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# *CONVERSATIONS WITH THE CONSTITUTION*

**By Greg Craven**
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Professor Greg Craven's book, *Conversations with the Constitution,* is provocative, refreshing, entertaining and intellectually challenging. Once I picked up the book I did not put it down except during the two hours when Adam Gilchrist was blazing his way to the fastest century by an Australian in the history of one day cricket while playing against the ICC World XI. This is not an encyclopaedic or deeply theoretical work. It is massively pragmatic and commonsensical. This is a book that was waiting to be written which is very well written. I say so as one who disagrees with Professor Craven on significant aspects of his message. The work deserves much more engagement than this short piece can manage.

The book is seriously misnamed. It should be called *The Conservative Constitutional Manifesto*. This is not a criticism; we must be thankful to Craven for giving a clear and unapologetic statement of the conservative outlook on constitutional government. Craven transforms into rational argument, the fear of the 'rights industry' and judicial activism that many in the community intuitively hold. Yet, it is more a punch-up over the heart and soul of the Constitution than a conversation with it.

I found at the core of each chapter, much to agree with. I am certain that this work would have won many more friends had the author's categorisations, arguments, depictions and denunciations been suitably qualified and refined. Perhaps the lack of nuance is intended. The book may have been written to shock and to provoke a debate that we have to have. If so, it will succeed provided it is not ignored by opponents. The text is charged with emotion and electrified by colourful hyperbole. The following paragraph captures both the book's principal complaint and the author's acerbic style. On 'judicial athletes' and their admirers, Craven writes:

> In some ways, judges and lawyers cannot be blamed for this scrambling ambition. Their traditional role is as intellectual plumbers, clanging away at the pipes of torts and property: well paid but dull work for well paid but dull people. The prospect of rising from the muck as unsuspected philosopher kings, primed to do social justice for humanity, is a drug just too intoxicating

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> to resist. Together, ascendant judges, adoring lawyers and enraptured legal academics make up a mutually reinforcing sub-angelic choir, singing of the destiny of the judiciary to save Australia from its brutish self. They are joined by a ragged host from the disappointed left rightly discerning in the aristocratic forms of judges unlikely allies in their own rights-based, minorities-oriented agenda.[1]

Professor Craven begins by dividing constitutionalists into two classes, the old and the new. The essence of old constitutionalism is faith in the practices and traditions of British parliamentary government, modified in Australia by federalism and home grown convention. This is the Hobbesian-Burkean vision of the constitution with sovereignty, stability and gradual adaptation as its hallmarks. Parliament is trumps in the constitutional game 'because no other card can claim to have been played by the people'.[2] It is said to be the constitutionalism of justices such as Griffith, Barton, Isaacs, Dixon and the current Chief Justice Gleeson. It was embraced by Deakin, Menzies and Curtin and is beloved of the current Prime Minister Howard. Old constitutionalists are intensively positivist and are said to be rarely found in academia. Rights are not a major concern for them owing to their faith in Parliament and its capacity to tame the executive. They are averse to constitutional change. Interestingly, the monarchy does not figure in this vintage model. This is not surprising given the republican sympathies of the author.

The new constitutionalists are all that the old ones are not. Their constitutionalism is like the merchandise at funky shoe shops in Brunswick Street, Fitzroy and their brand name is fit for a vegetarian restaurant in St Kilda.[3] They mistrust Parliament and the executive, are disdainful of democratic majorities, and regard the Constitution as a pliable instrument for social change. They loathe federalism and are obsessed with rights with an unremitting focus on minorities. They revere foreign constitutions such as those of the US and South Africa and also international human rights treaties.

I have no doubt that there are constitutionalists who fit the above caricatures. The trouble is that there are many serious constitutional thinkers who simply do not. For that matter some of the personalities that Craven puts in the old category might feel decidedly uncomfortable there. Sir Owen Dixon, for example, was a party to the creation of at least two of the major implied fetters on parliamentary power. In the *Communist Party Case*, he drew on the rule of law ideal to limit the defence power and strike down a very popular measure — the banning of the Communist Party of Australia. He was also a member of the Court that, in the *Boilermakers Case*, derived the rule against vesting non-judicial power in Chapter III courts — a conclusion that was not necessarily implied in the Constitution. Sir Samuel Griffith and Sir Edmund Barton were strong enforcers of the separation of powers that has

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1 Greg Craven, *Conversations with the Constitution* (2004) 148.
2 Ibid 39.
3 Ibid 46.

generated the most significant limits on parliamentary power. Sir Isaac Isaacs was the chief architect of the rule in *Engineers Case* lamented by Craven as having done lasting damage to the federal structure of the Constitution. Even today federalism is threatened by the old constitutionalist John Howard's attempts to use the corporations power to haul the States into line on industrial relations. Indeed federalism has suffered much more at the hands of the judges and politicians who used Parliament as trump than at the hands of the rights focused activists of the left. Federalism and parliamentary supremacy are strange bed fellows. The coupling of parliamentary supremacy and the federal constraint in Craven's typology amounts to a forced marriage destined to fail at the first quarrel.

Professor Craven's identification of new rights with new constitutionalism is undermined by the fact that Parliament, not the courts, has been the most prolific source of new rights. Native land title was created by parliamentary law long before *Mabo (2)* and *Wik*. Laws against racial and sex discrimination, racial vilification and unfair dismissal are not the handiwork of judicial athletes. Nor are the extensive array of rights granted to employees, the unemployed, tenants, disabled people, homosexuals, ethnic minorities, immigrants, car makers, shoe makers, banks, media owners, farmers, writers, artists, academics, greenies and other interest groups. These are parliamentary products, not judicial artefacts. Even the decisive argument for recognising the *Mabo* claim was supplied by the *Racial Discrimination Act* (Cth). Judicial tinkering by athletic judges pales into insignificance against social re-engineering accomplished by parliaments since federation. Professor Craven joins the chorus that condemns the High Court's recognition of the freedom of communication in political matters. This is an issue that could have been decided either way. The Court's ruling could be seen, as Craven does, as an assault on Parliament's legitimate power. It can also be seen as one that strengthens parliamentary democracy. Craven thinks that the founders could not have intended that result. How will we ever know, short of bringing them by time capsule to observe today's world of electronic mass communication? It is also noteworthy that the free speech claims that were upheld by the High Court were made not by left wing rabble rousers but by commercial media giants.

Professor Craven says a great deal about what is right with parliamentary government. It is steeped in tradition and disciplined by a host of institutions and common law liberties and rights such as free speech and association, strong parties and organised interests as well as a vigilant judiciary. Viewed in formal terms the parliamentary executive is an elected dictatorship. However, as Craven points out it is the whole package and not the several parts that make the system work. Even so, Craven is too kind to the executive and Parliament. We can appreciate the system while pointing out its serious failings. We need not throw out the baby with the bath water! The reality is that Parliament leaves much of its work to the ministry, public service and statutory authorities. The law is often made by officials at the point of its execution, leaving no recourse to the aggrieved citizen. Consider the plight of Matilda, a farmer whose property is stripped of all market value by land use limitations imposed by an official acting under an environmental protection

law. She cannot appeal to Parliament against Parliament's will. She cannot appeal to the electorate as hers is a lone voice. She cannot seek judicial relief as the High Court does not regard the restriction of property use as a compensable taking. There are thousands, if not tens of thousands, of Matildas and Matts who are victims of the arbitrary discretions that Parliament creates at the behest of the executive. We are not talking here about minority group rights but about Lockean individual rights trampled by a Hobbesian Leviathan. Surely conservative and liberal constitutionalists can find common ground here.

Yet, for all the hyperbole, Craven's discussion of the methods of constitutional interpretation is of a very high order. He labels three alternatives: intentionalism, literalism and progressivism. His critique of literalism exposes the method for what it really is. 'It is marketed as the constitutional brand of objectivity, and yet only the heroically obtuse could fail to see that it is in practice used to produce particular constitutional results'.[4] Literalism, as Craven points out, achieved the highly political objective of centralising power in Canberra. Craven's critique of judicial progressivism runs through the entire work. Progressivism is rampant judicial activism born of the view that democracy must be saved from itself by judicial sages. Put this way, progressivism surely has few friends. Craven's preferred method of constitutional interpretation is intentionalism. On the difficulty of gathering the founders' intentions, Craven refers us to the five fat volumes of convention debates. Craven is right that on many issues, the founders' intentions are crystal clear and their vitiation by judicial fiat amounts to illegitimate constitutional change without reference to the people. He concedes that there are ambiguities and blind spots in the conventions accounts. It is then that the judicial mind is truly challenged.

In the end, behind his strident rhetoric, Professor Craven turns out to be quite a reasonable chap. He has this to say:

> The judges have always made law, and there is nothing special about the Constitution. In any event, the founders never intended the Constitution as a straitjacket for the court, but rather as a loose-fitting lounging robe – probably silk – to be altered as taste requires. Otherwise the Constitution will suffocate under the detritus of its accumulated history, like an aging, unserviced Volkswagen.[5]

Who can disagree? As for me, I could not have said it better.

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4 Ibid 161.

5 Ibid.