.[128] At the extreme end, another supposedly distinguished academic who did not explicitly address *Mabo [No 2]* told the 1998 conference that "from the no doubt limited

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[125] One speech given to the Samuel Griffith Society stated that the author was "appalled to think we pay the Chief Justice $191,550 for being so silly": Campbell, 'The Social and Economic Realities of Mabo in the Federal Electorate of Kalgoorlie', (1993) *Proceedings of the Third Conference of the Samuel Griffith Society* 23 at 26.

[126] In addition to the 13 papers referred to above at footnotes 115 and 117, the Samuel Griffith Society received and published a further: 4 critical articles in 1994, *Proceedings of the Fourth Conference of the Samuel Griffith Society* (Hulme, 'Hit and Myth in the Law Courts', 6 at 15; Partington, 'The Aetiology of Mabo' 19 at 19; Forbes, 'Proving Native Title' 33 at 36-37; Howard, 'The High Court' 48 at 48); 2 critical articles in 1996, *Proceedings of the Seventh Conference of the Samuel Griffith Society* Evans, 'Reflections on the Aboriginal Crisis', 95 at 98) and Forbes, 'Revisiting Mabo: Time for the Streaker's Defence' 63 at 67; 2 critical articles in 1997, *Proceedings of the Eighth Conference of the Samuel Griffith Society* (Forbes, 'Amending the Native Title Act', 104 at 104; and Hulme, 'The Wik Judgment', 130 at 130); 3 critical articles in 1997, *Proceedings of the Ninth Conference of the Samuel Griffith Society* (Forbes, 'The Prime Minister's Ten Point Plan', 30 at 30; Hulme, 'The Racial Discrimination Act 1975', 17 at 27; Sykes, 'Address Launching Volume 8 of Upholding the Australian Constitution', 143 at 144); 3 critical articles in 1998, *Proceedings of the Tenth Conference of the Samuel Griffith Society* (Connolly, 'Taking Stock of the Role of the Courts', 60 at 60; Forbes, '"Just tidying up": Two Decades of the Federal Court', 71 at 71; Howard, 'The People of No Race', 88 at 92); 1 critical article in 1999, *Proceedings of the Eleventh Conference of the Samuel Griffith Society* (Forbes, 'Judicial Tidy-Up or Takeover? Centralism's Next Stage', 79 at 84); 1 critical article in 2000, *Proceedings of the Twelfth Conference of the Samuel Griffith Society* (Walsh, 'The UN Convention on Refugees and its Implications for Australia's Sovereignty', 23 at 24); 3 critical articles in 2001, *Proceedings of the Thirteenth Conference of the Samuel Griffith Society* (Windschuttle, 'History, Anthropology and the Politics of Aboriginal Society', 30 at 32; Forbes, 'Native Title Now', 38 at 38; Moore, 'Judicial Intervention: The Old Province for Law and Order', 70 at 75); and 1 critical article in (2002) *Proceedings of the Thirteenth Conference of the Samuel Griffith Society* (Walker, 'The Seven Pillars of Centralism: Federalism and the Engineers' Case', 18 at 34).
As for the period post-2002, see, for example, directly criticising *Mabo*: Windschuttle, 'Mabo and the Fabrication of Aboriginal History' (2003) Pro*ceedings of the Fifteenth Conference of the Samuel Griffith Society* 128; Forbes, 'Native Title Today' (2005) *Proceedings of the Sixteenth Conference of the Samuel Griffith Society* 106 at 107; Stone, 'The Aboriginal Question: Enough is Enough!' (2017) *Proceedings of the Twenty-Ninth Conference of the Samuel Griffith Society* 273.

[127] (1996) 187 CLR 1.

[128] Partington, 'The Aetiology of Mabo' (1993) *Proceedings of the Fourth Conference of the Samuel Griffith Society* 19 at 19: "Aetiology is the study of causes, especially the causes of diseases. I can only touch now on one strand in the pathogeny of the full-blown Mabo Judgment ...".

perspective of the surfer on the beach, Aborigines are a pretty incompetent lot, who are difficult to help".[129]

There were numerous other papers received and published by the Samuel Griffith Society that mentioned *Mabo [No 2]* and were not critical of the decision per se.[130] However not a single one that I could find had anything positive to say about the decision. Again, the point is not that judicial decisions cannot be commented upon or criticised or even that the comments or criticisms did or did not have validity. The point is that these are not the papers of a debating society, but the papers of a pre-social media echo chamber.

So, what does this all mean? Criticism, even pointed or outright nasty criticism, of Court decisions is an aspect of a free society. So is freedom of association and so is pointing out the basis on which others associate. If originalism is your bent, and that's the case for the Samuel Griffith Society, then a defining originalist characteristic of that organisation is its animosity towards *Mabo [No 2].* It's in the Society's DNA. Does Griffith deserve to have his legacy associated with that sentiment? For the reasons I described, that I cannot answer. Perhaps the better question is, if you are a law student today contemplating all of this, is that the way you wish to define yourself?

Federalist Society Aspirations

But going forward what's the problem? Well over time the Samuel Griffith Society has been cogitating over its potential future role. One academic told a society gathering[131] how "most right-of-centre voters" and right-of-centre politicians are "gall[ed] and disgust[ed]" by having judges who were appointed by right-of-centre governments join in particular decisions that the academic strongly disagreed with.[132] Why those voters unlike others would not appreciate that things are not cut and dried and that judges might legitimately disagree on things is not apparent. Anyway, that academic then

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[129] Minogue, 'Occasional Address, Aboriginals and Australian Apologetics' (1998) *Proceedings of the Fourth Conference of the Samuel Griffith Society* 159 at 164.
[130] See, eg, Frost, 'Old Colonizations and Modern Discontents: Legacies and Concerns' (1992) *Proceedings of the First Conference of the Samuel Griffith Society* 116 at 124; Davis, 'Native Title: A Path to Sovereignty' (1997) *Proceedings of the Ninth Conference of the Samuel Griffith Society* 125 at 125-129; Partington, 'Republicanism and the Repudiation of post-1788 Australia' (1999) *Proceedings of the Eleventh Conference of the Samuel Griffith Society* 97 at 100.
[131] Allan, 'Judicial Appointments Need for a Policy' (2015) *Proceedings of the Twenty Seventh Conference of the Samuel Griffith Society* 109 at 101.
[132] The author refenced *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

delivered his thoughts on his preferred criteria for appointing judges. The first of those criteria was that the judge must be one committed to interpreting the Constitution by "seeking the original intentions and meanings" of the framers and ratifiers.[133]

Originalists and originalism; there it is again. But how are such suitable judges to be identified? I am sure by now you can guess what some have in mind but to be sure we turn to another speaker, who a few years later told the Samuel Griffith Society that "looking to judicial appointments in future, it is imperative that candidates are screened for their judicial methodology", which means "selecting judges who will interpret the Constitution based on original intent".[134] The speaker proposed that the Samuel Griffith Society assume the same role as the Federalist Society in the United States in "screening" judicial appointments and "recruiting" law students and young lawyers, who are then offered access to a network of "senior mentors, clerkships with conservative judges and opportunities to extol their judicial beliefs through written work and events", thereby providing a "pipeline of potential judicial nominees".[135]

Save for the additional fact that the Federalist Society is enmeshed with one of the two main US political parties, that is a pretty fair summary of how the Federalist Society operates. All up, the Federalist Society is a type of secret handshake club; identifying, recruiting and indoctrinating future cadres to fill judicial office. In light of that history, the references to "student chapters" on the Samuel Griffith Society's website appears less benign.

In this country, responsibility for judicial appointments rests with executive governments. There have been various models and proposals for commissions and the like to assist or be involved in judicial appointments. There is a rich body of literature about the pros and cons of that process, as well as considerations of what factors are legitimate and illegitimate for a decision to appoint a particular judge.[136] I

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[133] Allan, 'Judicial Appointments Need for a Policy' (2015) *Proceedings of the Twenty Seventh Conference of the Samuel Griffith Society* 109 at 103.
[134] Stoker, 'All's Fair in Love and War: The High Court's Decision in *Love* & *Thoms*', (2020) *Griffith Society: Online Speaker Series* at 17.
[135] Stoker, 'All's Fair in Love and War: The High Court's Decision in *Love* & *Thoms*', (2020) *Griffith Society: Online Speaker Series* at 19. See also McGinniss, 'An Opinionated History of the Federalist Society', (2008) *Proceedings of the Twenty Seventh Conference of the Samuel Griffith Society* 57.
[136] See, eg, Davis and Williams, ‘Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia’ (2003) 27 *Melbourne University Law Review* 819; Evans and Williams, ‘Appointing Australian Judges: A New Model’ (2008) 30 *Sydney Law Review* 295; Handsley and Lynch,

am not entering that debate but that is a long way from the process that occurs with the Federalist Society in the United States. There is a highly sophisticated legal term to describe that process; it's known as court stacking. Whatever judgments in this country are motivating such animus, the judges who delivered them were not the product of ideological training schools and are not members of organised judicial factions.

To give you an example of how thoroughly comfortable the Federalist Society is with court stacking, in November 2024 an incoming administration official gave a speech to a conference of the Federalist Society telling that Society that prospective judicial nominees under the next President should expect to be asked: "What have you done to prove that you share President Trump's worldview and judicial philosophy?"[137] That statement would be *de rigueur* at a North Korean judicial college. The article reporting on that speech does not report the response to that statement at the Federalist Society conference but if the statement provoked a riot or outrage, then that outrage would presumably have been reported. Of course, it didn't. There were judicial aspirants in the room. The speech told them what they already knew and understood. We see this play out nowadays in one US Senate judicial confirmation hearing after another. By contrast, any gathering of self-respecting lawyers in this country who heard a speech like that given to the Federalist Society would, or at least should, respond with righteous indignation.

So as I said the thing to keep an eye on is this combination of originalism and court stacking. I was thinking of that combination as I read the US Supreme Court's 2021 decision in *New York State Rifle & Pistol Association Inc v Bruen*, *Superintendent of New York State Police.*[138] The Supreme Court declared that a New York law which required a license for the concealed carrying of firearms outside the home, where a licence could only be granted if "proper cause exists",[139] violated the Second Amendment.[140] Having previously interpreted the Second Amendment to the US

'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13' (2015) 37(2) *Sydney Law Review* 187.

[137] Schwartz, 'After the House Delayed a Bill to Add judges, a Biden Veto Looms', *New York Times* (2024) <https://www.nytimes.com/2024/12/19/us/biden-veto-federal-judges.html>.

[138] 597 US 1 (2022).

[139] See NY Penal Law Ann §400.00(2); "proper cause" was shown where an individual could “demonstrate a special need for self-protection distinguishable from that of the general community”: *In re Klenosky*, 75 App Div 2d 793 (1980).

[140] When read with the Fourteenth Amendment; see *New York State Rifle & Pistol Association Inc v Bruen*, *Superintendent of New York State Police* 597 US 1 (2022) at 62-63.

Constitution as conferring on an individual the right to bear arms,[141] the majority of the Supreme Court in *Bruen* confirmed that the State could only justify some restriction covered by that interpretation of the text where the regulation can be demonstrated to be "consistent with that Nation's historical tradition of firearm regulation".[142] It could not be justified simply because there might be some legitimate countervailing "important" public interest in firearms regulation;[143] perish the thought.

That Court's inquiry into this "historical tradition" in *Bruen* started in England in 1285,[144] continued through the Second Amendment's adoption in 1791 and past that point until it stopped at a consideration of firearm regulation in the 19th century.[145] That was because "how the second amendment was interpreted from immediately after its ratification through to the end of the 19th century" was said to represent a "critical tool of constitutional interpretation".[146] This represents one of the most spectacular examples of circular reasoning you will ever find. The end result was that what constituted justifiable firearm regulation in 2021 mostly depended on what state legislatures in the period between 1821 to 1871 thought was a good idea.[147] Contrast this with the Australian approach which, as I outlined earlier, rejects doctrinaire theories, and ironically was articulated by someone who was there when the Constitution was drafted, namely that we have a Constitution "broad and general in its terms intended to apply to the varying conditions which the development of our community must involve".[148] Which approach do you prefer? Theirs or ours?

The logical consequences of the reasoning in the *Bruen* case were laid out in all of its glory early last year when the US Court of Appeals for the 5th Circuit applied the reasoning to strike down restrictions on selling firearms to individuals aged between eighteen and twenty-one.[149] Unregulated selling of guns to eighteen to twenty-one year olds: what could possibly go wrong?

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[141] *District of Columbia v Heller* 554 US 570 (2008) at 592. The minority in that case held that the Second Amendment conferred, not an individual right, but a right to possess arms "if needed for military purposes and to use them in conjunction with military activities": *District of Columbia v Heller* 554 US 570 (2008) at 646.
[142] *Bruen* 597 US 1 (2022) at 15.
[143] *Bruen* 597 US 1 (2022) at 8.
[144] *Bruen* 597 US 1 (2022) at 31.
[145] *Bruen* 597 US 1 (2022) at 27.
[146] *Bruen*597 US 1 (2022) at 27, citing *District of Columbia v Heller* 554 US 570 (2008) at 605.
[147] *Bruen* 597 US 1 (2022) at 45.
[148] *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368.
[149] *Reese v Bureau of Alcohol, Tobacco, Firearms, and Explosives* 127 F 4th 583 (2025).

These US developments were not just some mechanical playing out of a muddle-headed doctrine of constitutional law. Only a fool would think this was not the intended outcome of a sustained politicised and political process of stacking courts with supine judges. We know enough about gun violence to see how decisions like this have real life consequences for innocent people. This all came about through choices, choices to stack courts with Federalist Society judges, choices by those judges as to how they purport to discharge their judicial duties, including choices about how they analyse the historical record, and choices about what conclusion they reach; choices that are hidden beneath originalist dogma.

Ordinarily all this would be none of my business but these methods are being advocated for in Australia. This has made it my business and it has made it your business as custodians of the law; we are all interested in this, whether we like it or not. To adapt a phrase, they have driven into my lane and they have driven into yours. If anyone thinks this particular US style of court stacking and judicial decision-making is a good idea, then go and live there. The rule of law appears to be having an interesting time in that country.

This abuse of Griffith's legacy has continued with more calls for the Samuel Griffith Society to operate like the Federalist Society. One commentator recently enthused about that prospect and identified how that would happen by observing that "[s]uccess will come down to resources. Change requires money. Perhaps there is a quiet billionaire willing to back the rule of law, just as a couple of wealthy Americans did for the Federalist Society 40 years ago".[150]

Well, there you have it. What would Samuel Griffith, who introduced the *Elementary Property Bill* into the Queensland Parliament, have thought of appealing to billionaires to fund an Australian Federalist Society? I do not think that question is very difficult to answer. But perhaps the better question is what do you think?

Thank you for listening.

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[150] Albrechtsen, 'The legal profession's giant lurch to the left', *The Australian* (2024).