Chapter 6

Judicial Appointments
Need for a Policy

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Let me start by mentioning appearances. If you are concerned solely with appearances then what lies underneath can be pretty much irrelevant. No, the concern on this level is with the look of the thing, which to a large extent is the sort of thinking that undergirds and underpins affirmative action-type thinking.

I refer to that class of concerns that are aimed at achieving some sort of pre-determined diversity ratio or balance that reflects wider statistical realities such as the percentage of women on a top court or, maybe, the ratio of some other minority amongst the ranks of university professors. That sort of thing. Of course, which statistical realities fire the indignation of these promoters and defenders of affirmative action can appear quite arbitrary.

For instance, well over half of Americans are Protestants – and, if you include Mormons and Jehovah's Witnesses and a few other such groupings, then it nears two-thirds – and yet not a single judge on the Supreme Court of the United States is currently a Protestant. There are six Catholics and three Jews. Yet this is basically of no concern whatsoever to virtually all of those who would be, and are, indignant at other statistical misalignments based on skin pigmentation or the type of reproductive organs, *attributes wholly outside the control of the future judge or professor* I should stress (well, give or take the odd Caitlyn Jenner).

Bear that in mind because the focus in this paper will be on some real live persons being considered for various important positions in society where the desired qualities and attributes for doing the job well might be thought to extend beyond what sort of reproductive organs someone brings to the job, or how much pigmentation his or her skin happens to contain. That is my theme, "The Need for a Judicial Appointments Policy". This topic, by the way, was given to me by the organisers. Plainly it is ambiguous, as well as being vague. So let me begin with a few clarifications.

Firstly, my comments will be premised on the assumption that a right-of-centre political party really does exist in this country, and I mean in deed as well as in name. So whether you take the suggestions that I am going to make about judicial appointments on the plane of fact or on the plane of fiction might depend on whether you think this assumption is plausible. And let's be honest. There are grounds for doubting it. For instance, all of us have observed a Liberal Party that spent much time before the last election trumpeting its commitment to free speech in the tradition of John Stuart Mill; one that gave endless assurances that the section 18C hate speech provision of the *Racial Discrimination Act* 1975 (Cth) would be significantly altered, if not wholly repealed, and yet – to use the words of Prime Minister Tony Abbott taken from a different context – the voters were dudded. A supposedly Liberal Party retreated and collapsed on this aspect of free speech in a way that would have made the French in the Second World War proud; it opted for the interests of "Team Australia" (whatever that means) over the interests of all those

who voted for it at the 2013 election in part or in whole because of this explicit hate speech repeal promise. Does that in our current Caesar government seem ambitiously liberal?

Or, moving to a different example, take the three dozen odd Liberal members of the parliamentary party who, we are told, recently made it clear that they think their consciences are better than those of the voters. Not for them a plebiscite on same-sex marriage. No, they are happy to run an election campaign knowing full well that next to none of their voters imagines this issue would be decided as a matter of MPs' consciences and then, once these same MPs were ensconced and enjoying those myriad and surprisingly generous perks, do a 180-degree turn on the issue.

Notice that this "My Kingdom for a Conscience Vote" position lines up extremely well, alas, with the Julian Burnside and George Williams-type thinking that supports a bill of rights. The core effect of a bill of rights is its anti-democratic transfer of power from the voters and their elected representatives to a handful of unelected ex-lawyer judges who, as it happens, resolve their disputes by voting. The awfulness of this was recently on display in the United States with the *Obergefell* case where, in my view, the five majority Justices just made up what amounts to a new entitlement; they did not interpret the Constitution of the United States in a way that protected what had originally been locked in and ratified by the voters; they simply legislated from the bench.

Well, that exact same sort of "end run around the voters" is on display when a political party at best obfuscates before an election and then moves to a conscience vote after that election. At least since the beginning of the democratic era it is hard to see how MPs who take that sort of line can easily class themselves as liberals, and I include the John Stuart Mill tradition of liberalism given that Mill, after all, was a utilitarian through and through and utilitarianism has a deep-seated commitment to democracy and to letting the numbers count on big ticket contested social issues. Or, to be a tad more forgiving of these "my conscience, not yours" MPs, their ambitions to be liberal should be made of sterner stuff. And, for what it is worth, if what these 30-odd Coalition MPs are implicitly telling me is that it is the consciences of George Brandis and Malcolm Turnbull and Josh Frydenburg *et al.* that will be on the ballot paper next election – *not* the policies of the Liberal-National Party – then were I them I would not lie awake expecting my Senate vote. In fact, I suspect I would rather spoil my ballot than vote for such an exiguous offering. And, anyway, conscience is most reliably displayed through actions when one has something personal to lose – say, resigning from Cabinet (with all its perks and privileges) because you are disgusted at the Government's U-turn on section 18C. In that sense I have not noticed all that many Coalition consciences in evidence since this new government came into office. Okay, I have not noticed any.

I suppose another way to make this first clarification is to say that although I am going to be making suggestions about a judicial appointments policy in this talk, in a deep sense what might be needed by the Liberal Party of Australia is a candidate selection policy – some set of procedures that might help it select, you know, *liberals* (as opposed to what a good few of the party's elected MPs now appear to me to be – which can be described in a host of ways, none of them involving the word "liberal").

Here is a **second** clarification. My focus in what follows will *not* be on the general question of how any democratic common law country's government – be it of the right or of the left –

ought to appoint judges. That question is certainly topical. Indeed, it is at the centre of the debate currently raging between those, on the one hand, who like the status quo procedure for appointing superior court judges – the current one here in Australia, for example, under which the elected government of the day (after varying amounts of consultation) can appoint to the judiciary anyone it thinks worthy and desirable – and, on the other hand, those who want some sort of judicial appointments commission along the lines of what one sees in the United Kingdom.

I am wholly with the former camp, in favour of the status quo and against the UK's Blairite innovation. Indeed, I have written about this at length in dry academic pieces.[1] The idea of a coterie of current judges, ex-judges and top lawyers appointing their successors as it were – and I would say that that, in effect, is precisely what such judicial appointments commissions do deliver, an incestuous procedure by which the legal fraternity picks the judges, when the legal fraternity holds, say, seven of the 15 commission posts – well, that is a pretty awful prospect for a myriad of reasons, the most obvious being its anti-democratic features (though in my view it is precisely those anti-democratic features that constitute its appeal to so many proponents, including to the upper echelons of what now appears to be a left-leaning legal fraternity – though for PC reasons its leaders might well *balk* at the use of the word "fraternity"). Yet that debate between proponents of some sort of judicial appointments commission and supporters of a system under which the choice of a future judge lies with the elected government of the day is *not* what I will be discussing in a moment. My comments will have to do with how a Coalition government – or, at least, how some hypothetical right-of-centre government in Australia – ought to go about appointing top judges under the existing status quo set-up, which is a quite different topic. You can think of what follows as confidential advice to Mr Brandis and Mr Abbott, advice that is being leaked to The Samuel Griffith Society.

My **third** and final clarification has to do with viewpoint. I am called to the Bar of Upper Canada and, for those who do not know their Canadian geography all that well, that means Ontario. I am not called to any Bar in any Australian jurisdiction. So, at least in one sense, what follows is advice to the Coalition from the vantage of the Visiting Martian, or outside observer; it is the offering of a few suggestions to guide whom they appoint to the High Court of Australia and maybe the Federal Court. The self-interest behind such advice is no more immediate than what flows from wanting to live in a country whose judges interpret its Constitution in a defensible manner.

A Judicial Appointments Policy for George and Tony

My comments will fall under three broad headings:

- Why is one needed?
- What are the two main (and arguably *only*) things that matter in deciding who to appoint?
- Are there any peripheral or ancillary considerations that might be worth considering on occasion?

That is it. Satisfy those three queries and nothing else matters – not whether the candidates for high judicial office are men or women, not whether they are white or black, not their religion, not whom their current spouse might be, nor anything else that might fire the indignation and ire of defenders and promoters of affirmative action considerations playing a role in such appointments to high judicial office.

Let us take each of these three headings in turn.

Why is a judicial appointments policy needed?

The answer here is simple and straightforward. Too many recent Coalition appointments to the High Court of Australia could have been better, in some cases much better. I put that in those kindly terms that good manners and the present situation require. And notice that this criticism is more aimed at the former Howard Government than the Abbott incarnation (2013-15). Can you imagine being a right of centre political party and appointing someone to the High Court of Australia and that appointee then going on to decide with the majority in both *Roach* (2007) and *Rowe* (2010)? To call the people who appointed such a Justice incompetent is to be Mandelaesque in one's charitable outlook. Don't forget, these are two recent cases, one about whether and when prisoners can vote and the other about the closing of the voting rolls, that are two of the worst decisions in recent times – at least if you dislike the rather massive increase in judicial power they signal (via a made-up new proportionality-type test amongst other things) and if you agree with the approach to constitutional interpretation I will defend below.[2] The majority judgments exemplify the unanchored, "living Constitution", "judges know best", "judges simply give themselves more over-seeing power" interpretive approach that ought to gall and disgust most right-of-centre voters, and one assumes most right-of-centre politicians (and arguably *all* elected politicians). And yet we find a Howard Government appointee to the High Court in the majority in both instances. What criteria were used in making that judicial selection? That is not really a rhetorical question because I simply do not have a clue. And please note that in the big case pertaining to the State of Victoria's *Charter of Rights and [No] Responsibilities* – and don't we all just love how Ted Baillieu reneged on his clear promise to repeal at least the worst aspects of that Blair-like innovation, reinforcing my point above about the need for a Liberal Party candidate selection policy – well, in that *Momcilovic* case (2011) the same Howard High Court appointee went off the rails there, too, in my respectful opinion. So did another Howard Government High Court appointee from late in that Government's tenure.

As for the Abbott Government, the two High Court picks from early in 2015 hardly appear to have given us a Heydon or a Callinan, or even a Gleeson (though Gleeson, I lament to say, was also in the majority in that awful *Roach* case). One might well be able to defend the claim that Justices Nettle and Gordon are better picks than those made by the Howard Government in its dying years. But, personally, I would prefer to be aiming at a standard a tad higher than that.

For what it is worth, this failure by right-of-centre governments when it comes to judicial appointments is not restricted to Australia. You can see it in New Zealand; you can see it in the United Kingdom; you can definitely see it in Canada (though up there the government has the excuse – and I mean this literally – that there is almost no one to appoint with interpretively conservative views and also the further excuse that the top court there has grown so big for its boots that the nine Justices simply gave themselves the power to invalidate one of Prime Minister Harper's Supreme Court appointments, which is rather incredible, I know – but the latest pick in Canada seems okay).

What about the United States? Well, at least the Republicans now realise the crucial importance of whom it is they put on the top court, something that was seemingly not true a few decades ago. (For example, think President Reagan's pick of Justice Kennedy, the deciding vote

in the recent *Obergefell* same-sex marriage case; to be fair, President Reagan's then first choice of Robert Bork was axed by the Senate.) But even with all the care that the Republicans now take in choosing who to nominate for the Supreme Court, I am quite sure that more than a few of them have been disappointed by recently chosen Chief Justice Roberts in the two health care federalism cases. (He was a George W. pick.)

At core the situation is this. Once appointed, top judges have a tendency to move leftwards politically and interpretively. There is no such obverse tendency for any appointees in any of the common law countries I have mentioned to move to the right. In fact, I cannot think of a single example of that sort of rightwards drift, though there may be an instance or two out there. But, if there is, it is dwarfed by examples of top judges getting on to the court and to some extent or other moving left – to the sunny uplands on which judges can do justice though the heavens may fall, comfortable in the knowledge the heavens will never fall on them personally; to a place where top judges think they know better than elected politicians and where they feel sure that judicial moral antennae vibrate at a more Godly frequency than those of mere legislators; to a place where the content of the Constitution is not locked in but shifts according to the judges' ability to perceive "implied" features no one intended be there and which no one had been able to see for the previous 9 or 10 decades or more; to a place where judges feel wholly comfortable in telling all the rest of us what counts as a "reasonable" and "proportionate" legislative response, as if they have any basis whatsoever for feeling that way.

If all this judicial hubris strikes you as bad public policy, bad for democracy and bad even for the judges themselves, then you are in my camp (which is not a camp very many legal academics occupy and not very many Bar Association presidents either).

At any rate, my point is that there clearly is a problem and that a good right-of-centre government will have some sort of judicial appointments policy in its back pocket.

Let me now trace out the core features of such a policy in the next two sections.

The Two Key Things that Matter in Deciding Who to Appoint

I can be quite brief here. There are only two main criteria. By far the most important criterion that a right-of-centre government needs to consider is the potential appointee's approach to constitutional interpretation. Let me be clear. I lived for 11 years in New Zealand and, rather like jurisdictions with no written constitution, of which New Zealand is today the clearest example given the UK's move into the European Union (which somewhat undercuts but does not wholly obliterate the UK's credentials as a member of the "unwritten constitution" club). So I would be happy to have no written constitution at all and to have a form of parliamentary sovereignty in play – an admission that would quite literally cause heart failure in a good many Bar Association presidents, Law Council head honchos, all the Human Rights Commissioners, and so on and so forth. Well, if it actually did cause such heart failure I suppose the effects would not be all bad. (And notice that, with parliamentary sovereignty in the background, the worry about who to appoint to the top courts diminishes.)

But, if we are going to have a written constitution, then the question is why? Well, the only sensible answer is the Madisonian one, that we want to take some things off the democratic table; we want to lock certain things in – perhaps federalism or bicameralism or a set of checks and balances or even a list of vague and amorphous moral entitlements that finesse disagreement

which we might call a bill of rights. But the point is that if you are going to go down the written constitution route, and you are going to lock certain things in, then this only has legitimacy for people in the future if the people doing the locking in are seen as having been warranted in doing this. So, if there is a process by which the founders actually took steps that make the final document look legitimate, then it is that past legitimacy that generates the document's authority. And so the job of interpretation of that document should concern itself with seeking the original intentions and meanings of those framers and ratifiers who possessed this authority and legitimacy (because that is what provides the main reason for any of us to obey the document today).

Michael Kirby has called this sort of interpretative approach "ancestor worship".[3] I do not say this often, but Kirby is right. It *is* a form of ancestor worship. Indeed, you might think that *all* interpreting of a written constitution is ancestor worship and that to escape it you need to move to New Zealand, where each generation enjoys parliamentary sovereignty with nothing legally or constitutionally off the democratic table.

That is not quite correct, however, as all interpreting of written constitutions is either ancestor worship or the worship of top judges. You see, there are only two interpretive choices on the table, broadly speaking. You either interpret the document by searching for the most likely historical meaning tied to what those who made it meant or intended, because you think these people were legitimate and authoritative law-makers. Or, you adopt an approach to interpretation that shuns ancestor worship. But once you shun the intentions of the framers and ratifiers,4 and hence move into a world where the written constitution is understood to be metaphorically "living" and the goal has shifted to finding or discovering "changing social mores and values" or "the most moral meaning" and it is still a fact that you and I and 99.999 percent of the population are just as locked in as we were under "ancestor worship" interpretation. It is just that now we are locked in by the preferences, beliefs and values of the seven or nine people who at the moment happen to be our top judges – or, rather, by the preferences of the majority of this small handful of unelected ex-lawyers, as they also must resolve their disagreements by voting, as I mentioned above.

So pick your poison. With a written constitution citizens will certainly be locked in either way. Your choice is between the poison of being locked in by the original intentions or original meaning at the time of adoption (which, by the way, suggests a stable, unchanging set of things being taken off the table, with further inflation requiring a constitutional amendment) OR the poison of being locked in by the ever-changing preferences and values of seven or nine point-of-application interpreters, a committee of unelected ex-lawyers (which is a fluid, dynamic thing, of course, with what is being taken off the democratic table wholly dependent upon what some half-dozen top judges happen to believe is proportionate, most moral, most in keeping with changing social values, call it what you will). Kiwis and pre-EU Brits might dislike and forswear both poisons. But Australians, Canadians, Americans and everyone who lives under a written constitution has to pick between these two. Or, rather, the top judges will pick for us.

For my money the former poison is much to be preferred, not least because it results in a world where top judges do not consult their own political and moral sensibilities to keep the Constitution "alive" and "in pace with changing social values" and "as moral as it can be" but rather they must look for the historical fact-of-the-matter as to what was being locked in back

then. Sometimes no one can really know, as the evidence will be be too scanty or unclear. But be abundantly clear about this. Originalism leaves more on the democratic table; originalism does not allow the judges continually to inflate the scope of their overseeing power.

Put bluntly, originalist interpretation ought to appeal a good deal more to right-of-centre political parties than the only other alternative on offer. Such parties, therefore, ought to appoint judges with such interpretive outlooks. It is all about democracy in a way, and about limiting the input of unelected ex-lawyer judges at the point-of-application, or rather their limiting themselves. (In that sense, this sort of originalist interpretive approach used to be more widely popular in left-of-centre political parties, back when more of the members of such parties preferred all social policy-making to be done by the elected legislature.)

The second criterion for appointment I mentioned above, one that in fact is tangentially related to the first, is the potential judge's attitude to federalism. Things are so far gone on this front in this country that I only raise this in passing. But note that if some version or other of originalism had been consistently adopted by our High Court since the 1920 *Engineers'* case then we would not have a world's near-worst vertical fiscal imbalance; we would not have seen the Commonwealth and High Court together take away the States' income tax powers for all practical purposes; we would not have seen the High Court sanction a reading of our Constitution under which the fact a treaty has been signed provides the basis for the Commonwealth to prevent the Tasmanian Government from building a hydro-electric dam; we would not have seen the idiocy of a Coalition government centralising labour relations powers in the hands of Canberra in the naïve belief that, once centralised, a future Labor government would not use such newfound centralised power (condoned as it was by the High Court in the WorkChoices case using a simply awful interpretive theory) to take us back to the 1980s or 1970s in terms of workplace relations. And the list goes on.

So a candidate's attitude to federalism is an ancillary concern to bear in mind, one that is second to that candidate's attitude to how a constitution ought to be interpreted which is the foremost concern in my view. Of course, in some ways the two concerns are related.

And that is it as far as the two things that really matter when picking top judges is concerned. You will notice that I have not listed such things as: To whom is the candidate married? What sort of reproductive organs does the candidate have? What is the candidate's skin colour? Is the candidate from "our" political party?

Do any other peripheral or ancillary considerations matter?

I am tempted here just to say, "No, nothing else matters". But I will resist that temptation and say this: Take a look at the track record of our High Court and you will see that in terms of over-riding the elected legislatures its record is better ("better" as in it does this less frequently and less virulently) than all its cousin common law top courts save for New Zealand's. This is a least-bad claim, and one causally related to the lack of a bill of rights. But, all the same, in a comparative sense, the record on this front is good, indeed very good. Be clear. Former Justice Kirby would have been, and would still be today, the most interpretively conservative judge on the Supreme Court of Canada on public law issues outside the realm of federalist disputes.

But the High Court's track record, when it comes to federalism, is at the same time far worse than Canada's and the US's top courts' records. Our top court is the most favour-the-

centre court going. So, given that track record, and partly out of despair with nowhere else left to turn, I would also consider factoring in a geographical consideration, a "can we put onto the High Court judges from outside Sydney and Melbourne"? And I mean five or six of them at the same time. Who knows? Maybe we can get some less-centralising decisions from Tasmanians? However, this consideration must only come into play for those who already have passed the "originalist approach to interpretation" and the "attitude to federalism" criteria. But pass those and tell me you are from South Australia and I might be tempted to put you to the top of the list. Heaven knows that former Commonwealth solicitors-general and most of those appointed from the Sydney and Melbourne bars seem to me not to have had a federalist bone in their bodies.

Of course, this is a counsel of desperation. It is one that ought never to override the search for an originalist approach to constitutional interpretation. But such is the state of Australia's federalism, a state in large part caused by the High Court, that it is worth a shot, I suppose. Take these last comments I have made as a loose sort of guideline in how I think George Brandis and Tony Abbott ought to go about looking for people to appoint to our top courts. And remember that you will never find perfect. Or, put differently, "you can't have everything in life" . . . well, not unless you are an MP claiming his or her expenses.

Endnotes

1. See, for example, my "Appointing Judges in New Zealand: If It Were Done When 'tis Done then 'twere Well It Were Done Openly and Directly" in P. Russell and K. Malleson, *Appointing Judges in an Age of Judicial Power*, University of Toronto Press, 2006, 103-121; and my "Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky" in Campbell, Ewing and Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays*, Oxford University Press, 2011, 108 from page 122.

2. For my lengthy dissection of these two voting rights-type cases, see my "The Three 'R's of Recent Australian Judicial Activism: *Roach*, *Rowe* and (no) Riginalism", (2012) 36 *Melbourne University Law Review*, 743-782.

3. See Michael Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24 *Melbourne University Law Review* 1.

4. Or, for other originalists, the public meaning at the time of adoption.