Chapter Three

Until the High Court Otherwise Provides — Electoral Law Activism

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My topic is the activism of the High Court of Australia in two voting rights cases. Let me preface all that I am about to argue with this caveat. I want my judges to think their job is to give the written legal text its intended meaning, or its original public meaning. I do not want judges who think they are there to prune and shape some metaphorical "living tree" Constitution whose meaning shifts and alters with changing social mores and values – or, to be rather more accurate, that shifts with the *judges'* sense of changing social mores and values. I think you will be queasy about this latter approach if you are at heart a democrat and believe all this updating and pruning ought to be done by the elected representatives of the voters, or after success in a referendum under section 128 of the Constitution.

My comments are about how our top judges are interpreting words on paper. My comments are *not* about my preferred legislative responses if I could magically be made a member of Parliament and somehow enact my personal druthers.

I turn now to look at two recent High Court of Australia cases, the 2007 *Roach* case and the 2010 *Rowe* case, and then to try to back up that general claim about judicial activism.

Roach is a prisoner voting rights case. *Rowe* has to do with the entitlement to vote as well, but this time more circuitously as a result of when the electoral rolls (listing all eligible voters) are to be closed and hence prevent any further applications for enrolment. In both *Roach* and *Rowe* the social policy lines that had been drawn by the democratically elected legislature were invalidated by the top judges of the land. The governing statutory provisions were struck down in majority judgments of the High Court of Australia – 4 of 6 of the sitting justices decided to do so in *Roach*; in *Rowe*, it was a 4-3 decision.

Both majority decisions, in my view, rest on the most implausible and far-fetched understanding of the meaning of the Australian Constitution, one that significantly liberates the point-of-application interpreter when it comes to gainsaying the elected legislature. This *Roach* and *Rowe* understanding of how to give meaning to Australia's written Constitution allows its judicial exponents to claim – at least implicitly – that legislation can be (and was) constitutionally valid at the time of federation and the coming into force of that Constitution (and, indeed, that the legislation remained so up to 1983 and beyond) but that that same legislation is today no longer constitutionally valid.

On top of that, this same *Roach* and *Rowe* approach to constitutional interpretation – to giving meaning to that text – also carries with it the clear and undeniable suggestion that if Parliament keeps its hands off old legislation governing, say, when prisoners can vote or when electoral rolls must close, then that old legislation will be, and will remain, valid. But where a Parliament in the recent past happens to have legislated to liberalise those rules, then no Parliament of even more recent vintage will be able to revert back to the older rules. Not ever. The Constitution, or so these *Roach* and *Rowe* judges claim, forbids it. If that is not a bizarre implication of any approach to giving meaning to a constitutional text, it is not clear what is.

Now the *Roach* and *Rowe* cases cannot be understood in isolation. They need to be seen as the latest incarnation of the so-called implied rights series of cases dating from the early 1990s. I have

written about those implied rights cases elsewhere, and the very fast-and-loose interpretive approach the majority justices relied upon in those cases. In brief, these decisions were very much premised on a "living tree" or "living constitution" interpretive approach.

For our purposes in this paper it will suffice simply to remind the reader of the reasoning of Chief Justice Mason in the *ACTV* case. Writing with the majority, the then Chief Justice arrived at the conclusion that the Australian Constitution – one that explicitly and deliberately left out any US-style bill of rights or First Amendment free speech entitlements and protections opting, after much debate and discussion amongst the Founders, to leave such social policy balancing exercises to the elected Parliament – nevertheless implicitly created an implied freedom of political communication with reasoning that followed these steps:

(1) The Constitution mentions that elected Members of Parliament are to be "directly chosen by the people";

(2) hence these MPs are representatives of the people;

(3) hence they are accountable to the people;

(4) thus they have a responsibility to take account of the views of the people;

(5) therefore the judges interpreting this Constitution must be able to, and hereby do, assert that there is an implied freedom of political communication.[1]

That provides sufficient background to allow us now to consider the majority reasoning in both these voting cases. In *Roach*, the four majority justices ended up deciding that the 2006 Act which disqualified all prisoners is invalid, but that the older legislation that disqualified those serving sentences of three years or more is constitutionally valid and can stand. So, after *Roach*, the Commonwealth Parliament is left with the scope to disenfranchise those prisoners serving three or four or more year sentences ("four years good"), but not to do so to those serving fewer than three years ("two years bad") – I like to call this "four years good, two years bad" approach *Animal Farm* judging.

Let us start with the joint judgment of Justices Gummow, Kirby and Crennan. After some introductory paragraphs and a recounting of the facts and how the legislation had changed over the years, we eventually come to the third of the plaintiff's grounds for challenging the legislation, namely that there is an implied freedom of political participation tied to the implied freedom of political communication. The three majority justices then proceed to side-step this third plaintiff's grounds, half-heartedly asserting that "what is at stake on the plaintiff's case is *not so much* a freedom to communicate about political matters but participation as an elector in the central processes of representative government" (para [40]). That is that. And it is not an overly persuasive assertion because the joint judgment justices need to tell us *why* it is impermissible for the elected Parliament to do what it did in enacting the 2006 Act.

Or, put the other way around, when the joint judgment justices come to tell us why it is that they can strike down and invalidate this statute, they have virtually nothing to point to in the Constitution itself. Indeed, they again and again make reference to the earlier implied rights case law.

Perhaps that partially explains the rather half-hearted or irresolute nature of their rejection of this third plaintiff's grounds for invalidating the 2006 Act.

From there we get reliance on another implied rights case, the *Lange* case, and we get assertions that "the Constitution makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution" (para [45]). Yes, the joint judgment recognises that representative government can be a dynamic institution through time in two ways: either because Parliament itself occasionally changes the rules falling under this aegis without any supervisory role

or input from the top judges (which is precisely the situation in, say, New Zealand) or, alternatively, because the top judges do have a supervisory role.

Indeed, this whole *Roach* case, and the *Rowe* one that followed, are simply instances of our High Court answering that question in its own favour, concluding that the top judges have been given a supervisory role by the Constitution, at least by the year 2007 if not before.

The constitutional issue is *not* a first-order one of whether you believe or think or prefer top judges to have this role. No, the issue is a second-order interpretive one of which alternative was meant by the Constitution, properly interpreted.

So the question in *Roach* is *not* whether the justices think prisoners serving sentences of fewer than three years ought to be able to vote. No, the question is whether our written Constitution ultimately left this decision with the elected Parliament or with the unelected High Court.

The next step in the argument put forward by the three joint judgment justices involves telling us why the "on their face" (para [46]) outcomes the ss 8 and 30 constitutional provisions appear to dictate – namely, that this issue of prisoner voting has been left to Parliament to decide – are wrong.

That next step involves an ancillary helping one, namely co-opting the Solicitor-General and all sorts of claims about what the Commonwealth accepts in running this case.

In other words, there is an element of "reasoning by claiming the Solicitor-General conceded the point" going on here. You see it in paragraphs [48] and [49]: "in oral submissions, the Solicitor-General of the Commonwealth readily accepted that a law excluding members of a major political party or residents of a particular area of a state would be invalid . . .".

That is a highly debatable claim, however, and, in my view, not a concession that ought to have been made. The general point can be made by thinking of a parliamentary sovereignty jurisdiction such as New Zealand. There, the elected legislature has no legal or constitutional constraints – no power in the top judges to pronounce a validly enacted law to be invalid. Rather, the constraints are all political and moral, many of them tied to the limits on power that democracy creates.

The Constitution of Australia clearly, and without doubt, not least in the many references to "until the Parliament otherwise provides" and the deliberately chosen lack of a bill of rights, places much weight on these parliamentary sovereignty-style political limits on power. Unlike the United States, our founders and our Constitution were extremely confident in the ultimate good sense and moral bearings of the voters. The scope for judges to invalidate statutes is much less than in the United States and Canada (where a potent bill of rights exists).

My point is that much that in the abstract might today seem distasteful, if enacted into law, nevertheless does not therefore – simply because of its distastefulness or even because of its perceived egregious nature to many present day sensibilities – thereby become something over which the top judges have been given a supervisory role by the Constitution. And, given that, the concessions attributed to the Solicitor-General are problematic, to put it kindly.

Lastly, for present purposes, let me note that the joint judgment picks out and cites an *obiter dictum* comment from *McGinty* by Brennan CJ, one bearing on what "chosen by the people" in ss 7 and 24 means. Not a single other *dicta* on this point of the many other possibilities on offer by many other justices was considered or cited in the joint judgment.[2] Worse, the joint judgment omits the tentativeness and qualifications and limiting context present in Brennan CJ's original *McGinty obiter* observations, simply noting in paragraph [83] that: "In *McGinty* Brennan CJ considered the phrase 'chosen by the people' as *admitting of a requirement*[3] 'of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them'."

And, with that, the joint judgment is effectively finished as far as providing a ratio for thinking "the 2006 Act impermissibly limits the operation of the system of representative (and responsible) government which is mandated by the Constitution" (para [40]).

Notice how rapidly, in just two paragraphs, the justices of the joint judgment turn the issue from one of (i) whether the Constitution, when properly interpreted, leaves this matter to the

elected Parliament or gives the judiciary a gainsaying, supervisory role that includes the power to invalidate disfavoured statutes into one of (ii) whether the disqualifications in the 2006 Act are "for a 'substantial' reason" (para [85]).

But that is it. The rest of the joint judgment is simply a form of proportionality analysis. It contains all that extra double dose of discretionary judicial input and potential judicial gainsaying power, all that plastic malleability, that Thomas Poole argues all proportionality analyses share.[4]

At this point I could note the inherent cherry-picking nature of all proportionality-type analyses. Or I could ask why the 2006 legislation is characterized as being about "stigmatising" prisoners rather than about their "character".[5] But, instead, I turn now from the joint judgment to that of Chief Justice Gleeson.

I can be very brief here. That is because Gleeson CJ's reasoning on the core issue of whether the top judges do or do not have a supervisory or "able to gainsay the Parliament" role when it comes to the details of the franchise – an issue over which there was no binding authority, only *obiter dicta*, before this *Roach* case – is so truncated.

Gleeson CJ's judgment starts with five and a half paragraphs that, in effect, re-state the fact that the drafters and ratifiers of the Australian Constitution had a fundamental faith in the good sense of the voters, and in the democratic process, and in political checks on distasteful outcomes rather than court-focused, judge-driven ones. Indeed, up to the first two or three sentences of paragraph [6] of the Chief Justice's judgment there is no indication that he will decide for the plaintiff and invalidate the 2006 Act.

His reasons for doing so are given in the next two and a half paragraphs – after that it is just 17 paragraphs of what amount to proportionality analysis and asking *not* whether judges have this supervisory power but rather whether they ought to use it to gainsay Parliament in this instance, and I am not here directly interested in that latter endeavour.

Here is the Chief Justice's argument. Firstly, after all the aforementioned genuflecting in the direction of how large a role parliamentary sovereignty thinking has played in the thinking of those who drafted and ratified our Constitution and, indeed, those who interpreted it in years gone by, his first step is to point to overseas democratic jurisdictions and to suggest that there is "a broad agreement as to the kinds of exception [to universal suffrage] that would not be tolerated" (para [6]).

Stop at this first step and notice two things. One is that interpretation of a constitutional text by appeal to overseas practice makes it overwhelmingly likely that the interpreter is adopting – without argument – a "living Constitution" or "living tree" interpretive approach.

The second thing to notice about Gleeson CJ's appeal to some broad overseas agreement as to who can be denied the vote is that it is empirically or factually suspect or debatable. The implied suggestion that the 2006 Act stands off by itself at the far end of some notional spectrum of how other democracies opt to deal with the issue of prisoner voting is plain out false. Many of the States in the United States have a considerably more restrictive legislative regime *vis-à-vis* prisoner voting than the 2006 Act enacted. And some of those jurisdictions that are more liberal about prisoner voting are so solely because of judges saying a bill of rights demands as much; they are the result of Parliament being over-ruled by judges under a bill of rights – as happened twice in Canada, a fact our majority justices omit to mention when citing the leading Canadian case of *Sauve*.

The second step in the Chief Justice's reasoning or argument comes in the form of a rhetorical question followed by a statement of belief. "Could parliament now legislate to remove universal adult suffrage? If the answer to that question is in the negative (as I believe it to be) then the reason must be in terms of ss 7 and 24 of the Constitution . . ." (para [6]).

However, this second step (aside from seeming to reason backwards) neatly finesses or fails to distinguish two important reasons for why the answer to the rhetorical question might be in the negative. One possibility, the one the Chief Justice simply assumes to be correct, is that the answer is "no" because the top judges have been afforded a supervisory role by the Constitution and, were

the elected parliament to legislate in this way, the unelected judges would over-rule it and invalidate the statute.

The other possibility, the live one in New Zealand to this day and the one in keeping with all the Chief Justice's earlier genuflecting in the direction of the large role our Constitution reserves to parliamentary sovereignty, is that the answer is "no" because of the democratic and political good sense of the voters and their elected representatives – as has worked perfectly well in New Zealand and in the United Kingdom (leave aside, if you wish, the period after the latter's entry into what is now the European Union).

The third and final step of Gleeson CJ's reasoning, before moving to his proportionality analysis, amounts to an argument that words in a constitution can remain the same and yet, "because of changed historical circumstances including legislative history" (para [7]), the power and supervisory role they grant to the courts can expand over time.

Gleeson CJ does not, of course, put it quite in those terms. What he does is to call in aid an analogy, the *Sue v Hill*[6] case about the meaning of the words "foreign power" in section 44 (i) of the Constitution, and the High Court's decision that the United Kingdom now (but not immediately after federation or, indeed, for some time thereafter) fell under the aegis of that phrase.

I do not believe that analogy is persuasive. Even leaving wholly to one side all originalist type objections, and there are many, we can still point to serious flaws in this attempted analogy here to *Sue v Hill*. One is that the mixture of factual determinations and evaluative moral sentiments or judgments is quite different when deciding if the mother country is now a "foreign power" as distinct from deciding how many inroads into 100 percent adult suffrage the legislature will be prevented from making based on the phrase "chosen by the people".

Gleeson CJ obfuscates this by claiming that " 'fact' refers[s] to an historical development of constitutional significance" and then "of changed historical circumstances including legislative history" (both para [7]). On examination, however, the changed historical circumstances – the so-called facts – that matter in *Roach* are past decisions by High Court justices (most importantly, the implied rights cases) as well as past legislative changes. But these "facts" are encapsulations of "ought" judgments by judges and legislators. They are not observations about which country now controls Australia's defence policy or foreign policy or whether Australia has its own embassies abroad.

As the dissenting judges make plain, it is an odd understanding of how to give meaning to a constitutional text to think past legislation can alter the Constitution's meaning.

More bluntly put, the sort of "facts" Gleeson CJ needs to rely on here are all ones that are just ethical and evaluative statutory and case law judgments by other political and judicial players (including a bit of glancing overseas to see what other jurisdictions' value judgments today are about prisoner voting). These are overwhelmingly all "oughts", some of which are masquerading as "ises" in the form of past statutes and cases.

So this attempted analogy fails in my view, leaving nothing convincing to support the Chief Justice's conclusion. As with the joint judgment, this is an unpersuasive piece of reasoning to the conclusion that the Australian Constitution grants a supervisory role to the top judges over these *Roach*-like issues.

In my opinion the dissenting judgments of Hayne J and Heydon J are far superior.

Perhaps the worst aspect of all as regards these majority judgments is how potentially limitless and unconstrained they leave the supervisory role of the top judges. In fact, it is hard to see what constraints the majority ratios place on judges' future gainsaying of Parliament powers other than ones the judges themselves feel inclined to observe. Here, today, it is which prisoners can vote. Next, on the reasoning of the majority, it could be almost anything else – however trifling.

And that brings us to *Rowe*, a 4-3 High Court of Australia decision in which the majority invalidated another 2006 Act initiated by the Howard Government. This Act related to when the electoral rolls must close after the calling of an election. The previous 1983 Act had provided a 7-day

grace period to those people who were entitled – indeed, obliged on pain of penalty – to be enrolled. The 2006 Act removed this 7-day grace period.[7]

Put somewhat differently, only three years after the 2007 *Roach* decision, and the then Chief Justice Gleeson's preliminary paragraphs about how much faith the drafters and ratifiers of the Australian Constitution had placed in the voters and the elected representatives of the people to decide contentious and debatable issues, and we now have, in *Rowe*, a decision in which the majority says the top unelected judges get to supervise when the electoral rolls will close. Or, to be rather more accurate, the majority in *Rowe* asserts that *the Constitution itself gives the High Court Justices a second-guessing or gainsaying power* over the elected legislature as regards 7-days and all the other minutiae surrounding the many competing incentives and disincentives involved in trying to get voters to enrol in a timely fashion. That is the meaning, supposedly, of a constitutional text which explicitly and clearly shunned a bill of rights, one that makes repeated references to "until the Parliament otherwise provides", and one where this claim about it supposedly meaning this rests only on four words of text, "chosen by the people", in sections 7 and 24.

In my opinion *Rowe* is one of the worst decisions by the High Court of Australia in years, and by worst I mean most feebly reasoned and most reliant on implicit assumptions (including those about how to give meaning to a written text) that can never be explicitly cashed out in any convincing or persuasive way. And just to make myself clear, let me tell the reader that were I able to legislate on a blank slate I would give the 7-day grace period. My criticism rests on the level of interpreting the law, not one's druthers if he could make it.

Whether you agree with that evaluation of mine, or not, notice that there are two distinct ways or bases on which to criticize the majority judgments in *Rowe*. They are quite distinct. One involves playing on the majority's home field as it were. So it involves accepting that *Roach* was correctly decided, unlike the second path I will come to which does not. If you opt for the first path, however, you concede that Australia's top judges have, or now have, a supervisory role – meaning, to be blunt, that they now have the power to invalidate or strike down Parliament's legislation – over a host of voting-related issues. What falls under this judicial supervisory power, or new supervisory power, is somewhat uncertain as the majority's reasoning in *Roach* has what might be thought of as a huge "penumbra of doubt" and a small "core of settled meaning" as far as indicating to where these newly-enunciated judicial supervisory powers extend. In other words, why you reject the majority decision in *Rowe* (should you opt for this first path) is *not* because you say the Constitution gives no supervisory role to the top judges on these matters. For you, that pass has already been sold. Instead, you disavow *Rowe* simply because you say the majority justices erred in performing that supervisory function. In particular, you say their proportionality analysis, denominated in whatever terms you prefer,[8] misfired. The 2006 Act in *Rowe* – after having been vetted and checked and supervised by the judges – ought to have been found acceptable. (And this seems largely to be what Justice Kiefel's dissent amounted to.)

Of course, travel down this first path for criticizing the majority in *Rowe* and not only do you accept *Roach* and its creation (or discovery) of a supervisory role for top judges in this area, you also have to ignore or gloss over or finesse the fundamentally unbounded or unconstrained or massive judicial discretion-enhancing nature inherent in all such proportionality analyses. And, on top of that, you are also forced – implicitly if not explicitly – to adopt an approach to constitutional interpretation that disavows completely all forms of giving the words in the Constitution the meaning they were intended to have by the drafters or the meaning they would have been understood to have by the ratifiers at the time.

The Constitution, for you, becomes this metaphorical "living tree" or "living Constitution" whose meaning changes over time (and so potentially locks in nothing) as determined by – and only by – a majority of High Court justices at any point in time.

Yet even that is not all. For travel down this first path for criticizing the majority and you also make it very likely that any and all future proportionality analyses will involve some looking overseas

at other jurisdictions, almost all of which (as it happens) will be ones with a bill of rights. You may make some perfunctory remarks about how proportionality analyses here in Australia without a bill of rights fundamentally differ from those in jurisdictions with such instruments, but that will not prevent you from citing and arguably relying on those jurisdictions and the judicial conclusions reached there. (As a strictly empirical matter, though, it may be that American case law and American resolutions of such things as when prisoners can vote will be quietly ignored.)

To put it bluntly, this first basis for criticizing the majority in *Rowe* involves conceding so much justificatory and theoretical turf to them, that you end up playing all your games on the majority's home ground. You lose before the kick-off (even if you are occasionally allowed to score the odd try or touchdown).

The other basis for rejecting the majority decision in *Rowe* is more principled, more coherent, and the only one with any long-term attraction or prospects. This second path is founded on an explicit rejection of *Roach*, on an assertion that *Roach* is bad law – for all the reasons given above and given in the two dissents there.

And if you have any doubts about how dependent upon *Roach* the majority judgments in *Rowe* are, consider this. The majority judgments cite *Roach* in 29 different paragraphs.[9] By my rough reckoning that means that over 10 percent of all of the paragraphs in the majority judgments in *Rowe* cite or refer to *Roach*.

If, like me, you believe that any persuasive criticism of the majority decision in *Rowe* pre-supposes – indeed, demands – the concomitant assertion that *Roach* was and remains bad law, then you will think that the Solicitor-General ought not to have relinquished, permanently, home-field advantage by assuming the correctness of the plaintiff's test, and hence of *Roach* itself (and hence should not have accepted the almost inevitable proportionality analysis – framed in terms of the need for the legislature to have "substantial" reasons (as evaluated by the judges) for its statutory provisions – that will come with accepting *Roach* as good law).

All three majority judgments in *Rowe* point to the Solicitor-General's acceptance of *Roach* and use that acceptance to arrive at their conclusion. Indeed, the reliance on *Roach* is such that we can be brief in outlining those majority judgments.

Chief Justice French spends one paragraph and the first sentence of the next paragraph at the very start of his judgment answering in the affirmative the core question of whether the top judges have a supervisory role over Parliament when it comes to "[i]ndividual voting rights and the duties to enrol and vote" (para [1]). A recital of the constitutional words, "directly chosen by the people" from sections 7 and 24, a citation to *Roach*, a bald implicit assertion that Parliament needs to justify its decisions to the judges in this area, and the rest is really just proportionality analysis and deciding that removing the 7-day grace period is disproportionate.

The joint majority judgment of Justices Gummow and Bell is likewise pre-occupied with asking the "Is this reasonably appropriate or rationally connected to a legitimate aim?" question rather than the "Is this any of our constitutionally allocated business?" question. It places huge reasoning weight on the *Roach* decision and then follows the Chief Justice in deciding that the 2006 Act fails the "rational connection" or "substantial reason" or "reasonably appropriate and adapted" or "proportionality" test (all mentioned in para[161]).

The last of the majority judgments is Justice Crennan's. Here there is an historical digression aimed at supporting the living tree approach to constitutional rights and there is a seeming concatenation of the "impolitic" into the "unconstitutional" (para [339]). But this is all much of a muchness with the other majority judgments – lots of *Roach*, mentions of what the Solicitor-General conceded, and the inevitable proportionality analysis coming down against the 2006 Howard Government legislation.

Again, the Hayne and Heydon dissents are far superior, with Kiefel's being unsatisfactory to the extent it is understood as immersing itself in proportionality analysis and so playing the game on the majority's home turf.

I am now in a position to make six concluding remarks about these two cases of *Roach* and *Rowe*. Firstly, the interpretive constraints inherent in the reasoning of the majority decisions in those two cases are almost all in the nature of "This is an evolving document whose changing meaning we seven judges (or a majority of us) will announce as time goes by, based on whether we consider the challenged legislation to be based on 'substantial' or 'proportional' or 'non-arbitrary' reasons." Put more bluntly, the constraints on what the top judges can do are almost wholly self-imposed; they have next to no connection to external factors such as the actual words and text of the Constitution or, just as importantly, the meaning those words had for the real life people who drafted them and ratified them.

Secondly, metaphors about constitutions being "living trees" merely obscure the fundamental choice we have when we forswear New Zealand-style parliamentary sovereignty and opt for a written Constitution. *Either* we will be locked-in by the understandings of the words and text at the time of adoption (subject to section 128 constitutional amendment) *or* we will be locked-in by the decisions of our present day top judges as they, from time to time, change the meanings they attribute to words that have remained the same.

That latter option, the one that permeates *Roach* and *Rowe* and the earlier implied rights cases, pre-supposes that a handful of top judges will be better at identifying the changing social values and mores that drive this living tree type of interpretation than will be the elected representatives of the people who would otherwise be deciding when prisoners can vote or electoral rolls can close.

Thirdly, and related to that second point, this sort of interpretive approach has the potential to politicise the judiciary (and to be seen to do so by citizens) and too often to circumvent or make redundant the section 128 amending machinery. Under the *Roach* and *Rowe* interpretive approaches it really, really matters who gets appointed to the High Court because those appointees will be the ones who will be exercising this supervisory power over Parliament and whose judicial, moral and political antennae will be consulted to determine if this, that or the other thing is substantial enough or rationally connected enough or adapted and appropriate enough for four of seven of them to give it a tick. In that world you cannot make the mistake of appointing someone whose moral antennae differ from your own (and I say that knowing that is a pathetic sort of world to have to inhabit).

Fourthly, my view is that if the *Roach* and *Rowe* interpretive approaches were spelt out, clearly and in advance, to people living in a parliamentary sovereignty democracy (say, people in New Zealand) who were considering whether to adopt a written constitution, they would overwhelmingly reject it and many would do so precisely because of this externally unconstrained interpretive approach you were spelling out to them in advance (which may be why it never is spelt out in advance).

If you doubt that, or if you think that my mooted change of perspective exercise is irrelevant to present day Australians, consider the possibility that a rewritten preamble to our Constitution will soon be put to the electors, perhaps to recognise the role of indigenous Australians. After *Roach* and *Rowe* what form of words – however clear – would ever leave you confident latter-day judges might not inflate them or redirect them or apply them to some purpose neither you nor any other people voting "yes" in a section 128 referendum (indeed, none of those involved in drafting the words either) intended?

Fifthly, and staying with present day New Zealand, here is a further seeming anomaly. In 2010 the New Zealand Parliament enacted the *Electoral (Disqualification of Sentenced Prisoners) Amendment Act*. This statute had to do with prisoner voting. Prior to this 2010 Act prisoners in New Zealand were unable to vote if they were in jail serving sentences of more than three years. The 2010 Act removed (prospectively only) the vote, the franchise, from all prisoners (however long their sentences) provided they have been convicted and are serving that sentence at the time of the election.

In broad terms this New Zealand 2010 Act is the same as the Howard Government legislation of 2006 that the High Court struck down or invalidated in *Roach*. And the implication, the clear implication, must be that the majority justices in *Roach* would not consider any post-2010 New

Zealand Parliament to be one that has been "chosen by the people." (And, if anyone is tempted to counter this claim by arguing that the *Roach* case was specific to Australia and Australia's constitutional text, the clear rejoinder I would make is that virtually all of the majority reasoning in *Roach* relies on a free-standing ethical or political argument about what is politically acceptable or rights-respecting, the text playing little determinative role compared to reliance on the implied rights cases, cherry-picked overseas cases, and the just mentioned free-standing ethical arguments.)

This is the exact same sort of judicial hubris one saw in Canada when the Chief Justice of Canada in *Sauve*, commented upon "self-proclaimed democracies" (meaning all the then democracies like the United States, United Kingdom, New Zealand and Australia that put restrictions on prisoner voting). There is a danger that judges who draw these sorts of contestable and debatable policy-lines can get a tad puffed up. They can implicitly be read as thinking they have superior moral antennae to voters and politicians. Their reasoning can come close to implying such absurdities as that New Zealand's Parliament, post-2010 elections, has not been chosen by the people.

Sixthly, and lastly, I simply pose a hypothetical question. Could Parliament today – post *Roach* and post *Rowe* – reverse itself and take away, say, Senate representation from the Territories? The first *Territory Senators Case*, you will recall, was a majority decision in which the High Court, weighing the seeming conflicting demands of sections 7 and 122, decided that the Constitution had left the question of Senate representation for the Territories to Parliament. It was a matter for the political process.

However, after *Roach* and *Rowe*, and given the reasoning employed by the majorities in those two cases, it seems quite plausible to me that the High Court of Australia would now assert (on no textual basis whatsoever other than the all-purpose "chosen by the people" passage) that they – the judges – had a supervisory role over that issue too. What would prevent removal of this Territory representation, they would think, was not the political good sense of the people but the keen supervisory eye of the top judges. If so, this hypothetical would see us moving from the plausible position that the Constitution gave Parliament no power to give such Senate representation to the Territories (the minority position in that first *Territory Senators Case*), through the position that it was a matter that had been left to Parliament and the political process to decide (the majority position there), on to a new position that our High Court would now never let Parliament change its mind on this matter (a seeming possibility after *Roach* and *Rowe*).

Most of us may well wish the Territories to have Senate representation (just as most of us might prefer a 7-day grace period). Certainly I do. But it is a *reductio ad absurdum* of the High Court of Australia's recent judicial activism to believe the Constitution gives our top judges a supervisory power to prevent such a legislative change of mind. It is a manifestation of the unbounded, unconstrained approach to constitutional interpretation that today passes for orthodoxy on our High Court.

And, on that unhappy note, I finish.

Endnotes

1. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at para [138].
2. Nicholas Aroney makes this point in a convincing fashion.
3. Brennan, CJ, did not say it requires this, but that this was one possibility that might be ascribed to the phrase. Hence, perhaps, the careful wording of the joint judgment.
4. Thomas Poole, "The Reformation of English Administrative Law", *Cambridge Law Journal*, vol 68, 2009, 142 (at 146).

5. See *Roach*, paras [89] and [95].

6. (1999) 199 CLR 462.

7. From the 1930s to the 1983 Act there had been no statutory grace period, but the Executive informally did as much by announcing an election date but delaying the issue of the electoral writ.

8. Perhaps in terms of "substantial reasons", "practical effects", "proportionality" or anything else.

9. See *Rowe,* paras. [1], [20], [23], [24], [25], [45], [86], [117], [123], [151], [154], [157], [160], [161], [162], [323], [325], [326], [327], [33], [366], [372], [373], [374], [376], [381] and [384]. Nine of these references to *Roach* have to be looked for in the footnotes.