

Contested Concepts, General Terms and Constitutional Evolution

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Abstract

Constitutional orthodoxy views the courts as interpreters of the Constitution with no power to amend it or to invalidate laws which were valid when enacted. Combined with the claim that a document's meaning is fixed at the date of drafting, it provides powerful arguments against judges innovating. However, it suffers from two weaknesses. Firstly, it is irrelevant in cases where the Constitution does not provide an answer. Secondly, it rules out all innovation.

The article considers whether concept-conception distinction can alleviate these weaknesses, firstly, by reducing the number of cases in which the Constitution does not provide an answer, and secondly, allowing some evolution consistently with the claim that the meaning of the Constitution is fixed. The article concludes that the distinction does little to reduce the number of cases in which the Constitution does not provide an answer because Dworkin's right answer thesis, which is often associated with it, is not part of its internal logic. The distinction also does not show how the Australian Constitution can evolve because it is only relevant to the interpretation of contested concepts, which are typically values such as those found in bills of rights, and is not relevant to the interpretation of general terms in which most of the Australian Constitution is drafted.

1. Introduction

Two powerful arguments suggest that the High Court has no power to change the meaning of the Constitution, even in incremental ways. The first argument, which goes back to *Marbury v Madison*,¹ and is one of the basic concepts underlying judicial review, is the idea that unconstitutional legislation is a complete nullity, void from the date of enactment, and incapable of changing any legal rights and duties or justifying any government action. Although the idea that an invalid law is a nullity seems unreal when a law has been enforced for a long time, it plays an important rhetorical role in the orthodox justification for judicial review because if unconstitutional laws are nullities, they are invalid whether or not the court intervenes. Individuals are entitled to ignore such laws and to act as if they did not exist.² Hence, no special power is needed to declare a law unconstitutional and invalid. When the Court does this, it is simply exercising its normal power to

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1 (1803) 1 Cr 176–178, 2 LE 73–74.

2 *Riverina Transport Pty Ltd v State of Victoria* (1937) 57 CLR 327 at 341–342 (Latham CJ) and *James v Commonwealth* (1939) 62 CLR 339, 361–362 (Dixon J).

interpret and declare the law.³ The High Court is still strongly committed to this argument. Even a progressive judge, such as Kirby J regards it as so entrenched that he has refused to abandon it in a case where there were very strong practical reasons for so doing.⁴

The claim that the courts do no more than declare that unconstitutional legislation is a nullity from the date of enactment entails that courts do not have a creative role to play in constitutional interpretation. If the courts add to the meaning of the constitutional text at the moment of interpretation, the meaning of the text will not be finalised until the court gives its decision. If that is the case, legislation cannot be unconstitutional from the date of enactment, because we cannot determine that legislation is unconstitutional until the court has finalised the meaning of the constitutional text. Although the court might back date the invalidity of the law to the date of enactment, it could not have been invalid before the court made its decision.

The idea that the court's role as constitutional interpreter requires it to eschew creativity has also found support in ideas taken from the philosophy of language. The orthodox view of the Constitution is that it is a document. That orthodoxy is based on the indisputable fact that there is a document called the Constitution of the Commonwealth of Australia which is accepted as setting up a federal system and as establishing the basic institutions of the Commonwealth government such as its executive, parliament and courts. A major current of thought in the philosophy of language holds that the meaning of a document can only be determined by interpreting its words in the light of the intentions of the drafters of the document.⁵ Applied to constitutional law, this strand of thought has given impetus to originalism, the theory that the meaning of the Constitution is determined by the original intentions of its framers.⁶ To the extent that they depart from that original meaning, judges cease to interpret the Constitution and change it instead.

When combined, the two strands of thought provide a powerful theory opposed to judicial activism. From *Marbury v Madison* comes the idea that the judges' role as constitutional interpreter is inconsistent with their exercising any power to change the meaning of the constitutional text. The philosophy of language adds the idea that if judges adopt any interpretation other than that intended by the framers, they change the meaning of the text. Together, they lead to the conclusion that the

3 *Marbury v Madison* (1803) 1 Cr 176–178, 2 LEd 73–74.

4 *Residual Assco Ltd v Spalvins* (2000) 202 CLR 629 at 653–654.

5 Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1st ed, 1994) at 150; and Christopher Birch, 'Mill, Frege and the High Court: The Connotation/Denotation Distinction in Constitutional Interpretation' (2002–3) 23 *Australian Bar Review* 296 give a good account of some of the relevant work in the philosophy of language and its implications for constitutional interpretation.

6 Goldsworthy, above n5 and Birch, above n5 both bring out the originalist implications of the recent work in the philosophy of language to which they refer.

words used and the intentions of the framers fix the meaning of the Constitution at the date of enactment and that the role of the court is to declare the meaning of the text without changing it.

Although it is a powerful theory, there are problems in its application. It is of limited relevance in all cases in which the Constitution, interpreted in accordance with the intentions of the framers, fails to provide a clear answer. These cases may not be rare because many issues arise which the drafters did not foresee and to which they gave no thought.⁷ In these cases, the court must, if it is to provide an answer, add to the meaning of the Constitution. The theory constrains the court in doing this in that it requires the court, in most cases, to provide an answer which is consistent with the meaning of the words used and with the known intentions of the drafters. However, it may be impossible in many cases to say that the words coupled with the drafters' intentions are sufficiently clear to require a specific interpretation rather than one from a range of interpretations. Therefore, the theory must allow the courts some power to add to the Constitution in those cases in which its meaning cannot be determined from the words used, interpreted in the light of the intentions of the framers. In these cases, of course it is impossible to claim that laws found to be inconsistent with the Constitution were invalid from the date of enactment, although the court has been reluctant to admit that.

On the other hand, in the cases where the Constitution, interpreted in the light of the intentions of the framers, is clear, the theory may provide too much rigidity. There is general agreement that one of the purposes of judicial review is to ensure a degree of constitutional rigidity by ensuring that constitutional limits on power are not ignored by the legislature. However, few supporters of judicial review want the courts to interpret the Constitution in a completely rigid way. Some flexibility and adaptability is needed to ensure that the Constitution remains capable of meeting the needs of the nation over one hundred years after it was adopted. Hence originalists have sought for theories which can ameliorate the inflexibility to which a strict originalism leads.⁸

In particular, originalists have sought for theories of meaning and interpretation which enable it to be argued that the meaning of the Constitution evolves over time without any deliberate intervention, especially without any intervention by the court. The most successful and least controversial of these theories is the connotation-denotation distinction. It claims that the connotation or essential meaning of a general term, which provides the list of features which an object must have to fall within the term, may remain the same while its denotation or extension,

7 Geraldine Chin, 'Technological Change and the Australian Constitution' (2000) 24 *Melbourne University Law Review* 609 gives one example and it is likely that there are many others.

8 Prof Jeffrey Goldsworthy has developed a moderate originalism, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1; Dr Jeremy Kirk an evolutionary originalism, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323; and Dr Christopher Birch has stressed the need for a different type of theory, one which justifies a tribunal such as the High Court, in regularly replacing the meaning attributed to the Constitution with a fresh meaning, Birch, above n5 at 313.

that is the class of objects or phenomena which have all the features necessary to fall within the term, may expand as new examples are discovered or invented.⁹

This article examines another theory which may justify some constitutional evolution, the concept-conception distinction. This theory has two great advantages for those who combine the *Marbury v Madison* doctrine that unconstitutional laws are void from the date of enactment with the originalist notion that constitutional meaning was fixed by the intentions of the framers. Firstly, it suggests a mechanism by which the Constitution can evolve without the court making any deliberate changes. It claims that when the framers used contested concepts, they deliberately provided for a degree of constitutional evolution by requiring later interpreters to use the best conceptions of those concepts, not the conception which they themselves may have preferred. In other words, the framers committed later interpreters to an enterprise in which each of the interpreters seeks to apply the best possible understanding of the concept which they can develop. That enterprise is never completed because no interpreter can claim a monopoly of wisdom or understanding. As a result, the choices facing the interpreters are not simply the accidental and inevitable result of the open texture of general terms but are required by the standards chosen by the framers. Hence, when the Constitution uses a concept of which there are competing conceptions, it invites, indeed authorises the court to choose between the different conceptions of the term, thus offering a justification for their making the choice; the need to make the choice follows from the nature of the language used, the use of that form of words giving the court the authority to make the choice.¹⁰

As a result, the concept-conception distinction combines fidelity to the text and the intentions of the framers with freedom to reinterpret constitutional terms in the light of current understandings of relevant constitutional concepts. The idea that there is a best conception of an essentially contested concept implies that the Constitution, to the extent that it is drafted in terms of such concepts, requires the court, as its interpreter, to determine which is the best conception of these concepts. In deciding this issue, the court cannot defer to the views of someone else, including the drafters, because the views of the drafters on the issue are as likely to be wrong as the views of anyone else. If the drafters desired to tie the court to a particular conception of a concept, they had the option of embodying that conception in the Constitution. However, having chosen to adopt a concept rather than a conception of it, they authorised and indeed required later interpreters to adopt what they believed to be the best conception of that concept. As views about the best conception of a concept change, the constitution evolves while remaining consistent with the framers' intentions. Hence it may provide for a degree of

9 Recently, the distinction has been subjected to telling criticism; see Birch, above n 5; and Simon Evans, 'The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-based Approaches' (2006) 29 *University of New South Wales Law Journal* 207.

10 Ronald Dworkin, *Freedom's Law* (1996) at 7–15 assumes that the drafters of the broad provisions in the US Bill of Rights granted just such authority to the Bill's interpreters by embodying contested concepts in those provisions.

constitutional evolution without any departure from the framers' intentions and without the need for anyone to balance the need for some flexibility against those intentions.¹¹

Secondly, by committing the court to finding the best conception of a concept, the theory allows an originalist court to go beyond the words of the Constitution and the evidence of the intentions of the framers to consider moral and political arguments which may throw light on the best conception of the concept in question. By doing so, it opens up rich sources of material for the court to consider. It also opens up the possibility that there may be right answers to difficult constitutional questions. At least one major advocate of the concept-conception distinction, Prof Ronald Dworkin, relies on the distinction, to some extent at least, in his defence of the claim that there are right answers to such questions, often arguing that the court can reach the right answer by applying the best conception of a contested concept.¹² That claim, if correct, can be used to support the *Marbury v Madison* doctrine that unconstitutional laws are void ab initio. As noted above, this doctrine cannot be true of cases in which the court has to add to the Constitution to provide an answer, because in these cases, we cannot know whether the law is unconstitutional until we know how the court is going to add to the Constitution. Hence the doctrine is more relevant the greater the number of cases in which it is possible to argue that the Constitution provides an answer without the need for the court to add to it.

The right answer thesis is a weak thesis in that it does not claim that there are obvious answers to difficult legal questions or that there is a magic formula for discovering what the right answer is, if only judges and lawyers could be persuaded to use it. Dworkin recognises that the thesis has to be reconciled with the undoubted fact that there is ongoing and unresolvable debate about many legal questions and that we have no agreed method for determining the right answer to these questions.¹³ All the thesis entails is that, in a difficult case, all things considered, the legal argument for one side is better than the argument for the other.¹⁴ However, although it is weak in these ways, it may be strong enough to

11 To this extent, the theory is inconsistent with theories which require such balancing, such as that put forward by Jeremy Kirk, above n8, especially at 360 where Kirk lists matters which need to be taken into account in a good evolutionary argument. Kirk suggests that his theory overlaps with Dworkin's concept-conception distinction at 361. I disagree in that in my opinion, Dworkin sees the judge as only having a discretion in the weak sense of having to exercise judgment in determining the best conception of a contested concept, whereas Kirk's evolutionary originalism gives the judge a strong discretion to choose the appropriate standard. For the difference between a weak and a strong discretion, see Dworkin, *Taking Rights Seriously* (1977) at 31–33.

12 Dworkin, above n 10 at 7–12, especially at 11; Dworkin, *Law's Empire* (1986) at 355–400; Antonin Scalia (ed), *A Matter of Interpretation – Federal Courts and the Law* (1998) at 122–123.

13 Dworkin, of course recognises that law is inherently controversial and has emphasised that the right answer thesis must deal with this aspect of law; see especially *Law's Empire* (1986) at 1–86.

14 Ronald Dworkin, *Justice in Robes* (2006) at 41–43.

bolster the *Marbury v Madison* doctrine that unconstitutional laws are invalid from the date of enactment. Even if we had perfect knowledge about the intentions of the framers, originalism could not provide an answer to every case because there will be some cases on which the framers expressed no intentions. In these cases, an originalist court will not be in a position to decide that one of the arguments is better than the other because it will not have enough information to make that decision. Hence it will have no option but to add to the Constitution in order to decide the case. By enabling the court to access moral and political arguments, the concept-conception distinction may fill the gap, enabling the court to conclude that the argument of one party is better than that of the other and hence to decide the case without adding to the Constitution.

It may be objected that the existence of right answers in the weak sense outlined above adds nothing to the *Marbury v Madison* doctrine that unconstitutional laws are void from the date of enactment and that that doctrine is in some way dependent upon there being obvious answers to questions of constitutional validity. No doubt, if constitutional laws are invalid from the date of enactment, it is more convenient for everyone, government, citizen and court, if it is obvious when a law is invalid and when it is not. However, that fact alone does not justify the conclusion that laws cannot be invalid from the date of enactment unless it is obvious that they are invalid. States of affairs can be true without their being obvious to us and so there is no reason in principle why a proposition of law, including one about the constitutional invalidity of legislation, should not be true without its truth being obvious to us. All that we can do in cases where the law is not obvious is to rely on our judgment about which is the better argument. There is nothing incoherent in the idea that a law may be invalid from the date of enactment but that it is a matter of moral and political judgment whether or not the law is invalid. It is arguable that the situation differs from that of the originalist described above, because in this case there is sufficient information to make a decision, but judgment is needed in assessing that information.

This article does not pursue the argument that there is a real difference between the position of the originalist who does not have sufficient information about the intentions of the framers to make a decision and the judge who has sufficient information to make a decision but has to exercise judgment in its evaluation. Instead, the article considers the extent to which the concept-conception distinction can be used to add flexibility and strength to the theory of judicial review derived by combining the idea of invalidity derived from *Marbury v Madison* with modern linguistic philosophy. The article concludes that, in spite of its attractions, the concept-conception distinction offers limited assistance to that theory because it is of relevance to too few issues of Australian constitutional interpretation to provide us with a general theory of constitutional evolution and because by itself it does not add substantially to the cases in which there are right answers, even in the weak sense outlined above.

2. *The Concept-Conception Distinction*

The concept-conception distinction was developed as part of a general theory of essentially contested concepts. Not all concepts are contested concepts. Essentially contested concepts are used to evaluate rather than to refer to objects or phenomena. They are incapable of being fully understood by looking for their essential meaning because that meaning is the subject of ongoing and irresolvable debate.¹⁵ An essentially contested concept is one which admits of different competing conceptions and the debate which focuses on the concept is part of an ongoing attempt to determine which of these conceptions is preferable or correct.¹⁶ Although the issues are incapable of final resolution, people do not abandon the debates because they are typically about vitally important moral, political, religious and aesthetic issues. Hence, it is impossible to comprehend fully the meaning of an essentially contested concept without an understanding of its competing conceptions. Moral and aesthetic concepts such as justice and beauty are good examples of contested concepts because there are competing conceptions of both. At bottom, these competing conceptions reflect different theories of justice and beauty.

Gallie, who first analysed essentially contested concepts, identified a number of necessary features which they share. They are:

1. [I]t [the concept] must be appraisive in that it signifies or accredits some kind of valued achievement;¹⁷
2. This achievement must be of an internally complex character, for all that its worth is attributed to it as a whole;¹⁸
3. Any explanation of its worth must therefore include a reference to the respective contributions of its various parts or features....there is nothing contradictory in any one of a number of possible rival descriptions of its total worth, one such description setting its component parts or features in one order of importance, a second setting them in a second order, and so on. In fine, the accredited achievement is initially variously describable;¹⁹
4. The accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstances; and such modification cannot be prescribed or predicted in advance. For convenience I shall call the concept of any such achievement 'open' in character;²⁰
5. ...[D]ifferent persons or parties adhere to different views of the correct use of some concept but...each party recognises that its own use of it is contested by those of other parties and that each party must have at least

15 Dworkin, above n11 at 103.

16 Ibid.

17 Walter B Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167 at 171.

18 Id at 171-172.

19 Ibid.

20 Ibid.

some appreciation of the different criteria in the light of which the other parties claim to be applying the concept in question... To use an essentially contested concept means to use it against other uses and recognise that one's own use of it has to be maintained against these other uses.²¹

A basic objection to the notion of essentially contested concepts is that it may be impossible to distinguish a situation in which there are competing conceptions of the same concept from the situation in which there are different but related concepts to which the one term refers. In both situations, there are likely to be unresolvable arguments, one arising from the contested nature of the concept, the other from the fact that the participants in the argument are talking at cross purposes without realising it. Gallie argued that the two situations may be distinguished by the fact that in the case of essentially contested concepts, there must be an exemplar, either in the form of a prototype or a tradition which gives people a model of the concept. Although that model is necessarily complex (see necessary condition 2), it unifies the concept because all plausible conceptions of that concept must be plausible interpretations of the exemplar.²²

Although disputes about contested concepts can only be resolved by argument, arguments are not likely to lead to any final resolution of the issues. Our understanding of contested concepts reflects this aspect of their nature. If a final resolution of all issues relating to a contested concept were possible, the concept would cease to be contested because the conception which embodied that final resolution would be the correct conception of the concept. All other conceptions would be known to be flawed and hence would not be able to compete with the correct one.²³ So on the one hand, we resolve to the best of our ability issues about contested concepts and adopt the best conceptions of those concepts whenever we use them to make a judgment and to justify that judgment. For example, we may need to resolve issues about the requirements of justice in order to justify the decision in a difficult law case. On the other hand, issues relating to these concepts are ultimately irresolvable because there is unlikely to be any final resolution of all the issues raised by competing conceptions of concepts such as justice and beauty.

Dworkin has taken Gallie's idea and applied it to the practice of law as a whole, with the system of legislation and precedent constituting a tradition which fulfils the role of the exemplar in Gallie's terminology.²⁴ But he has also applied it to particular moral and political values enshrined in the American Bill of Rights, such

21 Ibid.

22 Id at 174–177. The requirement of an exemplar enables a defence against the charge of Platonism. It would be possible to have a theory of contested concepts in which an imperfectly perceived ideal type of the concept played the role which the exemplar plays in Gallie's argument. That theory would be open to all the standard objections to Plato's theory of ideal types. It is not clear that the notion of an exemplar offers a complete defence to the charge of Platonism because it may be that without some intuitive understanding of an ideal type, we would not be able to identify the important features of the exemplar.

23 Gallie concedes that it is impossible to fix on a general principle for determining correct answers to questions raised by the application of contested concepts; Gallie, above n17 at 177–178. Dworkin agrees that there is not and cannot be such a test; Dworkin, above n13 at 44.

as equality and justice in what he has termed the moral reading of the Constitution.²⁵ The long western tradition of political philosophy coupled with previous decisions embodied in precedents on the meaning of these terms as used in the Bill of Rights provide the needed exemplar.

3. *Contested Concepts and Descriptive General Terms*

Not all concepts are essentially contested. Contested concepts need to be distinguished from general terms, the former being evaluative and the latter descriptive and classificatory, giving us criteria for classifying phenomena into one class rather than another. Although descriptive general terms may be ambiguous, they are not essentially contested for reasons set out below. As they are not essentially contested, their interpretation does not require the assessment of competing conceptions, as does the interpretation of essentially contested concepts.

In interpreting a document like the Constitution, there is often a superficial resemblance between the interpretive issues which arise in the interpretation of general terms and those which arise from the interpretation of contested concepts. Consider the problems arising from the interpretation of ‘trade among the States’ in s 51(1). There are two alternative interpretations which are consistent with the words. The first, the accepted interpretation, limits interstate trade to transactions which involve, at some point, the crossing of the border between two States.²⁶ The second alternative extends the concept to include trade involving more than one State or extending beyond the borders of one State, that is regional or national trade.²⁷ The words are ambiguous, giving rise to choice. It may, as in arguments about which is the best conception of a moral or political concept, be appropriate to appeal to economic and political argument to resolve this choice. However, the existence of a choice and the relevance of economic and political arguments does not in itself, entail that trade among the States is an essentially contested concept, of which there are competing conceptions. Nor does it entail that, like grants of power over an area of law, the trade power gives the Commonwealth power with respect to a contested practice.

Trade among the States is not an essentially contested concept nor does it give the Commonwealth power with respect to a contested practice because it is drafted in general terms which are descriptive not evaluative. Even where ambiguous, general terms tend not to be essentially contested in that they are not understood

24 Dworkin, above n13 at 87–113. At a higher level of generality, Dworkin’s theory of interpretive practices in which the practice has a point or rationale which is used to determine the rules of the practice in contested cases can be seen as an application of Gallie’s ideas to social institutions; Gallie, above n17 at 45–86. Interpretive practices could with equal accuracy be called essentially contested practices.

25 Dworkin, above n10 at 1–43.

26 *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330; *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Airlines of NSW v NSW (No 2)* (1965) 113 CLR 54; *Attorney-General (WA) Ex rel Ansett v Australian National Airlines Commission* (1976) 138 CLR 492.

27 This interpretation, adopted in USA, was rejected in all the cases cited, above n 26.

as embodying competing conceptions. Disputes about the meaning of general terms are usually a consequence of the indeterminacy of language and resulting uncertainty about the essential features of the class of objects or actions to which a general term refers. They give rise to border line cases and questions of meaning which we resolve by examining the context in which the term is used, the intentions of the user and other considerations which indicate the exact meaning of the term in that context. But they do not give rise to test or pivotal cases and theoretical questions of the sort which arise in arguments about contested concepts.²⁸

A common problem arising in the interpretation of general terms is that of distinguishing the features of an object which are essential to bring it within a general term from other inessential attributes which the object may possess. The concept-conception distinction does not throw any light on this problem. It may seem possible to use the distinction to throw light on these problems by interpreting essentialism as a claim that there is one correct conception of every general term, that conception which distinguishes the essence of the concept from its inessential attributes. If we reject that claim and accept the view that there may be differing conceptions of the meaning of a general term, each differing as to the attributes which it claims are of the essence of that term, it may seem possible to view that conception which essentialism claims is the one correct conception as merely one possible conception among others. If this view is accepted, it may seem possible to argue that there are competing conceptions of most general terms to the extent that there are different views of the essential meaning of those terms.

However, differing conceptions of general terms which refer to classes of phenomena compete in a different way from the competing conceptions of those concepts which Dworkin and Gallie identified as contested. There are differing conceptions of general terms to the extent that the meaning of those terms is ambiguous or unclear or the term has more than one meaning. Although the class of activities or objects to which a general term refers may be complex and describable in various ways, and although this may add to the ambiguity of the term, this is not sufficient to make the term essentially contested. The problems of interpretation to which general terms give rise can be resolved by clarifying the ambiguities or differentiating between the different meanings of the term. Issues about how the term was used may, in some cases, be resolved by evidence, such as evidence about the speaker's intentions. If a term has more than one meaning, there is no ambiguity if we know which meaning was intended. Therefore, if we know what was intended, the need for an interpreter to choose between alternative meanings disappears. Where that is the case, it would be wrong for an interpreter such as a court, to appeal to social and political arguments to resolve the ambiguity.²⁹ The fact that a user may not have had a definite intention when using

28 For the difference between borderline cases and test or pivotal cases see Ronald Dworkin, *Law's Empire* (1986) at 41–43.

29 The High Court has assumed that it knows the intended meaning of 'trade among the States', so it has never considered the policy arguments in favour of each interpretation. If its assumption is correct, its refusal to consider the policy arguments is justified.

a term adds to the difficulties facing an interpreter but does not mean that the term, at least in that case, is essentially contested. It simply entails, to use Hart's language, that the user had relatively indeterminate aims when using the term.³⁰

Essentially contested concepts do not admit of different conceptions because of ambiguity or lack of clarity but because of continuing disputes about the most justifiable understanding of the values which underlie the concept. These disputes cannot be resolved by clarifying the meaning of the term or differentiating between its different meanings. Hence they cannot be resolved by appealing to facts such as what was intended. As contested concepts are the subject of ongoing and unresolvable dispute, it is impossible to understand the meaning of such a concept without understanding that it is contested and without some understanding of the competing conceptions available.³¹ Where a contested concept is used, we may face a choice between competing conceptions of that concept but cannot determine which competing conception we should adopt by determining which was the intended conception because a person cannot intend to use a contested concept and at the same time limit its meaning to one intended conception. The user may have one conception in mind or may prefer one conception to all competing conceptions, but as the user may be taken to know that the concept is contested and is understood by other users to be contested, by using the concept, he or she must be taken to have intended not to have ruled out the competing conceptions. Hence where the speaker has used the concept rather than a particular conception of it, we are not bound by the speaker's understanding of that concept.³²

Similarly, if the user of a contested concept did not favour one conception of that concept over others, we cannot say that the user had relatively indeterminate aims, because the intention of the user of such a concept is that the interpretation of the concept is open to contestation. It is a mistake to assume that contested concepts are vague or schematic simply because they do not stipulate which conception of the concept we are to use. Using a contested concept rather than a conception of that concept is not a difference of detail but of kind because the former requires the interpreter to apply the best conception of the concept in question, while the latter ties the interpreter to a particular conception.³³ A user of a contested concept may intend to adopt one conception of that concept to the exclusion of all others. For example, it has been suggested that the framers of the Constitution intended that the power with respect to marriage, s 51(xxi), was to be limited to a power with respect to marriage as understood at common law; that is marriage as the union of one man to one woman for life to the exclusion of all others.³⁴ Where this is the case, the user does not use the concept, but the intended conception of that concept. When we use a contested concept rather than one conception of that concept, although we may favour one conception over others,

30 HLA Hart, *The Concept of Law* (1st ed, 1961) at 125.

31 Gallie, above n17 at 172

32 Dworkin, above n11 at 132–137; above n10 at 13–15.

33 Dworkin, above n 11 at 132–137.

34 Henry Alan Finlay & Rebecca Bailey-Harris, *Family Law in Australia* (4th ed, 1989) at 62.

we are not limiting its meaning to that conception, but are intentionally leaving the meaning to be contested. Hence disputes about the interpretation of a contested concept, unlike disputes about the meaning of an ambiguous general term, are not resolvable even in principle by appealing to facts such as the intention with which the concept was used. All that an appeal to intention will show is that the speaker intended to use the concept rather than any particular conception of it.

A sceptic may claim that we are exaggerating the difference between contested concepts and general terms. It may be that apparently contested concepts are merely confused concepts, the use of which hides from the participants that their arguments are unresolvable because they are using different concepts which only need to be discriminated to resolve the dispute.³⁵ If all contested concepts are in reality confused concepts in need of further discrimination rather than essentially contested, they may differ less from general terms than I have indicated. Although they would remain evaluative rather than descriptive, they would be essentially ambiguous, in that they had a number of different meanings, so that, like general terms in some cases it would be possible to determine as a matter of fact their exact meaning in a particular context.

We can derive a test from Gallie and Dworkin for determining whether a concept is contested or is merely confused. If there is an exemplar or tradition which unites all conceptions of a contested concept in the sense that all are attempts to interpret the exemplar or tradition and use it to determine what adherence to the tradition requires of us now, we have a contested concept. If there is no unifying exemplar or tradition, we have a confused concept.³⁶

If this test does not work, so that scepticism with respect to contested concepts is correct, it may be accepted that Gallie and Dworkin exaggerate the difference between contested concepts and general terms. However, this sceptical account suggests that contested concepts lack that feature of being essentially contested which distinguishes them from general terms used to refer to classes of objects. I do not intend to consider in this paper whether the sceptic is right but rather to assume that Gallie and Dworkin are correct and to consider some of the implications of the distinction between general terms and contested concepts for the interpretation of the Constitution.

4. Are there Right Answers to Disputes About the Best Conception of Contested Concepts?

The Introduction argued that the concept-conception distinction, if it entails that there are right answers to questions arising from the interpretation of contested concepts, may be capable of strengthening the theory of constitutional interpretation derived by combining *Marbury v Madison's* doctrine of invalidity

³⁵ Gallie recognises this possibility, above n17 at 173–174.

³⁶ Both Gallie and Dworkin stress the need for an exemplar or tradition to bind a contested concept together and use it to distinguish contested concepts from ambiguous terms; Gallie, above n17 at 175–178; Dworkin, above n13 at 68–73, especially ‘Paradigms’ at 72–73.

with ideas taken from linguistic philosophy. This part argues that the internal logic of the distinction does not entail that there are right answers to questions about the interpretation of contested concepts, even in the weak sense of right answer developed in the Introduction. Hence, the distinction cannot be used to strengthen the theory of interpretation in the way the Introduction suggests.

Disputes about essentially contested concepts can be disputes about meaning which may be resolved in the same way as disputes about the meaning of other general terms because these concepts are general terms. However, more often than not, disputes about these concepts are not disputes about the meaning of the terms or about their correct usage, but are disputes arising from competing interpretations of the exemplar which provides a model of the concept.³⁷

Both Gallie and Dworkin agree that competing conceptions of contested concepts compete in two ways. Firstly, they offer competing visions of the exemplar and the way in which it should be developed in future. There are competing visions of most of the great traditions of our society, whether in law, politics, religion or art. These competing visions give substance to competing conceptions. Secondly, conceptions compete in that they are used competitively, to criticise the visions of others and to defend one's own position from criticism. They also agree that persons who use contested concepts critically to attack the position of others and to defend their own position do so on the basis that their conception of the concept is the best conception and can make a case in defence of that claim by pointing to features of the exemplar which support it.³⁸ The result of the making and defending of claims with a view to convincing others that a particular conception of the concept is the best conception is necessary for but will not necessarily lead to the continued sustaining and development of the exemplar in optimum fashion.³⁹

However, Gallie and Dworkin disagree on the extent to which the practice of making and defending claims is rationally justifiable. Both agree that the disputes to which contested concepts give rise are unresolvable in the sense that there is never likely to be universal agreement about which is the best conception of a contested concept because there is no generally accepted principle or test for deciding which competing conception of a contested concept is the best.⁴⁰

37 Dworkin, above n13 at 45–86. Dworkin does not use the term 'exemplar' but it is clear that the common law and constitutional law tradition and the tradition of courtesy in his imaginative example are exemplars within Gallie's use of the term as they provide the material against which to test competing conceptions and arguments. To that extent they fulfil the same role as Gallie's game.

38 Gallie, above n17 at 178; Dworkin, above n11 at 81–130. Dworkin's story of Hercules, the judge who develops a theory of the law based on its morality and its fit with existing legal materials is a case study in how to use an exemplar, the existing body of law, to develop a conception of what the law, best understood requires in hard cases.

39 Gallie, above n17 at 180.

40 Gallie, above n17 at 188–189; Dworkin, above n11 at 81–130; Ronald Dworkin, 'No Right Answer?' in PMS Hacker & Joseph Raz (eds), *Law Morality and Society – Essays in Honour of HLA Hart* (1977) especially at 77–84. The theory of law as interpretation put in *Law's Empire*, above n13, assumes that there is not and cannot be a generally accepted test for law in hard cases.

However, both accept that the fact that there is no likelihood that one conception of a concept will be universally accepted as the best conception does not prevent disputes about contested concepts from being rational disputes.⁴¹

However, for Gallie, the fact that there is no likelihood of universal agreement limits the role of rationality. As there is no universal agreement, there are various conceptions open, none of which are necessarily wrong. He equates a person's commitment to one conception rather than another as the result of a process akin to conversion, and uses that term to describe a person's decision to change from one conception to another. Although there are various choices and people commit to one conception rather than another, rationality plays a role in that process in that it is possible to describe a person's commitment to one conception rather than another as rational or right for that person.⁴² Each conception of a contested concept may be regarded as embodying a vision of the area of human endeavour to which the concept relates. For example, each conception of Christianity is based on a different vision of what it means to be Christian. It may be rational for a person to commit to a sect or be converted from one sect to another where that sect embodies what he or she sees as valuable in the Christian tradition more perfectly than does any other sect. For Gallie, it will be rational where other persons recognise the force of the considerations that led the person in question to form a new allegiance, whether or not it leads them to change their allegiance. He sums up his position thus:

... a certain piece of evidence or argument put forward by one side in an apparently endless dispute can be recognised to have a definite logical force, even by those whom it entirely fails to win over or convert to the side in question; and that when this is the case, the conversion of a hitherto wavering opponent of the side in question can be seen to be justifiable ... given the waverer's previous state of information and given the grounds on which he previously supported one side and opposed the other.⁴³

Dworkin allows rationality a greater role in the operation of contested concepts in areas such as law, morality and politics. In these areas of human endeavour, the exemplar which unifies a concept has, according to Dworkin, additional features which enable us to say that there are best conceptions of contested concepts not merely conceptions which are the best for particular persons. The additional feature is that the exemplar is an interpretive practice or part of one, the standards of which have a point which is used to determine the content of the standards in hard cases. In these cases, the standards are what they ought to be in the sense that that version of the rules which will make the practice the best it can be is the correct version.⁴⁴ Thus Dworkin is wedded to the claim that there are best conceptions of at least some contested concepts although he accepts that there is no way of

41 Gallie, above n17 at 188-189; Dworkin, above n11 at 81-130; Dworkin, above n13 at 45-86; and Dworkin, 'No Right Answer?', above n40 especially at 77-84.

42 Gallie, above n17 at 189-90.

43 *Id* at 190.

44 Dworkin, above n13 at 46-48.

demonstrating as a matter of fact or accepted criteria for determining which is the best conception, and, as a result, it is unlikely that there will ever be agreement on which is the best conception.⁴⁵

Dworkin adopts this position for two reasons. First, he claims that it is impossible to understand the role which contested concepts play in legal and moral argument without assuming that there are best conceptions of these concepts. Although he did not use the term ‘contested concept’ it is clear that in his early example of the sergeant being commanded to choose his best soldiers, the term ‘best soldiers’⁴⁶ operates as a contested concept. It is a contested concept because different sergeants would be likely to disagree about which soldiers were actually the best. That disagreement was likely to be the result, not only of empirical disagreements about which soldiers best met the relevant standard, ‘best soldier’, but disagreements arising from the application of different conceptions of the concept ‘best soldier’.

Although there was no agreed test which could be used to determine which conception of ‘best soldier’ was correct, that did not mean that ‘best soldier’ was meaningless as a standard or that the sergeant was free to take any soldiers. The sergeant was under a duty to select the best soldiers and would have disobeyed the order if he/she had made a random selection. At first glance, Gallie’s explanation of the role of rationality in contested concepts does not appear to be adequate to elucidate fully the nature of the order given to the sergeant. Gallie is able to show that given such an order, the sergeant can obey it in a rational way. As noted above, Gallie’s position is that, given his/her past commitments and actions, we can determine whether it is logical for a person who must commit to some conception of a contested concept to commit to one conception rather than another.⁴⁷ On this view, we can determine what it is rational for a particular sergeant to do and if the sergeant did not do that, we would appear to be able to criticise him/her as inconsistent. However, the sergeant would be entitled to reject the criticism on the grounds that he/she now realised that her/his previous conception of best soldier was incorrect, and that as he/she was ordered to take the ten best, he/she was under an obligation to adopt the correct conception, even though that was not the conception which he/she had previously adopted.

The rationality of the sergeant’s position can be accounted for with minimal change to Gallie’s position. Gallie’s limited conception of the role of logic in these cases does not extend to the sergeant’s choice to abandon one conception of best for another which is not closely related to it. However, there is no good reason for not extending his conception to cover that case. The sergeant’s decision to adopt a new conception which is not closely related to his/her former conception is rational if he/she can offer a justification for it by pointing to considerations which explain it, the force of which cannot be denied, even by those who are not moved by them to change their views. Dworkin’s claim that there may be a best conception,

45 Dworkin, ‘No Right Answer?’ above n40 at 76-84; Dworkin above n12 at 43-46.

46 Dworkin, above n11 at 32.

47 Gallie, above n17 at 189-191.

although we have no agreed test for identifying it, can also explain the logic of the sergeant's actions. It is logical for a person to adopt a different conception of a contested concept where he/she has a defensible claim that the new conception is better than the old, all things considered, even though he/she cannot prove that to be the case. The claim is defensible if we assume that there is a best conception because that assumption makes it rational to weigh competing conceptions against each other. To sum up, although Dworkin's assumption that there is a best conception enables us to portray the sergeant's change of position as logical, the rationality of such a change can be explained without assuming that there are best conceptions.

Underlying Dworkin's account is the assumption that disputes as to which is the correct conception of a contested concept are theoretical disputes about the weight to be given to relevant values, not disputes about the meaning of words.⁴⁸ His argument builds on this assumption. He argues that unless we accept his claim that there are correct answers to questions arising from competition between competing conceptions of contested concepts, although we have no agreed test for determining what these answers are, we are likely to interpret arguments based on competing conceptions as arguments about the meaning of words. If we make this mistake, we deny the distinctness of contested concepts, reducing them to the status of ambiguous general terms by conflating the distinction between arguments about the borderline use of a general term and arguments about test or pivotal cases. Borderline cases are disputes about the proper use of a descriptive general term which is vague around the edges. For example, we may be clear that a car is a vehicle but may disagree about whether a pram or a bike is. If we ignore the context in which the word 'vehicle' is used, the issue can only be settled by appeal to common usage. Pivotal cases are cases which require us to examine our theoretical understanding of an area of human endeavour, such as art or law. For example, an argument about whether there is any justification for regarding photography as art is a pivotal case, because we may be forced to deploy competing aesthetic theories to justify our position.⁴⁹

Dworkin argues that refusal to accept that there may be correct answers to questions arising from competing conceptions of contested concepts may lead to a conflation of the distinction between borderline and pivotal cases because the failure forces us to recast arguments about pivotal cases in order to make sense of them. If there cannot be correct answers because there are no accepted tests for determining the answer, the argument cannot be understood as an argument about our theoretical understanding of the subject. That argument is pointless because there is no way of resolving it. The argument is better understood in one of three ways. First, it may be fraudulent in the sense that one of the parties is trying to convince the other by rhetoric to change his or her mind, although there may be no good reason for doing so. Secondly, the argument may be at cross purposes in that both parties have different understandings of the meaning of a word without

48 Dworkin, above n11 at 54–58; above n13 at 39–43.

49 Dworkin, above n13 at 41–42.

realising that that is the case. Thirdly, the argument may accept that it is not clear whether the word in question extends to the case in point and is making a case for extending or limiting its meaning. All three of these arguments assume that the problem arises from indeterminacy in the meaning of a concept rather than from any understanding that the concept is essentially contested.⁵⁰

However, there does not have to be a best conception of a contested concept to maintain the distinction between contested concepts and ambiguous descriptive general terms. The limited role which Gallie attributes to rationality is sufficient to save contested concepts from collapsing into ambiguous general terms. Gallie allows that it may be rational for a person to be persuaded by an argument in favour of one conception of a contested concept rather than another whenever other persons are able to accept the strength of that argument, although not persuaded by it themselves, but does not accept that there are right answers to questions involving competing conceptions.⁵¹ This is sufficient to make sense of pivotal cases and to distinguish them from borderline cases. Pivotal cases are cases in which the parties are making a case for one conception of the contested concept rather than another or others. As that case can be rational, there is no need to recast the pivotal case argument in one of the three ways mentioned above.

Gallie may be unable to account for claims that a particular conception is the best conception.⁵² However, in fields like art, such claims are either evidence of triumphal enthusiasm inspired by a new way of looking at the field or evidence of a closed mind rather than indicators that there is a best conception. Nor do we need to have a best conception to understand the claim that one conception is superior to another. That is a comparative claim the rationality of which does not depend upon having an ultimate measure of what is best. We are justified in claiming that one conception is better than another when it advances the factors which lead us to value the other to a greater extent or in a better way than the other without sacrificing any values which the other does not sacrifice.

Dworkin's claim that there are best conceptions of contested concepts is not needed to explain Gallie's suggestion that continuous competition between competing conceptions of a concept may enable the achievement embodied in the exemplar to be sustained or developed in optimum fashion.⁵³ Take the case of art. Art has the features of a contested concept in that it refers to a complex endeavour which, although it has many facets, can be evaluated as a whole. It is contested in that the contest gives rise to pivotal cases, for example, the question of whether photography is truly art, which are assessed against the exemplar, the tradition of art. Debate about such cases is one of the drivers of new development in art, leading it, we hope, in an optimum direction. Yet it would be folly to claim that there is a best conception of the concept of art. Such a claim ignores the plurality

50 Id at 37–44.

51 Gallie, above n17 at 188–91.

52 He does, however, recognise that such claims are commonly made with respect to competing conceptions; Id at 176–178.

53 Gallie, above n17 at 178. Gallie recognises that competition between contested concepts does not necessarily lead to the optimum outcome; Id at 179.

of forms of art. More importantly, it ignores the reason for debate about conceptions of art. These debates are not designed to lead us to an ultimate, perfect form of artistic expression. Art would be impoverished if we thought that we had arrived at such a form. Instead, it is designed to encourage us to explore new ideas and new avenues of artistic expression and to reconsider old ones in the light of arguments about the value and importance of art.

Hence Dworkin's claim that there can be best conceptions of contested concepts does not add to our understanding of the idea of a contested concept. However, we cannot dismiss it for that reason alone as it may play an important role in some of the endeavours and practices to which contested concepts relate. Dworkin's model of an interpretive or contested practice, such as law and morality, in which the point of the practice is used to determine the rules of the practice are one such type of endeavour.⁵⁴ These practices differ from art and literary criticism in that judgments in law and morality have practical consequences for people which judgments in art and literary criticism do not have. They are used to determine claims to scarce resources and to decide whether people should be censured or sanctioned for their behaviour. Judgements about art do not have this dimension. A claim that photography is not art is not a claim that photography should be excluded from all the galleries or that photographers should not be able to apply for grants or other assistance for the arts. It is designed to increase our understanding of art, not to condemn or sanction photographers.

The claim that there is a best conception of a legal or moral concept has a significance which such a claim does not have when the concept is related to art or music. Legal and moral concepts are used to judge behaviour, to allocate scarce resources among competing claimants and to justify the imposition of sanctions on wrong doers. Hence the search for the best conception of a legal or moral concept is a search for the most just decision and the strongest justification for that decision. The search may be elusive but some conceptions of law and justice require that we make it. Hence, Dworkin's claim that there are best conceptions of contested concepts is more understandable in law and morals than in art and literature.⁵⁵

The difference between legal and moral concepts and those used in art and literature is summed up in the idea that the former are dispositive, in that if true, they require some person to act in a particular way.⁵⁶ Dworkin argues that dispositive concepts have a distinctive role in legal argument, in that:

54 Dworkin, above n13 at 46–48.

55 Of course, the fact that it is understandable does not entail that it is correct. I do not intend to consider that issue in this paper.

56 Dworkin, 'No Right Answer?' above n40 at 59. The fact that legal and moral concepts are dispositive and have been developed to close off the third option, that neither party may have a right or a duty, distinguishes them from artistic and literary concepts in a way which casts doubt on the analogy which Dworkin has often drawn between legal and literary arguments. Contested concepts are common to both. But because of the need to dispose of legal and moral cases, interpretive practices in which the point of the practice are used to determine the rules of the practice in hard cases, are more likely to develop with respect to law and morals than in art and literature, making the analogy less relevant than Dworkin believes.

They both designate tests for conclusory claims [with respect to rights and duties] and insist that if the tests they designate are not met, then the opposite conclusory claim, not simply the denial of the first, holds instead. The need for concepts having that function in legal argument arises because the concepts of right and duty in which conclusory claims are framed are structured, that is because there is space between the opposite conclusory claims. The function is the function of denying that the space thus provided may be exploited by rejecting both the opposing claims. Dispositive concepts are able to fill this function because the first version of the no right answer thesis is false; if there were space between the propositions that a contract is and is not valid, that concept could not close the space the concepts of right and duty provide.⁵⁷

Concepts used in art, literary criticism and other practices which are aesthetic rather than moral, although contested, tend not to be dispositive. Hence, they do not close off the third option so that the fact that one work of art or interpretation is not better than another does not entail that the other is the better. Instead, they may be of equal merit. This increases the likelihood that although it is possible to rank some of the alternative conceptions of a concept against others, it is not possible to conclude that one conception is the best.

The fact that legal concepts are dispositive as well as contested and exclude the third logical option allowed by the concepts of right and duty does not entail that there are necessarily right answers to questions about which is the best conception of a contested legal concept. The answer to that question depends upon whether our legal values are essentially inconsistent with one another or are capable of being reduced to one coherent whole.⁵⁸ If our values are essentially inconsistent, there can be no right answer to any question about which is the best conception of a contested concept where the answer depends upon reconciling those values. All we can do is resolve the inconsistency by choosing to give priority to one value over the other and hence to the conception which that value supports. As we would not be able to offer a completely rational explanation for giving priority to one value rather than the other, we would not be able to claim that our answer was the best answer in the sense of being based on the best argument, only that it is one good answer among others. Gallie's language of conversion to one value is more appropriate to the situation than is the language of argument.

The fact that the concept in question may be dispositive does not assist in reconciling the inconsistent values. All that it does is require the judge to support one claim rather than the other, rather than finding neither is sustained. But if our basic values are inconsistent rather than coherent, the judge could not give a rational justification for that support other than it reflected a commitment to some values rather than others. As at bottom, the judge's position is based on a commitment to some values over others, it is not based on rational argument.

⁵⁷ *Id.* at 65.

⁵⁸ Dworkin, not surprisingly, is committed to the view that our basic moral and legal values are consistent rather than inconsistent; above n14 at 105–117.

Hence, the judge must concede that his or her justification is not right in the sense of being the strongest argument; it is merely one good argument among others.

The fact that there may be no right answer does not undermine the notion of a contested concept. As argued above, the notion does not require that there be right answers, only that the concept be sufficiently rational for us to have some understanding of the ways in which the concept is contested and to be able to understand the nature and strength of arguments for conceptions which we do not accept. To sum up, the internal logic of essentially contested concepts, even ones which, like legal concepts, are dispositive, does not entail that there are right answers to questions about which of the competing conceptions of the concept is the best conception. For there to be right answers to such questions, our values need to be coherent rather than inconsistent. Hence, the concept-conception distinction does not strengthen the theory of interpretation outlined in the Introduction.

5. The Concept-Conception Distinction, Constitutional Evolution and the Interpretation of Basic Constitutional Rights

The idea that the Constitution changes as our understanding of the concepts it contains changes makes sense in the interpretation of provisions which reflect key underlying moral and political values such as justice and equality. Guarantees such as freedom of speech and guarantees of elections embody important basic rights and values governing the relationship of the individual to government. They act as limits on the powers of the legislature which the courts enforce at the behest of individuals who are claiming the rights. Those rights are generally expressed in broad concepts of which there are competing conceptions. Parliament infringes the guarantee if it adopts conceptions of their scope which are inconsistent with the constitutional conception. The court is entrusted with determining the constitutional conception and parliament is bound to respect that determination.

The content of such guarantees has been debated for a long time and there are arguments for and against different conceptions. The participants in these debates put forward their conceptions as better than the competing ones. Over time, a consensus may develop in favour of some conceptions rather than others. For example, over the course of the last century a consensus developed in favour of the view that representative government requires that all responsible adults be able to vote and against the view which prevailed at federation that it was not improper to exclude women and some ethnic groups from voting. Other conceptions may remain controversial. However, it still makes sense to talk in terms of the best conception as something distinct from conceptions which may have been acceptable to the framers or to any other group of people. Not only that, it is rational to assume that the framers, by enshrining the guarantee in the Constitution, intended that the Constitution should contain the best conception of that guarantee rather than the one which appealed to them.

There are two versions of the role which the concept-conception distinction should play in the interpretation of constitutional guarantees, a weak version and

a strong one. The weak version argues that courts should interpret guarantees of rights as embodying contested concepts rather than particular conceptions of those concepts, including the conceptions which the framers may have held, only where that was the intention of the framers. This version is consistent with originalist theories which argue that the Constitution should be interpreted in light of the intentions of the framers. The strong version argues that courts should interpret constitutional guarantees of rights as embodying contested concepts rather than particular conceptions of those concepts whether or not that was the intention of the framers. This version rejects originalism, at least in the interpretation of guarantees of rights and other provisions which embody contested concepts.⁵⁹

The weaker version can be relied on to justify the use of the concept-conception distinction in the interpretation of some of the express guarantees in the Constitution. Where these guarantees embody broad concepts it is reasonable to assume that the framers intended to adopt contested concepts rather than any particular conception of those concepts. If that is the case, courts today are not bound by the framers' conception or anyone-else's conception of the meaning of constitutional contested concepts but must adopt the best conception.⁶⁰ Hence, the authoritative interpretation of the Constitution may change over time in accordance with changes in the understanding of the courts of the conceptions which constitutional concepts embody. To that extent the Constitution changes. However, the Constitution does not change in the sense that the question for the court always is 'What is the correct interpretation of the Constitution?' If an authoritative interpretation is later rejected as wrong because based on a mistaken conception of a fundamental principle, it is arguable that that conception was never the law and hence the court did not change the Constitution by abandoning it.

Consider the requirement in sections 7 and 24 of the Constitution that the Senate and the House of Representatives be directly chosen by the people. The requirement of a direct choice by the people is an essentially contested concept of which there are competing conceptions. It meets Gallie's criteria⁶¹ in that it is used to appraise or evaluate complex achievements, the system of elections for the Commonwealth parliament. The electoral system admits of considerable modification in response to changing circumstances and those modifications cannot be prescribed or predicted in advance. Although that system is complex, its worth is attributed to it as a whole. However, any explanation of its worth must include reference to the respective contributions of its various features, such as its

59 It is not clear which Dworkin adopts. He seems to have committed to the weak version in that he believes that the framers' linguistic or semantic intentions but not their legal or expectation intentions are relevant to interpretation; above n10 at 291–296; and Scalia, above n12 at 116–121. However, he simply assumes that the Constitution embodies broad concepts rather than contested conceptions of those concepts. It is not clear that he believes that the issue is one where evidence is relevant.

60 See above, 'The Concept-Conception Distinction and the Interpretation of the Constitution' for a discussion of this point.

61 Gallie, above n17 at 171–172. These criteria are set out in the text accompanying notes 17–23 above.

success in providing representation for minorities or in giving equal weight to each vote cast. As a result, there are rival possible descriptions of the system's total worth, each attaching a different order of importance to the various features of the system. One may for example, attach greater weight to the need to ensure that minorities are represented than to the requirement that each vote cast is given equal weight, while another may consider it more important to give equal weight to each vote than to ensure that minorities are represented. Parties to debates and litigation about whether the Commonwealth parliament is properly chosen by the people recognise that their use of the concept 'chosen by the people' is contested by other parties and have some appreciation of the different criteria which those other parties are using to elucidate the concept.

Just as different people have different conceptions of these concepts, our own conceptions may change over time. It is arguable that as our conceptions of these values change so does our understanding of the Constitution. We are not constrained to accept the limited understanding which our ancestors had of these concepts, just as our children are not constrained by our limited understanding. Instead, each generation is free to and indeed is under a duty to adopt its own best understanding of these basic concepts. As it does so, its interpretation of the Constitution will change.⁶²

The court has used the idea that the Constitution changes as our understanding of the concepts it contains changes in cases dealing with voting rights, trial by jury and freedom of speech. In the voting rights cases,⁶³ the High Court was asked to consider whether the requirement in section 24 of the Constitution that the House of Representatives be 'chosen by the people' mandated that all votes have equal value and whether there was a similar requirement in the West Australian Constitution. In these cases, the High Court rejected the argument, but some of the judges commented that 'chosen by the people' now required universal adult suffrage even though the Constitution itself makes clear that that was not the case in 1900, permitting women and men from some ethnic groups to be denied the vote in sections 25 and 128.⁶⁴ The idea that the Constitution embodies general concepts rather than the specific conception of those concepts which may have appealed to its drafters was relied on, especially by Gaudron J, to reject the founders' understanding of the term 'chosen by the people'. She said:

62 The argument owes much to the jurisprudence of Ronald Dworkin, especially to the argument in Dworkin, above n10, that the Constitution embodies broad moral principles. In that book at 1–39, Dworkin stresses that this thesis about the nature of the Constitution does not entail any particular conception of those principles, whether liberal or conservative; at 2–3. Rather, as the principles are controversial, the thesis suggests that Constitutional law is and should be a lively debate about the content of those principles.

63 *Attorney-General (Commonwealth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v State of Western Australia* (1996) 186 CLR 140.

64 *Attorney-General (Commonwealth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36 (McTiernan & Jacobs JJ) and 70–71 (Murphy J); *McGinty v State of Western Australia* (1996) 186 CLR 140 at 200–202 (Toohey J), 220–221 (Gaudron J) and 286–287 (Gummow J). See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 260–262 (Kirby J).

It has long been accepted that the Australian Constitution is “broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.” The words “chosen by the people” are as broad and general as any in the Constitution and, as with other words which are necessarily general, they are to be approached on the basis that, although their essential meaning is unchanged, “their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge”. They must also be interpreted bearing in mind that democracy was not a perfectly developed concept at the time of federation and, perhaps, is not yet so. These considerations necessitate that the content and application of the words “chosen by the people” be determined in the light of developments in democratic standards and not by reference to circumstances as they existed at federation ...⁶⁵

The argument in *Cheatle v The Queen*⁶⁶ with respect to the content of the guarantee of trial by jury is not so obviously based on the concept-conception distinction. Although much of the argument is an historical analysis of the requirement of unanimity in criminal jury trials, it should not be understood as a search merely for the original intent of the framers. Counsel for the respondent had argued that jury trial in 1900 had included a number of features which were unacceptable today, such as the requirement that all jurors be male property owners. They argued that just as section 80 did not give any right to a trial by a jury with these unacceptable features, it gave no right to a unanimous verdict.⁶⁷ The High Court rejected this argument, holding that the exclusion of females and the poor from jury service were not essential features of a trial by jury. Their justification for this conclusion was not an historical one about the intentions of the framers, as they in effect conceded that people in 1900 may have believed that only men of property should sit on juries:

The exclusion of women and unpropertied persons was, presumably seen as justified in earlier days by a then current perception that the only true representatives of the wider community were men of property.⁶⁸

Rather, it was based on the argument that a conception of the jury which limited jurors to men of property was absurd and unacceptable in the more enlightened climate of 1993 and hence was no longer required by the guarantee of trial by jury if it ever had been.⁶⁹

On the other hand, the Court held that unanimity was, and for constitutional purposes remains, an essential feature of a jury trial. They concluded that it was a necessary feature of any constitutional conception of trial by jury because the constitutional conception is one based firstly on the principle that no person should

⁶⁵ *McGinty v State of Western Australia* (1996) 186 CLR 140 at 221.

⁶⁶ (1993) 177 CLR 541.

⁶⁷ *Cheatle v The Queen* (1993) 177 CLR 541 at 560.

⁶⁸ *Ibid.*

⁶⁹ *Id* at 561.

be convicted of a criminal offence if there is any reasonable doubt of his or her guilt. That the jury is not unanimous is an indicator that there is a reasonable doubt.⁷⁰ Secondly, they argued that the requirement of unanimity ensures that the representative character and collective nature of the jury are carried forward into any verdict. It promotes deliberation and provides some guarantee that the views of each juror will be listened to and discussed.⁷¹

So the High Court's approach to the interpretation of section 80 was something of a hybrid, viewing s 80 as embodying in part the contested concept of trial by jury and in part a particular conception of that concept. Some features of trial by jury as understood in 1900, such as the requirement that jurors be men of property, were not properly regarded as essential to the concept of trial by jury but were based on the mistaken conceptions of the framers. These could be changed by legislation. Other features, such as unanimity, were essential to the constitutional conception, and were not subject to legislative change. The intentions of the framers were of little help in distinguishing the essential unchangeable features of trial by jury from the inessential changeable ones as the framers may have believed that all the features considered were unchangeable. So the Court built up its own conception of the essence of trial by jury as it existed in 1900, based on the history of the institution and the values which were seen as underpinning it at that time. The institution may have changed since that time to allow majority verdicts, but those changes went to the essence of the constitutional conception as it was in 1900 and hence were not relevant to the interpretation of that conception. Other changes such as women jurors and the removal of the property qualification were not essential to the 1900 constitutional conception and hence were subject to change.

Similar ideas surface in the freedom of speech cases, especially in the judgment of Mason CJ in *Australian Capital Television v Commonwealth*.⁷² After pointing out that the framers expressly did not include a bill of rights in the Constitution because they believed that the best way to guarantee rights was through the common law supported by legislation where necessary, he argued that that did not preclude the implication of a guarantee of freedom of political speech if that was essential to the system of representative government which the Constitution established.⁷³ In other words, Mason CJ argued that the Court was not bound by the framers' conception of representative government but by the best conception. If that conception required a court-enforced guarantee of freedom of political speech, then by implication that guarantee was part of the Constitution even though the framers decided not to adopt a bill of rights embodying such a guarantee.

70 Id at 553, 561.

71 Id at 553.

72 (1992) 177 CLR 106.

73 Id at 136.

6. *Conceptions of Terms, Constitutional Change and Grants of Legislative Power*

In interpreting grants of legislative power framed in general terms, the court has rarely used the concept-conception distinction to justify the claim that it is not limited to conceptions of the terms in which legislative powers are granted which would have been acceptable to the framers.^{74 75} As noted above, the High Court has, from the beginning, recognised that the Constitution is drafted in broad and general terms, which should be interpreted broadly rather than narrowly. That approach is consistent with the idea that the terms in which powers are granted were intended to embody broad concepts rather than narrow concepts. It is also arguable that, properly interpreted, the powers may embody concepts which are broader than the framers recognised. However, because grants of power, other than those over areas of law, are expressed in descriptive general terms which refer to classes of activity or objects rather than in terms which are essentially contested concepts, the concept-conception distinction is not relevant to their interpretation. It is a misuse of the distinction to use it to justify an evolutionary interpretation of Commonwealth powers defined in general terms.

Where the Commonwealth is given powers over contested concepts and practices, such as powers over areas of law, like the power over some types of intellectual property, or power over a social institution such as marriage, differences between the interpretation of grants of power and constitutional

74 McHugh J's comment in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 551–554, that constitutional terms, including the terms in which powers are granted, should be given their current meaning rather than the meaning they had at federation, may be an example. It depends upon whether McHugh J was arguing that the court should adopt current conceptions of contested concepts rather than those which were accepted in 1900, or whether he was merely arguing that where words change in meaning, the court should accept the meaning the word has today rather than the meaning it had in 1900. He refers to the concept-conception distinction as relating to different levels of abstraction at which terms may be used rather than as a feature of essentially contested concepts. In this part, I shall argue that this understanding of the concept conception distinction is wrong and that the distinction does not usually support an evolutionary interpretation of grants of power as distinct from rights.

75 Other evolutionary theories such as the theory that the Constitution evolves in response to changing social and political circumstances have been used more frequently in the interpretation of grants of power. Probably the best known statement is that of Windeyer J in *Victoria v Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353 at 396, where he said, in effect that the principles of the *Engineers Case* were justified by social and political changes resulting from the First World War and the growth of Australian nationhood. Similar ideas have been applied to the interpretation of the aliens power, s 51(xix) and the external affairs power, s 51(xxix) and have influenced the interpretation of the IP power, 51(xviii); see with respect to s 51(xix) *Nolan v MIEA* (1988) 165 CLR 178 at 185–186 (Mason CJ, Wilson Brennan, Deane, Dawson and Toohey JJ), *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 400 (Gleeson CJ), 408 (Gaudron J), 426–428 (McHugh J), 466–468 (Gummow and Hayne JJ), 495–496 (Kirby J); *Shaw v MIMA* (2003) 218 CLR 28 at 37–43 (Gleeson CJ, Gummow and Hayne JJ), 58 and 64–67 (Kirby J), 80–85 (Callinan J); with respect to s 51(xxix) *NSW v Commonwealth* (1975) 135 CLR 337 at 373 (Barwick CJ) and especially 497–498 (Jacobs J); *Kirmani v Captain Cook Cruises* (No 1) (1984–5) 159 CLR 351, 379–382 (Mason J) and 434–441 (Deane J); with respect to s 51(xviii) *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479 at 495–497.

guarantees ensures that the concept-conception distinction, although relevant, plays a different role in interpreting these grants.⁷⁶ I have argued above that guarantees of rights are often used to appraise or evaluate laws by reference to an exemplar either in the form of a prototype or a tradition which is accepted as valuable but the value of which is contested. Therefore, to implement the aims of a constitutional guarantee which reflects a contested tradition or is expressed in terms of contested concepts, the Court may need to determine which is the best conception of that concept. Hence the court may need to interpret it as embodying conceptions of the guarantee which the framers may have rejected and as excluding conceptions of the guarantee which they may have accepted.

These considerations do not apply to the interpretation of constitutional grants of power even where the power is over a contested practice such as an area of law. Constitutional grants of power do not, with a few exceptions, enshrine basic values or fundamental rights and are not used to determine the merits of laws by weighing them against those values.⁷⁷ Instead, they grant powers to the federal parliament and limit those powers in order to reserve areas of jurisdiction to the States. They are used to categorise laws by reference to the topics with which they deal rather than to appraise or evaluate laws by reference to an exemplar either in the form of a prototype or a tradition. They owe more to circumstances of time and place and to the politics of the drafting process than they do to theories of fundamental rights. As a general rule, no fundamental values would have been infringed if the Commonwealth had been given a different set of powers. Nor are fundamental rights infringed if a matter remains in exclusive State jurisdiction rather than falling under Commonwealth power. Nor were the limits on Commonwealth power designed to protect any particular values or rights.⁷⁸ Hence, to limit Commonwealth legislative power by reference to current moral and political values only gives limited protection to those values and a limited guarantee to citizens because it does not limit the States' power to enact legislation inconsistent with those values. For example, it was State legislation and the common law, not Commonwealth legislation under the marriage power, which permitted rape in marriage.⁷⁹ The States would arguably be free to permit it again even if Brennan

76 I have discussed this in detail in 'The interpretation of legal terms used in the definition of Commonwealth powers', to be published in a forthcoming issue of the *Federal Law Review*.

77 The most important exception is section 51(xxxi) which gives the Commonwealth parliament power to make laws for the acquisition of property on just terms, which has been interpreted as a guarantee of just terms. The cases are discussed in Peter Hanks, *Constitutional Law in Australia* (2nd ed, 1996) at 499.

78 This is not to deny that a division of power between Commonwealth and states may provide some general protection for rights on the basis that limited government is less likely to be tyrannical than a government of unlimited power. It merely argues that the limits on Commonwealth power were not intended to and do not guarantee any particular set of rights or values.

79 The common law of crime adopted Hale's view that a husband could not rape his wife; see *R v L* (1991–2) 174 CLR 379 at 396–402 (Brennan J). The original Australian Criminal Codes adopted the exception in favour of the husband; *Criminal Code Act*, 1899 (Qld) Schedule 1, s 347; *Criminal Code Act Compilation Act* 1913 (WA) appendix B schedule s 325; *Criminal Code Act* 1924 (Tas), First Schedule s 185.

CJ's suggestion that the Commonwealth could not enact such a law under the marriage power were accepted.⁸⁰

I do not wish to imply that moral limits on Commonwealth grants of power are pointless unless the limits also apply to State powers. If that were the case, the guarantee of freedom of religion in s 116 would be of no value. Moral limits on Commonwealth grants of power can serve a number of purposes. Firstly, in some cases, a clear statement of the value enshrined in the guarantee is valuable, even if the guarantee does not bind the states. So the clear statement of freedom of religion in s 116 is a constant reminder of the value of the separation of church and state, making it less likely that any State will ever attempt to establish a religion or establish religious tests for public office. Secondly, moral limits on the scope of Commonwealth powers may be of great symbolic importance as expressing a national commitment to particular values. Arguments that, properly interpreted, the power to make special laws for the people of any race after the 1967 constitutional amendment did not permit discriminatory laws pointed to the symbolic importance of that amendment to the aboriginal people and to how permitting discriminatory laws under that power would undermine the symbolism.⁸¹ The symbolic importance of the interpretation of the power was in no way undermined by the fact that, regardless of its interpretation, States retained the constitutional power to enact discriminatory laws.⁸² Thirdly, States may be unwilling or unable to legislate effectively in an area from which the Commonwealth is excluded by a moral limitation, so that the limitation operates to rule out any legislation on the topic.

Where a grant of power is subject to a moral limitation, that limitation will be used to evaluate the law's compliance with the moral standard in question. If it does not comply, the law falls outside the power which contains the limitation. Hence, the limitation operates in a way which is similar to a limitation contained in a guarantee of rights and must be interpreted in a similar way. This is the case, even if the moral limitation only limits the power in which it is contained and does not limit the scope of other powers. The concept-conception distinction will be relevant in interpreting such limitations, because, if the limitation is expressed as a contested concept, the court will need to determine which is the best conception of that concept. For example, if the court had decided that the race power could not be used to enact discriminatory laws,⁸³ it could have relied on the concept-conception distinction to argue that its duty was to determine which was the best conception of discrimination.

80 *R v L* (1991) 174 CLR 379 at 396–398. The only barrier would be arguments based on s 109 of the Constitution that Commonwealth legislation covers the field of marriage, ruling out any State law to this effect on the basis of inconsistency.

81 The history of the amendment as discussed by Kirby J in his judgment in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 404–409 emphasises the symbolism of the proposed change, which was designed to remove any perception of discrimination from the Constitution.

82 A power which currently they are unable to exercise due to the existence of the *Racial Discrimination Act 1975* (Cth) which covers the field to the exclusion of State discriminatory law; *Mabo v Queensland (No. 1)* (1988) 166 CLR 186; *Western Australia v Commonwealth* (1995) 183 CLR 373.

83 A view rejected in *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

These considerations are irrelevant to the interpretation of the bulk of grants of power, which do not contain any moral limitation. Besides, where a power is defined in general terms, it is usually not possible to say that one conception of the general terms used to define a power is better than another in the way that it is possible to say that one conception of contested concepts used in a guarantee is better than another. As argued above, the claim that one conception of a guarantee is better than another is a claim that appeals to a tradition of moral and political ideals and needs to be supported by moral and political argument. There is normally no relevant body of moral and political theory which can be appealed to support a claim that one conception of the terms of a grant of power is better than another.⁸⁴ For example, political and moral theory may be of little use in determining whether one conception of 'like services' is better than another for the purposes of the interpretation of s 51(v), the grant of power with respect to 'postal, telegraphic, telephonic and other like services.'⁸⁵ Therefore, to say that one conception is better than another is to say little more than that one is more in accord with the dictionary or popular usage than the other. That is not necessarily a good reason for expanding or limiting the interpretation of a Commonwealth power.

These considerations limit the extent to which the concept-conception distinction can be relied on as an engine of constitutional change. As argued above, when interpreting a contested concept used to define a guarantee or a right, the court is committed to applying the best conception of that concept. Hence, it may appeal to the current understanding of the tradition associated with the concept to reject earlier conceptions, including that of the drafters, because the current understanding is more likely to embody our considered opinion of the best conception of that guarantee and the tradition which it exemplifies than is any earlier understanding. As a result, the court's understanding of a constitutional right may evolve or change over time as its understanding of the best conception of the right changes.

When interpreting grants of power over actions or objects, the court must determine the meaning to be given to the general terms in which the grant is expressed rather than decide what is the proper conception of a contested concept. When interpreting an unclear general term, the court usually has no grounds for rejecting the framers' understanding of its meaning on the basis that it is morally or politically unacceptable because there is unlikely to be any tradition associated with such a term to provide the competing conceptions which could be used to justify preferring a current conception of the term to that which was accepted at any earlier time. It may be arguable that the framers' understanding of a term was

84 The marriage power may be an exception to this general rule in that there is considerable moral, political and religious theorising about marriage which could be appealed to to argue that one conception of marriage is better than another.

85 In *R v Brislan; Ex parte Williams* (1935) 54 CLR 262, the court had to decide whether radio was a like service for the purposes of the section. The majority held that it was, but the minority dissented on the grounds that it was not sufficiently alike because the other services were means of sending messages from one person to another while radio was a means of sending a message to the world at large. Political and moral theory is irrelevant to such issues. Public policy, of course, may be relevant.

not consistent with the meaning of the term as generally understood. But that is not a ground for the court to reject that understanding because there is no good reason why the framers should not use a word in other than its normal meaning.

Besides, because the grants of power are the results of the circumstances in which the Constitution was drafted and the politics of the drafting process rather than the embodiment of any fundamental political ideal or tradition, there is often little reason to prefer our understanding of the meaning of the terms of a grant to that of the drafters.⁸⁶ By so doing, we may change the scope of the powers which the Constitution has granted the Commonwealth without going through the process of a referendum for no better reason than that our understanding of the meaning of the language used differs from that of the framers. As a result, we make ourselves hostages to changes in the meaning of language and may obtain results which are at best no improvement and at worst stupid.⁸⁷

To sum up, the concept-conception distinction is of little relevance in interpreting grants of legislative power, especially those framed in general terms, as distinct from guarantees of rights and is incapable of providing a theory of how the meaning of such grants may evolve. However, this may not be of great importance because, as such grants tend to be the result of a political compromise and do not usually embody contested political values, there are good reasons for not adopting a consistent evolutionary approach to their interpretation.

7. Conclusion

The article has considered two ways in which the concept-conception distinction may strengthen a powerful theory of judicial review obtained by combining the idea of nullity derived from *Marbury v Madison* with modern linguistic philosophy. The arguments considered lead to the conclusion that, in spite of its promise, the distinction adds little to the theory, at least in the Australian context.

In the Introduction, I argued that the theory cannot apply to cases in which the court has to add to the Constitution in order to decide the case. It follows that the fewer the cases in which the court has to add to the Constitution in order to decide the case, the stronger the theory. The article considered whether the concept-conception distinction entailed that there were right answers in one class of difficult case, cases involving the interpretation of contested concepts. If there were, that was a class of case which could be decided without adding to the

86 I do not mean to imply that we therefore should adopt the drafters' understanding. There are other alternatives to the drafters' understanding and our own understanding which may be preferable to both. These include an understanding adopted and confirmed by precedent.

87 Where the terms of the power are discriminatory, there may be good reasons for rejecting conceptions of the terms of the grant which would have been acceptable to the drafters for conceptions which are more acceptable today. In these cases, the terms embody essentially contested concepts or take their meaning from such concepts in a way which makes the interpretation of the grant depend upon contested political and moral issues rather than on disputes about the meaning of general terms. The best example may be whether *placitum xxvi*, the race power, allows laws which discriminate against people of a particular race; see *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

Constitution, thus strengthening the theory. The article concluded that the internal logic of the concept-conception distinction does not entail that there are right answers to questions involving the interpretation of contested concepts, even in the weak sense of right answer developed in the Introduction. Although Dworkin often argues as if there are right answers in this weak sense to questions about which is the best conception of a concept, the article concludes that whether or not there are right answers depends on moral values being coherent rather than inconsistent, and the concept-conception distinction does not require that moral values be coherent. As its internal logic does not entail that there are right answers to questions about which is the best conception of any particular concept, the concept-conception distinction, even in the cases in which it is relevant, does not add much strength to the doctrine of nullity by increasing the number of cases in which there can be said to be right answers.

The concept-conception distinction suggests a theory of constitutional evolution which is consistent with the theory of judicial review derived from *Marbury v Madison* and linguistic philosophy, arguing that fidelity to the constitutional text may require us to adopt the best interpretation of concepts used in the Constitution, so that the interpretation of particular provisions may evolve as our understanding of what is the best interpretation of those provisions changes. To this extent, the concept-conception distinction is appealing to a constitutional court faced with the dilemma of allowing some constitutional change while lacking the authority to change the constitution itself. However, the article concludes that the distinction is only relevant to the interpretation of contested concepts, which are evaluative and which are typically found in grants of rights. It is not relevant to the interpretation of general terms used to define grants of power, which are not evaluative but are used to classify classes of objects and actions by reference to specified criteria. Although they may be ambiguous, general terms differ from contested concepts in that they are not constituted by competing conceptions.

Hence the concept-conception distinction does not provide an argument which the court can use to show that grants of power framed in general terms have evolved since federation. As the concept-conception distinction is most relevant to the interpretation of guarantees of rights which typically refer to contested concepts rather than general terms and as the Constitution grants few rights, the distinction can only play a minor role in Australian constitutional interpretation. It is relevant to the interpretation of too few provisions to provide a general theory of evolution for the Australian Constitution. Thus it does not provide a way of allowing some flexibility into the theory of constitutional interpretation derived from the combination of *Marbury v Madison* and linguistic philosophy. A final word of warning: the irrelevance of the concept-conception distinction to the interpretation of general terms suggests that ideas developed to aid in the interpretation of bill of rights provisions are not always applicable to the interpretation of grants of power and should be applied to the Australian Constitution with caution.