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Abstract:

This essay is divided into two parts. Part one analyses the history of how the High Court has interpreted the Constitution. This will involve examining judgments of the High Court in cases that have been the most influential on the development of Constitutional interpretation. For the sake of simplicity, an emphasis will be placed on the dichotomy between the legalist and 'living force' theories of Constitutional interpretation that has guided the High Court in its decisions.

Part two endorses an interpretational approach grounded in the legalist theory of interpretation. This argument is based on the Constitution's construction – in particular s 128 – and on the elements of stability, reliability and consistency the Constitution is designed to imbue. Assisting this argument is a comparison of the Australian and US Constitutions with scepticism placed on the 'living force' decisions of the US Supreme Court which the United States Constitution has permitted.

Ultimately, by examining the Constitution's form, its intended function, its comparison to the US Constitution and the overarching doctrine of the separation of powers this essay argues that an interpretive approach that is focused on the Constitution's textual construction favours the legalist approach over the 'living force' philosophy.

The Fall and Rise of Legalism

Part I

Justice Deane argued his 'living force' theory of Constitutional interpretation when the High Court 'was perceived by many to have embarked on a path of judicial activism.'[1] His comments purport to uphold the intention of the framers but they actually foster a progressive style of interpretation that extract 'hidden' implications from the document. The High Court recently repudiated its creative renaissance present in the 1990s in favour of an approach more aligned with its origins. This essay argues that the approach advocated by Deane J is ultimately unnecessary and unreflective of the direction the High Court has taken and is incompatible with what the Constitution actually *is*.

A History of Constitutional Interpretation

The seminal and most influential case on constitutional interpretation is *Engineers' Case*.[2] Justice Mason (as he then was) has referred to the case as a 'fundamental and decisive event in the evolution' of the High Court and its dismissal of implied reserved powers remains unquestioned. [3] The majority held that the Constitution is to be interpreted according to its natural meaning and not by politically desirable outcomes.[4] Although the Court was willing to acknowledge that necessary implications like the separation of powers will inevitably arise,[5] the argument that implications could be readily sourced from the Constitution was rejected. The 'implication' approach was deemed to be 'referable to no more definite standard than the personal opinion of the Judge who declares it' and was held to be based on 'a vague, individual conception of the spirit of the compact.'[6] *Engineers'* legitimized originalist interpretation and demanded judges construe the Constitution in

[1] Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions, A Comparative Study* (2006) 106, 158.
[2] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[3] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 227.
[4] *Engineers'* (1920) 28 CLR 129, 142, 160.
[5] Ibid 155.
[6] Ibid 142, 145.

accordance with the original intention of the drafters. The consequence of adhering to the Constitution by its words alone,[7] leaving aside vague notions permeated by the 'spirit of the document,'[8] is that unless amended by s 128[9] of the Constitution its words continue to mean what they meant when first enacted. This sets originalism in stark opposition with the 'living force' theory and has fuelled judicial conflict ever since.

On taking office as Chief Justice of the High Court, Sir Owen Dixon proclaimed 'strict and complete legalism' as the only safe option for guiding constitutional interpretation.[10] His honour's advocation of 'strict legalism' reflected 50 years of High Court decisions[11] and was replicated in 1972,[12] 1975[13] and 1993.[14] As legal philosopher Jeffrey Goldsworthy has asserted 'legalism has been defended by Australian judges, including two Chief Justices, explicitly on the ground that it offers the best way of maintaining the confidence of all parties in the judicial resolution of constitutional disputes.'[15] Throughout the 20th century strict legalism was seldom challenged with the Court generally ignoring the 'living force' theory later articulated by Deane J. However, by the mid-1990s Deane, Toohey and Kirby JJ would strongly oppose orthodox interpretation in a series of cases that convinced many 'a new era of bold judicial creativity'[16] was emerging.

The Mason Court

By the 1990s the Court had strayed from traditional concepts of interpretation towards 'a more purposive and even creative approach.'[17] The shift of judicial opinion precipitated a momentous High Court decision in *Cole v Whitfield*[18] which saw the

[7] (1920) 28 CLR 129, 160.
[8] *Huddart v Parker* (1909) 8 CLR 330, 388.
[9] *Australian Constitution* s 128.
[10] Goldsworthy, above n 1, 152.
[11] Ibid 153.
[12] *King v Jones* (1972) 128 CLR 221.
[13] *Western Australia v Commonwealth* (1975) 134 CLR 201.
[14] *Cheatle v The Queen* (1993) 177 CLR 541.
[15] Goldsworthy, above n 1, 157.
[16] Ibid 146.
[17] Ibid 144.
[18] (1988) 165 CLR 360, 402.

Court overrule roughly 127 cases[19] and allow referrals to the Constitutional Convention Debates[20] to shape judicial decisions. The decision was significant because it meant extrinsic evidence could now influence judicial decisions. The decision was unanimous and marked a clear departure from legalism. This was culminated in 1992 when the court 'discovered' an implied freedom of political communication within the Constitution.[21] The Court ruled that legislation banning political advertising during election campaigns was unconstitutional because an implied freedom of political communication could be sourced from the underlying principles of the Constitution.

Two years later Deane J referred to the Constitution as a 'living force.'[22] A shift in constitutional interpretation towards an increasingly creative approach was a burgeoning prospect. In 1993, Toohey J asserted that an implied bill of rights was on the horizon[23] and in *Leeth v Commonwealth*[24] Toohey and Deane JJ held that the Constitution contained an implied right to equality. Justice Murphy in 1986 even claimed the Constitution contained an implied right to free speech.[25] Some commentators argued the Court was adopting a style similar to the 'naturalist and instrumentalist'[26] approach of the US Supreme Court. However, some justices remained loyal to more grounded principles of interpretation. In *Theophanous* Brennan J disagreed with Deane J arguing 'the Court… can do no more than interpret and apply its text, uncovering implications where they exist. The Court has no jurisdiction to fill in what might be thought to be lacunae left by the Constitution.'[27] Legalism seemed to be waning before a more creative and imaginative approach but by the end of the 1990s it would again represent the view of the majority of the High

[19] Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (Speech delivered at the Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) <http://www.hcourt.gov.au/assets/publications/speeches/formerjustices/mchughj/mchughj_26nov04.html>.
[20] *Official record of the debates of the Australasian Federal Convention*, Parliament House Melbourne, 20th January to 17th March 1898.
[21] *Australian Capital Television v Commonwealth (ACTV)* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
[22] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 171–3. The 'living force' theory was also emphasised by Toohey J in *McGinty v Western Australia* (1996) 186 CLR 140, 170.
[23] Justice J Toohey 'Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 170.
[24] (1991) 174 CLR 455.
[25] *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581–2.
[26] Goldsworthy, above n 1, 155.
[27] *Theophanous* (1994) 182 CLR 104, 142–3.

Court.

A Return to Legalism

The High Court cases of *McGinty*[28] and *Re Wakim*[29] were heard before a High Court composition McHugh J has claimed was critical of its recent activism.[30] *McGinty* saw the Court eschew its earlier creativity and reject the implied guarantee of 'one vote, one value.' McHugh J argued that the implied freedom of political representation was fundamentally wrong[31] with Gummow J submitting the earlier decisions were incompatible with orthodox interpretative principles.[32]

Re Wakim concerned the validity of cross-vesting legislation enabling State jurisdiction to be conferred on Federal courts. Despite its convenience and that it had operated for over ten years the Court held 6-1 that it was unconstitutional under ss 76 and 76 of the Constitution. Even Gaudron J who had often sided with Toohey J[33] agreed with Gummow and Hayne JJ that the Court must follow 'the application of accepted constitutional doctrine.'[34] McHugh J reiterated his familiar opinion that the Court's function is to apply the Constitution as the drafters intended and with the language they provided.[35]

Importantly, *Re Wakim* relied heavily on past authorities.[36] If the tide of progressivism of the 1990s had continued to develop, a different decision would likely have been reached. But instead, more than 90-years on, the decision of *Engineers'* was being rejuvenated. By 1997 in *Lange*[37] the threat of interpretational activism had subsided with the political communication implication recast as a principle actually extracted from 'the text and structure of the Constitution.' Justice

[28] *McGinty v Western Australia* (1996) 186 CLR 140.
[29] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
[30] Mchugh, above n 19.
[31] *McGinty* (1996) 186 CLR 140, 232, 234, 236.
[32] Ibid 289.
[33] *Lange v Australian Broadcasting Corporation* (1987) 189 CLR 520.
[34] (1999) 198 CLR 511, 550 [126].
[35] Ibid [35].
[36] In *Re Judiciary and Navigation Acts* (1921) 29 CLR 257; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 579.
[37] (1987) 189 CLR 520.

Selway has commented on the current interpretational climate stressing 'it may not be strict "legalism" but it is legalism nonetheless.'[38] The momentum behind the 'living force' conception has been derailed with what some commentators have referred to as a return to legalism.[39] Since then, only Kirby J has maintained that the Constitution is to be interpreted in light of contemporary settings.[40]

The Judicial Flexibility of Legalism

The rationale behind 'living force' interpretation is that it aims for Constitutional validity and to ensure the Constitution remains adaptable and relevant to contemporary society. As Kirby J has noted 'The Constitution is to be read according to contemporary understandings of its meaning, to meet, so far as the text allows, the governmental needs of the Australian people.'[41]

However, traditional principles of interpretation have proven themselves capable of flexibility. Firstly, originalist interpretation accommodates the application of constitutional provisions to new objects the framers may not have foreseen.[42] This has subsequently been called the 'connotation' and 'denotation' principle.[43] Goldsworthy has actually lamented the scope of judicial opportunity afforded under policy considerations, notably 'the remarkable abuse of constitutional powers through constitutional interpretation' in relation to the 'massive expansion of Commonwealth powers since 1920.'[44] Indeed, the *First*[45] and *Second*[46] *Uniform Tax Cases*, the *Tasmanian Dam Case*[47] and *Workchoices*[48] support Goldsworthy's assertion that even under the constraints of legalism the High Court operates with a vast degree of judicial freedom and can interpret the Constitution in ways unanticipated by the

[38] Justice Brad Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia', (2003) 14 *Public Law Review* 234, 250.
[39] Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5(2) *Constitutional Law and Policy Review* 21, 29; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court', (2002) 37 *Australian Journal of Political Science* 241, 241–2.
[40] *Re Wakim* (1999) 198 CLR 511, 599–600; *Re Colina* (1999) 200 CLR 386, *Grain Pool of Western Australia v Commonwealth* 202 CLR 479, 515.
[41] *Eastman v R* (2000) 203 CLR 1, 80 [242].
[42] *Street v Queensland Bar Association* (1989) 168 CLR 461.
[43] Goldsworthy, above n 1, 122.
[44] Goldsworthy, above n 1, 138–9.
[45] *South Australia v Commonwealth* (1942) 65 CLR 373.
[46] *Victoria v Commonwealth* (1957) 99 CLR 575.
[47] *Commonwealth v Tasmania* (1983) 158 CLR 1.
[48] *New South Wales v Commonwealth* 229 CLR 1.

framers.

This is not particularly surprising. The Constitution was always intended to be interpreted broadly.[49] Because orthodox interpretation, as Dixon J once proclaimed, has always treated the Constitution as an instrument that confers powers 'wide enough to be capable of flexible application to changing circumstances,'[50] judicial decision-making already fosters a measurable degree of discretion.

Part II

Precise Interpretation

An examination of how the Constitution is written and how it confers law-making powers favours a legalistic approach to interpretation over a progressive one. As Chief Justice Mason has asserted the Constitution is a 'prosaic document expressed in lawyer's language.'[51] It is wildly dissimilar to the US Constitution, eschews a bill of rights and has avoided the use of 'grand declarations of national values or aspirations.'[52] Unlike the US Constitution, it was not written by revolutionaries but by colonial politicians assisted by an imperial government that fostered a system of parliamentary supremacy unrestrained by a binding Constitution of its own. The context of the document's formation suggests the framers were cognisant of the fact 'judicial interpretations of abstract rights could have unpredictable and undesirable consequences.'[53] Put simply, what the Constitution actually *is* makes it incompatible with principles of judicial progressivism. Nowhere is this highlighted more definitively than by the Constitution's inclusion of s 128.

Section 128 acts as a provisionary safeguard against progressive interpretation because it explicitly specifies the only way in which the wording of the Constitution can be changed or amended. Which is through the carrying of a successful

[49] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81.
[50] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81.
[51] Anthony Mason, 'The Australian Constitution in Retrospect and Prospect' in R French G Lindell and C Saunders (eds) Reflections on the Australian Constitution (*The Federation Press*, Sydney, 2003) 8.
[52] Goldsworthy, n 1, 109.
[53] Ibid.

referendum, a momentous and notoriously difficult challenge.[54] By including s 128 in the Constitution the framers denied the High Court the opportunity of readily sourcing implications from its text. As Dawson J has contended 'implications must be necessary or obvious having regard to the express provisions of the Constitution itself. To draw an implication from extrinsic sources… would be… guided only by personal preconceptions of what the Constitution should, rather than does, contain.'[55] Similarly Gummow J has argued an interpretation inconsistent with s 128 would pervert the purpose of judicial power because the Constitution would then extract its meaning from the personal opinions of successive judges.[56] In fact, s 128 has been so successful in preserving the wording and application of the Constitution that it can explain some of the High Court's more creative decisions as justices have sought to bypass its stringency.

The interpretive inflexibility of the Constitution seems to be apparent within the judgments of those justices who have sought to modernise it. Deane J's 'living force' interpretation rests on the assertion that it was actually "intended" to be a living instrument.[57] Which is a somewhat paradoxical stab at interpretational legitimacy. In *Newcrest Mining (WA) v The Commonwealth*[58] Kirby J stated the seemingly legalist viewpoint that 'the duty of the Court is to interpret what the Constitution says and not what individual judges may think it should have said' and 'nor should the Court adopt an interpretative principle as a means of introducing, by the backdoor, provisions of international treaties… not yet incorporated into Australian domestic law.' But his honour then immediately argues that where there is ambiguity, the Constitution justifies an interpretation that supports obedience to international human rights law![59]

Deane J claims originalist interpretation of the Constitution regrettably promotes the 'declaration of the will and intentions of men long since dead.'[60] However, the drafters' opinions and intentions do not shape the policy considerations or outcomes of justice that judicial interpretation of the Constitution creates. The drafters'

[54] Only 8 out of 44 referendums have been successful.
[55] *Theophanous* (1994) 182 CLR 104, 194.
[56] *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75.
[57] (1994) 182 CLR 104, 171.
[58] (1997) 190 CLR 513.
[59] Ibid 657–8.
[60] (1993) 182 CLR 104, 171–2.

intentions merely shape how the Constitution is to be utilised. Which is that it be interpreted as a regulator of law-making powers. It is for the mandated parliament to be creative and progressive. As Goldsworthy has aptly proclaimed 'by deciding against a bill of rights, the framers entrusted to parliaments, not courts, the responsibility for striking the necessary balances between competing rights… balances that require political rather than legal judgment.'[61] The Constitution merely sets out the structural framework of how law-making powers are distributed. It does not present itself as a mechanism for the facilitation of judicial maneuvering based on the desirability of particular political outcomes.

'Living Force' Interpretation

An enlightening comparison to Australia's Constitution is the Constitution of the United States. Inspired by the American Revolution and enshrining a Bill of Rights, the American Constitution is composed of grand poetic language and is consequently much more susceptible to creative or even opportunistic interpretation. This is particularly evident in the 'un-enumerated' rights it has been interpreted as upholding.

The US Supreme Court's interpretation of the Fourteenth Amendment, which specifies '[no State shall] deprive any person of life, liberty, or property, without due process of law' is a pertinent example of the result-oriented constitutional analysis the US Constitution is capable of facilitating. In *Roe v Wade*[62] the US Supreme Court held that the un-enumerated constitutional right to privacy contained in the Fourteenth Amendment's concept of personal liberty was broad enough to encompass abortion.[63]

Construing a right to privacy, which already stems from a nebulous concept of personal liberty, as constituting a right to major medical intervention is transparently opportunistic. The logical connection between personal liberty, privacy and abortion rights seems concocted and suspiciously convenient. Even moreso considering the right was held to extend only to the first trimester.[64] Such a specific interpretational

[61] Jeffrey Goldsworthy, 'Constitutional Implications Revisited', (2011) 30(1) *University of Queensland Law Journal* 10, 22.
[62] 410 U.S. 113.
[63] Ibid 113, 162.
[64] Ibid.

outcome does not appear to have arisen organically from the substance of the text but to have been manufactured to reach a predetermined goal. Whatever the individual's opinion on abortion it is undeniable the decision in *Roe v Wade* illustrates judicial creativity.

The Fourteenth Amendment has also been interpreted as protecting the un-enumerated right of same-sex marriage. In 2015 the Supreme Court held in *Obergefell v Hodges*[65] 5-4 that same-sex marriage was Constitutionally protected. The Court was vehemently split on the Constitution's bearing on the decision with Roberts CJ lamenting:

> 'If you are among the many Americans — of whatever sexual orientation — who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not Celebrate the Constitution. It had nothing to do with it.'[66]

Justice Anthony Kennedy who supported the decision defended the 'living force' theory asserting that those who wrote the Bill of Rights and the Fourteenth Amendment never presumed to know freedom in all its dimensions,[67] but wanted to enshrine liberty 'as we learn its meaning.'[68]

The decision perhaps reveals the temptation for justices to adopt 'living force' interpretation to secure political outcomes expediently. But it seems clear the motivation behind these decisions is to achieve personal assumptions of what is honorable and right rather than on protecting the structural integrity of the Constitution.

The Risks of 'Living Force' Interpretation

[65] 576 U.S.
[66] Ibid 28.
[67] Ibid 7.
[68] Ibid 5.

There *is* practicality in the 'living force' theory. In his 'Bicentennial Speech' in 1987 Justice Thurgood Marshall celebrated that many constitutional principles that emerged to meet moral changes in society, including human rights for African Americans, were not germinated by the Framers but by those 'who refused to acquiesce in outdated notions of liberty, justice, and equality, and who strove to better them.'[69] Holmes J expressed a similar sentiment in *Missouri v Holland* remarking '[the framers] called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.'[70]

The 'living force' theory does aim to instill contemporaneity into the Constitution to ensure its continued capability of providing fair and valid outcomes within the context of modern society. However, it is a hazardous and inherently unstable endeavour. Of the various constitutional interpretations the 'living force' theory is the most defenceless to judicial activism. Activist interpretation is anathema to the Constitution because it seeks to modify for politically desirable outcomes a document that was designed to transcend political influence.

The 'living force' theory can also precipitate unintended consequences by thwarting changing societal attitudes and social development. US Supreme Court Justice Ruth Ginsburg has criticised *Roe v Wade* for damaging the changing perceptions of women's rights in the 1970s and for stifling the 'momentum on the side of change.'[71] According to Justice Ginsburg, abortion rights should have been secured more gradually by state legislatures in a process that would have legitimised its development.[72] The opportunism and questionable reasoning of *Roe v Wade* offered pro-life activists a clear target and seemed to validate their position that the Supreme Court had exploited the Constitution for political purposes. Justice Ginsburg is an unlikely proponent of such criticism. A staunch advocate of womens' rights Ginsburg believes the culmination of gender equality will take the form an entirely female

[69] Justice Thurgood Marshall, 'The Bicentennial Speech' (Speech delivered at The Annual Seminar of the San Francisco Patent and Trademark Law Association, San Francisco, May 6 1987).
[70] *Missouri v Holland* 252 US 416, 433 (1920).
[71] Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit* (May 15 2013) The University of Chicago Law School <https://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit>.
[72] Ibid.

Supreme Court.[73] However, her honour's views on gender equality make her displeasure with *Roe v Wade* and her criticism of opportunistic judicial decision-making all the more powerful.

Ultimately, the Australian Constitution does not possess the equivalent concepts or rhetorical language of its American counterpart and cannot be interpreted as broadly. But to the extent both documents are comparable the US Constitution's facilitation of un-enumerated rights should function as a stern warning. Not because 'living force' interpretation has not contributed to worthy causes or because justices should not be permitted to bring about meaningful change. But because the Constitution can only be interpreted flexibly to a certain point before it loses its integrity and becomes essentially pointless. As Justice Antonin Scalia remarked in his book *A Matter of Interpretation*, '[by] trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.'[74]

Conclusion

The Constitution's strengths do not flow from its malleability to contemporary socio-political pressures. Designed to regulate power rather than accommodate political outcomes, manipulation of its function risks violating its utility. Interpretational change should not encompass the progressivism envisioned by the High Court's more progressive justices. And it does not need to. Three weeks after Chief Justice Mason's retirement his honour suggested 'too much should not be made of the movement away from legalism towards a more purposive… form of jurisprudence. The text of the Constitution must always remain the principal foundation of Constitutional interpretation.'[75] Whatever the High Court's future interpretational direction, it must remain grounded in notions of legalism and in the meaning of the Constitution's text rather than in Deane J's 'living force' theory.

[73] *Ginsburg Wants To See All-Female Supreme Court* (November 27 2012) CBSDC <http://washington.cbslocal.com/2012/11/27/ginsburg-wants-to-see-all-female-supreme-court/>.
[74] Justice Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (Princeton University Press, 1997) 47.
[75] McHugh, above n 19.

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