Chapter Five

The Engineers' Case: Time for a Change ?

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1. Introduction

When first asked to contribute a paper to this conference, the subject assigned to me was *The Engineers' Case: Time for a Change?* In accepting this proffered task, it occurred to me that the answer to the question thus posed was a little obvious. It was like asking, "Bosnia: Is a solution desirable?"; or, "Dawkins: a disaster?"

Yet as I have considered the *Engineers' Case*, and the school of literal constitutional interpretation which it has engendered, it occurred to me that the general topic of *Engineers* is a little more complicated than is usually thought to be the case. In particular, it became obvious that the parallels between the High Court's cynical adoption of a centralising literalism in that case, and its equally cynical invention of implied rights pursuant to a subsequent change of fashion in judicial politics, have more than a little in common in terms of judicial method and interpretative ethics.

For this reason, a more accurate title for this paper might well be *Literalism and the High Court: The Changing of the Fraud*. What needs to be considered are not only the manifest deficiencies of *Engineers*-style literalism, but also its relationship with the Court's newest constitutional three-card-trick, implied rights theory.

Here, it has to be acknowledged that all of us, even constitutional lawyers, have our own pet hates. These are instinctive, intensely negative visceral reactions, which are not necessarily inconsistent with, but which certainly transcend rational thought. Such hates are usually focused on such corporeal objects as football teams , politicians and television announcers. My own father-in-law, an intensely mild man, has a loathing of this type for the late Bert Evatt, which is so pronounced that the mere mention of his name is enough to produce a nervous rash.

It is against this background that I must admit at the outset that my pet hate in constitutional terms has always been literalism. I have hated it from my first encounter with the *Engineers' Case* as a student. I have hated it with a growing passion as an academic, and the more I thought about it, the more I loathed it. I hated it when nearly every other legal academic in Australia thought it was little less than holy writ. And now, when many of its previous supporters have abandoned it in favour of implied rights theory, I find myself hating it just as much as ever, with a cold, dismissive detestation.

In short, I have always regarded literalism as intellectually bankrupt as a method of constitutional interpretation, and beyond this slight debility of admitted pre-judgment, would assert my utter objectivity in assessing its faults and virtues.

Nevertheless, I am intensely alive to the irony of my present position as a constitutional commentator. I have spent much of my academic life attacking literalism, and in my writings have whiningly urged the High Court to abandon it. But now that the Court is in the process of at least partially loosening the grip of literalism, I find its designated replacement to be even less palatable. The difficulty is that, if literalism is intellectually bankrupt as an interpretative method, then its mooted replacement - implied rights theory - is the constitutional equivalent of a South American economy which last turned a profit supplying Simon Bolivar's army.

What I intend to attempt in this paper is as follows. Firstly, I propose to define what is meant by literalism. Secondly, I will examine the deficiencies of literalism as a method of constitutional interpretation. Next, the paper will consider why the High Court adopted literalism as its chosen constitutional methodology in the first place. Following upon this will be an assessment of the place of literalism in contemporary Australian constitutional law. This will include a brief account of the challenge posed to literalism by emerging implied rights theory, and the inconsistency which has emerged in the High Court's treatment of rights cases and federalism cases as a result of this clash. Crucially, the paper will go on to consider the true nature of the Court's present implied rights theory, which it presently favours over literalism. Finally, the paper will consider the proper place of literalism within the wider context of Australian constitutional interpretation, conceding that such a place does indeed, to a limited extent, exist.

2. The Idea of Literalism

The essence of Australian constitutional literalism is that the words of the Constitution are to be given their ordinary - that is their literal - meaning. What this means in simplistic terms is that the Constitution means what it says. The document is to be read as an ordinary piece of English language, and the words to be ascribed their every day meaning. The essence of literalism is thus that the Constitution may be read in much the same way as a telephone directory or the instructions to a model aeroplane kit, with the assistance of a dictionary, but not much else.

Such a mode of constitutional interpretation is potentially attractive for a variety of reasons, and these reasons will be considered more fully when we examine why the High Court chose to adopt literalism as its anointed constitutional methodology. For present purposes, we may note that literalism has a variety of general advantages. These are that it is "objective", in the sense that there is no need to have resort to considerations extraneous to the document; it promotes certainty, in the sense that the Constitution may be applied simply as it is written and as it is read; and literalism is, as a method of interpreting the Constitution, profoundly easy, at least in the sense that it provides a self-contained, intensely narrow regime of constitutional construction. Thus, the basic appeal of literalism undoubtedly lies in an apparent objective simplicity.

However, the real problem for literalism in constitutional terms is that the Constitution has never been remotely like a telephone directory or a set of instructions for a model aeroplane. In fact, the Constitution is the product of a complex range of historic intentions, designed to produce a blue-print for an exceptionally evolved form of federal government. These intentions are those of the Founding Fathers, who haggled and wheedled for a decade over the exact type of Constitution which Australia was to possess. In this connection, what literalism inevitably means in practical terms is the de-emphasising of this historic constitutional intention. Literalism, with its exclusive emphasis upon the words as they appear in the text, must ultimately be destructive of any recourse in direct terms to notions lying at the heart of the Founders' vision, such as a broad concept of strongly decentralised federal government.

Of course, supporters of literalism have been quick to stigmatise recourse to such concepts as being productive of nothing more than rampant constitutional uncertainty. The difficulty here is that the asserted certainty of literalism itself vanishes upon application. Thus, at the heart of the idea of literalism is the notion that it is indeed possible to understand the Constitution unaided and unadorned by all extraneous considerations. The assumption is that the vast majority of the Constitution's provisions lie innocently open to human understanding, like so many shell-fish in a chowder.

In reality, however, nothing could be further from the truth. In many contexts, the terms of the Constitution are susceptible to more than one meaning, and any attempt to maintain that the text

is dispositive is at best misguided, and at worst positively misleading. In such contexts as the meaning of s.92, or of the term "excise" in s.90, it is impossible to make sense of the Constitution simply by having recourse to its words. In these connections, the only intellectually satisfying course is to seek to understand the Constitution in the broad context of its making, and by reference to the broad character of the government which it sought to ordain. This critical deficiency of literalism will be returned to presently.

Consistently with the comments previously made concerning the tendency of literalism to emphasise the words of the Constitution while down-playing any recourse to its essential character, the main practical effect of literalism in the course of Australian constitutional law has been to de-emphasise the concept of federalism as a controlling consideration in constitutional interpretation. This follows inexorably from the fact that federalism is part of the basic frame of the Constitution, and suffuses that entire document, underlying as it does virtually all the dispositions of the Founding Fathers. The effect of literalism's exclusive insistence on the primacy of the words has been to drastically limit the use which can be made of this controlling constitutional principle in the interpretation of the Constitution. Critically, it has meant that the use of implications from the nature of federalism for the purpose of curtailing the exercise by the Commonwealth Parliament of its enumerated powers has been greatly limited.

In fact, literalism has had precisely the opposite effect. As s.51 gives to the Parliament of the Commonwealth highly specific powers, the effect of literalism is to widen the ambit of these powers by insisting that no regard be had in their interpretation to the limiting effect of the over-arching federal character of the Constitution. In light of the fact that the States have unspecified residual powers, the consequence of this approach has been to expose the competencies of the States to ongoing reduction at the hands of the Commonwealth.

In light of this, it is unsurprising that the first High Court, composed of the Founders Griffith, O'Connor and Barton, adopted a decidedly non-literal approach to the Constitution, interpreting it - and particularly the powers of the Commonwealth Parliament - in light of a fundamental implied term of federalism. That implied term ran essentially to the effect that the powers of the Commonwealth were to be interpreted in as limited a fashion as possible, so as to minimise disturbance to the powers of the States. In essence, this doctrine of "reserved powers" posited that the Constitution was to be read, not literally, but subject to a fundamental historic vision on the part of those who wrote it.

As every law student knows, this approach was swept away in 1920 by the splenetic judgment of Sir Isaac Isaacs in the *Engineers' Case*. There, the doctrine of literalism was firmly established, with the High Court holding that the words of the Constitution were to be interpreted according to their natural meaning, and without regard to any notion of reserve powers. The basic effect of this was that it was only the words of the Constitution, and not the intention behind those words, which were to determine Australia's constitutional direction.

In practical terms, this resulted in a massive accretion of power to the Commonwealth. If this were all, the *dicta* contained in the *Engineers' Case* would have been a catastrophic blow both to the position of the States, and to the achievement of the federalism intended by the Founding Fathers. However, the literalism that was initiated in *Engineers'* came to have an even more insidious operation as it was developed and embroidered in later cases. This was because *Engineers'* literalism over time acquired a particularly savage twist. This was that in interpreting the legislative powers of the Commonwealth, they were to be given not only their literal meaning, but the widest possible literal meaning that their words could bear.

Thus, the proximate outcome of *Engineers'* was a proposition along the lines that, when interpreting a power contained in s.51, a Court was to construe it absolutely literally, and in doing so, the widest meaning which would be borne by the literal words was to be adopted.

It may immediately be seen that such an injunction amounts not to literalism *simpliciter*, but to a form of "ultra-literalism", which necessarily bears no relationship to the actual intention underlying any particular provision. Thus, the triumph of this ultra-literalism saw an enormous extension in the scope of Commonwealth power. Precisely why, in the context of a federal Constitution, one should invariably prefer any linguistically feasible interpretation of a phrase which involves an extension, rather than a confinement, of central power remains, along with the Bermuda Triangle, one of the great mysteries of our age.

Of course, it must be conceded that *Engineers'* was unable to stand in its full glory for long. As Sir Owen Dixon pointed out in the *Melbourne Corporation Case*, it is impossible to exclude the drawing of all implications from the process of constitutional interpretation; after all, as a governmental blue-print, a Constitution will be the legal document above all others that will require recourse to unstated assumptions for its interpretation. But the implications which emerged after the interpretative catastrophe of the *Engineers' Case* were but pale survivors of the reserve powers doctrine, and strictly limited in their scope. The basic rule remained that the Constitution was to be interpreted literally, and in the case of the powers of the Commonwealth Parliament, ultra-literally.

One basic thing which should be noted of literalism as it emerged after *Engineers'* is its virtual lack of any articulated theoretical basis. The High Court has consistently asserted literalism as the only safe rule of constitutional construction, but has never offered any extended explanation of why this should be so. The closest approach is in *Engineers'* itself, when literalism's claimed virtues of certainty, objectivity and grounding in British precedent were lauded. Thereafter, the Court largely has been content to cite the *Engineers' Case* itself as a sufficient justification for literalism. In fact, it is - ironically - possible to discern the inarticulate premise beneath literalism. This is that literalism, which has been resorted to in Australia precisely for the purpose of defeating the historical intention behind the Constitution, is itself in fact based upon a fundamental notion of intent.

The true claim of literalism, as a mandated constitutional approach within the Anglo-Australian tradition, is that the words of the Constitution themselves provide the best guide to the intent of those who wrote them. This has always been the underlying rationale of literalism as a phenomenon in the interpretation of statutes within the British legal tradition, as is discernible even in the judgments in *Engineers'*. Thus, when one probes to the heart of literalism, even it concedes that the ultimate search in constitutional interpretation is the search for intent.

3. Why Literalism?

There are two basic classes of reason underlying the High Court's adoption of literalism. The first class of reasons is political, while the second is legal in character.

Of the two, it cannot realistically be doubted that it has been the political, rather than the legal, which has rendered literalism so enduring a force in Australian constitutionalism.

The general point to be made concerning the political justifications for *Engineers'*-style literalism is obvious enough. Such justifications promoted the adoption of literalism as an interpretative methodology, not through an appeal to its legal plausibility, but rather by reference to the acceptability of its results in policy terms.

Thus, it is apparent from the merest reading of the joint judgment in *Engineers'* that far more than legal factors are at work. No one has ever doubted that Sir Isaac Isaacs and his brother

Justices were thoroughly motivated by a desire to augment the powers of the Commonwealth Parliament in adopting the stance they arrived at; nor has any serious commentator expressed doubt on the same point in relation to more modern Justices, such as Sir Anthony Mason, in decisions such as *Tasmanian Dams.*

Commentators and judges alike have been virtually unanimous in viewing literalism as having been the means by which the High Court has consciously conferred upon the Commonwealth the increased powers necessary to achieve what the Court has regarded as a desirable centralisation of responsibility within the Australian federation. So much has been more or less explicitly recognised by the Court itself for at least 30 years, as in the famous *dictum* of Windeyer J. in the *Payroll Tax Case*, where he argued that the *Engineers' Case* simply involved reading the Constitution in a new light, a light shed by national development and the need for more cohesive governmental power.

In fact, seen in this way, literalism is itself merely a reflection of a far broader constitutional phenomenon. This is the phenomenon of "progressivism", whereby judges will consciously discharge their interpretative role so as to judicially amend the Constitution in accordance with what they perceive to be the current demands, needs and desires of the Australian people. This phenomenon will be returned to later in this paper, but it may be noted for present purposes that it is entirely illegitimate as an incident of constitutional interpretation within a popular democracy.

In reality, the political character of literalism is so manifest that the real question is not whether it bears such a character, but rather the underlying issue of why the Justices of the High Court have taken up the cause of centralism with quite such relish. This is a broad issue, and too complex to be fully canvassed here, but a few very brief points may be made.

The first is that judges like Isaacs undoubtedly were deeply influenced by such scarring experiences as the First World War, and the corresponding perceived need for strong, directive government. Subsequent judges undoubtedly were similarly impressed by the Depression, the Second World War, the threat of international Communism, and the need for `globalisation'. To such judges, all of these factors went to suggest that the destiny of Australia would be best assured by the increased centralisation of power.

Secondly, such views were consistent with previously existing and very intense British biases in favour of centralising tendencies. The glories of British history had always been centralising glories, whereby remote ethnic minorities (preferably Celtic, best of all Celtic-Catholic) were decisively brought beneath the heel of Westminster. Such views were roundly expressed by commentators such as Dicey, and are still to be heard ringing down the corridors of Canberra today, many of their articulators being proud descendants of precisely those fierce and independent princes who found centralism to be so fatal an ailment. Consequently, the trend toward centralisation has always been attractive to many Australian lawyers. It is worth pausing to note that this tendency, much beloved of the Left, in fact represents one of the last remnants of truly imperial theology in Australian constitutional thought.

A similar impetus for centralism in the judicial mind has been the undeniable success of the Commonwealth as a vehicle of national identity in times of nationalism, a factor that undoubtedly has come into the minds of judges - as of other citizens - from at least the time of Isaacs. Coupled with this national success of the central government has been the political and economic decline of the States, with the result that our federal integers have for many years born a shabby and down-at-heel appearance, as unlikely to provoke loyalty as it is to engender sympathy.

Nor should it be forgotten that the High Court is, at the end of the day, a national institution appointed by the national government. However independent the Court may be, it is part of the central judiciary, and it can come as no great surprise that it is inclined to think of things central as being more important than those of State origin. This tendency has not been ameliorated in any sense by the recent tendency to appoint to the High Court Justices who have served previously on the Federal Court, and thus come to the Court with a pre-existing central focus. Nor has the preponderance of Victorian and New South Welsh appointees on the High Court bench done anything to mitigate its national focus. Finally, it must be remembered that the Court is nothing more itself than a particularly sophisticated microcosm of the national policy. The intellectual fashion in Australia has been, for a great many years, in favour of centralism over federalism, and to this extent the High Court is doing nothing more than reflecting its predominant milieu.

All of these reasons have combined to produce a Court highly inclined to the pursuit of centralism, and to the adoption of any constitutional mechanism which will achieve this end.

As has been indicated, however, there are also non-political, legal considerations underlying the acceptance by many judges of the *Engineers'* methodology. Chief among these has been an undeniable strand of traditional literalism in British statutory interpretation. To British judges, trained in a tradition of legal positivism and objectivity, the notion that statutes could be interpreted simply according to their tenor, and without the slightest recourse to extraneous considerations, has always been attractive. Indeed, it is this British tradition that provided much of the justification for the Isaacs' approach in *Engineers'*.

Indeed, the attractiveness of literalism as a politics-free, objective, legal means of interpreting a Constitution within the fundamental British tradition of judicial independence cannot be over-stated. To judges trained in the notion that their role was, by definition, apolitical, it was enormously comforting to be able to believe that the process of constitutional interpretation was nothing more than a mechanistic application of the written word.

Moreover, such a method of interpretation had the further undoubted virtue that it was, at least in theory, profoundly simple and easy. There was no need for a judge to be trained in the techniques of history or political economy: all that was required was a legal education, a dictionary, and a modicum of common sense. It has already been noted that literalism has, in reality, never operated in so straightforward a manner, but the appeal of such rhetoric to a judge raised in the British legal tradition is undeniable.

In summary, therefore, it may be accepted that different judges adopted literalism as their chosen methodology for different reasons, and for a mixture of different reasons.

However, it cannot be disputed that overwhelmingly the most important institutional reason for the High Court's adherence to literalism was its purely political desire to advance the centralisation of power within the Australian federation. To see literalism merely as an outcome of a British legal literalistic tradition is to lose sight of this primary objective. Of course, this agenda is articulated in overt terms far less often than sententious calls for "certainty" and "objectivity", though even here the Court's pretence has slipped more often of late. Nevertheless, in line with what has been said earlier concerning the origins of the *Engineers'* approach, the essentially political sub-structure of literalism cannot be seriously doubted.

4. Deficiencies of Literalism

It is already abundantly apparent from the general approach of this paper that the author is no supporter of literalism. However, it is appropriate at this point to dwell briefly and more

particularly upon the specific deficiencies of literalism as a methodology of constitution interpretation.

The first, and probably the greatest deficiency of literalism, has been its absence of any articulated theoretical justification. As has already been noted, the traditional judicial justification of literalism has simply been that it is the "best" or "safest" or "only" or only "objective" method of interpreting the Constitution. While *Engineers'* itself tended to be grounded most upon an appeal to British constitutional tradition, subsequent applications of literalism generally content themselves with citing that Case as having laid down incontrovertible principles of constitutional construction. Thus, it would be extremely difficult for anyone reading a case within which the Australian High Court has propounded and applied a literal technique to discern, in purely theoretical legal terms, precisely why such a technique was thought to be so intellectually compelling. In short, the premise behind literalism is less inarticulate, than mute.

As we have seen, that premise probably rests upon some notion that the words are the safest guide to the intent, but this has rarely (if ever) been acknowledged in an Australian constitutional context, for obvious reasons.

This leads on to the second deficiency of literalism. As employed in Australia, literalism has been used for the purpose of defeating precisely that intent to which the words supposedly are the safest guide. That is, literalism has been utilised by the High Court for the precise purpose of frustrating the intentions of the Founders that the Australian federation be fundamentally decentralised in character.

Thus, rather than the literalistic interpretation of constitutional language being used to implement the intentions of the Founders, it has been used to oppose and defeat them. This is profoundly true of the ultra-literalism that has ultimately emerged in the wake of *Engineers'*, according to which the powers of the Commonwealth Parliament set out in s.51 have consciously been given an ambit vastly beyond that intended by the Founders.

Indeed, in the context of the uneasy conjunction between Founders' intent and literalism, the Court has at times seemed to flirt with a bizarre notion of "objective" intention, this being the intention disclosed by a construction of words according to the *Engineers'* ultra-literalistic canon, regardless of whether the "objective" intention so produced bore any relationship to the actual intention upon which the words of the Constitution were founded. On such metaphysical inanities has literalism thriven.

Flowing inexorably from this intentional deficiency is a further failure of literalism: it is irredeemably unhistorical. No-one could seriously dispute that literalism has not promoted the historical purpose of the Constitution as devised by the Founders. Indeed, it cannot seriously be argued that literalism has operated in anything other than a manner which is in direct opposition to historical fidelity. It may be noted that this particular failure of literalism has become increasingly unattractive of recent years, as judicial pronouncements and academic writings on statutory interpretation consistently have stressed the virtues of a purposive approach to legislation in general.

A fundamental practical failure of literalism is its complete inability to deal with the interpretation of constitutional language which is ambiguous, or even with the elucidation of constitutional language which, while it may not be technically ambiguous, nevertheless cannot intelligently be understood in isolation from the circumstances surrounding its inception.

The difficulty with literalism as annunciated in the *Engineers' Case*, is that it turns upon a concept of `natural meaning'. While such a notion may be fully applicable to the more

mechanical provisions of a Constitution, there inevitably will be numerous fundamental aspects of a Constitution which simply cannot be understood merely as an abstract set of linguistic expressions. Good examples of these phenomena are the concept of "excise" in s.90, and "free trade" in s.92, but a similar analysis could be applied to many of the *placita* in s.51. To understand such provisions it is absolutely necessary to have regard to evidence of their historical purpose, and any attempt to comprehend them in documentary isolation would be doomed to abject failure.

What this means in practical terms for a literalist judge, is that whenever that judge is faced with a piece of constitutional language which is indeterminate in this sense, he or she will be forced to place their faith in improbable assertions that their own chosen `natural meaning' is the only one possible upon the face of the language, despite the fact that three or four of their equally learned brethren have found equally plausible, but divergent meanings. Once again, this fundamental problem with literalism has become increasingly apparent as Australian lawyers, under the influence of mainly North American jurisprudence, increasingly embrace notions of the indeterminacy of language.

A related problem has been the fact that literalism is more or less incapable of dealing with the concept of implications. In every day language, we all accept that implications are as much a part of speech and meaning as explicit expressions. Thus, for example, if I say, with my wallet in hand, "I am going to the bank", then it is a fair bet that I am about to deposit (or withdraw) money, and not to hurl myself to oblivion into the Yarra. Likewise, in a Constitution, the expression "external affairs" in s.51(xxix) almost certainly refers to aspects of foreign relations, and not to extra-marital relationships occurring overseas. Yet both these refinements of meaning flow not from the explicit language, but rather from the context in which that language has been used, revealing as it does the intention behind the words.

Obviously, the capacity of literalism - with its myopic insistence upon `natural meaning' - to deal with such refinements is exceedingly limited, with the obvious result that the intentional element embodied in the notion of implications is devalued within the process of constitutional interpretation. It is true that, in the years since the *Engineers' Case*, the High Court has made some attempt in a federal context to accommodate the concept of implications, but, absent the implied rights cases, no pervasive accommodation has been achieved.

There is, in addition, a whole bundle of highly contemporary reasons why literalism is finding it particularly difficult to cope with modern legal trends. It has already been noted that literalism is inherently unattractive to those committed to a purposive approach to interpretation, and to those who believe that language is characteristically indeterminate in character. There are, however, further difficulties.

The first is that literalism's blanket denial that it is in any way concerned with the achievement of political results, and its allied claim that it provides an apolitical means of interpreting the Constitution, appear increasingly threadbare at a time when judges and lawyers themselves are far more ready - rightly or wrongly - to admit that the process of interpretation contains an element of the political. Thus, to a judge like Justice Michael Kirby, the assertion that literalism is entirely free from the taint of politics must seem, on any historical understanding, bizarre.

Secondly, hand in hand with the willingness of lawyers and judges to admit that at least part of their task is political in character, has been a willingness on their part to admit into the process of legal interpretation perspectives from disciplines other than law. Such disciplines have included history, linguistics, and political science, and all have stressed the need for language to be

interpreted in context before it can intelligently be understood. Once again, such views are antithetical to the simplicities of literalism.

Finally, and crucially, literalism has been found to be deficient by Australia's ruling constitutional elite for the carrying forward of its great project of the waning years of the 20th Century. This project has been the creation of an Australian Bill of Rights by judicial fiat.

The difficulty with literalism in this context is that there quite simply is nothing in the words of the Constitution which gives the slightest comfort to any notion that it contains a cohesive series of human rights guarantees. Consequently, literalism - while it has given good service for the enthralment of the States - is useless for the purpose of creating a judicial Bill of Rights. Consequently, once it became apparent that the Australian legal elite was determined to follow international fashion and create a Bill of Rights, it equally was inescapable that its attachment to literalism, at least in this particular context, would wane.

This consideration inter-locks closely with the fact that literalism has, to some extent, become a victim of its own success. It has been used with great effectiveness to bring Australian federalism to its knees, but now that federalism is gasping in the mud, the need for literalism is less obvious. Like Alexander sighing for new fields to conquer, the High Court has set its eyes upon tantalising empires of human rights jurisprudence, and in so doing has left literalism in some respects like a middle-aged mistress, whose delights having been savoured to the full, may now safely be discarded - at least until the cudgels must be taken up against federalism once again.

5. Literalism Today - Decline in Triumph

In light of what has been said above concerning the deficiencies of literalism, it is clear that its decline as the High Court's chosen constitutional methodology was inevitable, at least from the point when the Court began its flirtation with human rights in the mid 1980s. It may be noted at this point that this comparatively recent flirtation, and the Court's long-standing commitment to literalism, in fact have one fundamental point in common. They are each examples of the phenomenon referred to earlier as `progressivism', whereby the Court determines to alter the meaning of the Constitution in order to give effect to what it believes to be the aspirations and desires of the contemporary community.

Thus, just as the Court has long believed that the Australian federation demanded a greater degree of centralisation, it now believes the nation demands constitutionally entrenched human rights, and that these boons should be provided, not via a democratic constitutional amendment under s.128, but rather through judicial `creativity'. As between literalism and implied rights, the essential thesis as to the right of the Court to unilaterally alter the Constitution is identical: only the direction which the relevant alterations are to take is different.

Consistently with what was said above about the nature of literalism, the High Court had no choice, once it had determined to embark upon a constitutional jurisprudence of human rights, but to modify its attachment to literalism. As has been noted, there quite simply was no possibility that the desired human rights could be discerned within the explicit words of the Constitution, construed literally according to the *dictum* of Isaacs.

Consequently, in the context of human rights, the High Court has adopted a jurisprudence of "implied rights", which will be fully considered in the next section of this paper. In particular, the question will be asked as to whether these "implied" rights have anything to do with actual "implications", but this is a matter which can be put off until then. For present purposes, the obvious point may be made that a pervasive notion of rights based upon implication is fundamentally inconsistent with any adherence to literalism.

Indeed, such a notion in essence bears strong similarities to the doctrine of reserved powers enunciated by the first High Court (and so savagely dismissed in *Engineers'*), in that it is based upon some notion of the fundamental features underlying the Constitution. In the case of the implied right of freedom of political communication, as it has emerged from decisions like *Theophanous*, this fundamental feature is the concept of representative democracy.

Here, it is true that the language of the Constitution may sometimes be broadly indicative, in the most nebulous terms, of the concept of `representative democracy' upon which the right to freedom of political speech is said to be based. Thus, the words of such provisions as s.24 certainly are consistent with some notion of representative democracy, although to argue that they say anything prescriptive about the content of that notion is highly dubious. Nevertheless, it has been upon "implications" drawn from the language of such provisions that the Court has based its jurisprudence of implied rights in decisions like *Theophanous*, *Leeth* and *Australian Capital Television*.

Critically for any assessment of the modern place of literalism, the most cursory reading of such cases will instantly reveal that the constitutional methodology employed there bears absolutely no resemblance to the mechanistic application of literalism within federalism cases. Instead of minutely construing the constitutional text, the Court is concerned rather to extrapolate sweeping generalisations concerning the character of the Australian polity from the merest and most unpromising hints in the Constitution itself.

The result of this has been that, in the area of constitutional interpretation which some members of the High Court clearly see as their monument to the passing of the millennium - the implied rights cases - literalism simply does not hold sway. Indeed, one of the most amusing experiences available to an Australian constitutional lawyer is to read the implied rights cases, to note their stylistic affinity to the reserved powers decisions of Sir Samuel Griffith, and to savour the fact that the rage of Sir Isaac Isaacs would have found as apt an object in Sir Anthony Mason in *Australian Capital Television* as ever it did in Sir Samuel Griffith in any of his more federalist decisions.

Bizarrely, however, the High Court's repudiation of literalism has stopped at the borders of the implied rights cases. Within the other main field of the Court's constitutional endeavours - federalism - there predictably has been no perceptible slackening in its enthusiasm for the literalistic approach laid down in *Engineers'*, and that approach continues to be used for the purpose of limiting State, and enhancing Commonwealth, powers.

Thus, for example, the majority in *Capital Duplicators* showed no tendency to have regard to the fundamentally federal character of the Constitution in construing the scope of the Commonwealth's exclusive powers over excise conferred by s.90, despite the fact that the document's fundamentally democratic character obviously was moving them deeply.

Again, in *Re Australian Education Union*, the majority of the Court followed a catholic literalist approach in construing a scope of the industrial relations power contained in s.51(xxxv), and were not remarkably more sympathetic to arguments based upon implications drawn from the federal character of the Constitution than previously.

Finally, in *Re Dingjan* the Court construed the corporations power (section 51(xx)) in accordance with its usual literalist methodology, with no apparent awareness that such an approach sat most oddly with the free-ranging interpretative method employed in the context of human rights.

At the most, it might be suggested, on the basis of its most recent federalism cases, that the Court has lost some of its enthusiasm for the more blood-curdling of its previous endorsements of

Engineers' literalism, but even this would probably be to overplay any signs of constitutional shame on the part of the High Court's membership.

The depressing conclusion, therefore, must be that the High Court's present constitutional jurisprudence is fundamentally unprincipled. By this is meant that the interpretative method to be employed by the Court in any particular case seems to be chosen, not by reference to constitutional principle, but rather according to the result which the Court desires to procure.

Thus, when dealing with issues of human rights, the Court will adopt a broad, implicatory approach, paying careful regard to the supposed central characteristics of the Australian Constitution. Yet when dealing with an issue of federal power, the Court will adopt the diametrically opposed approach of minutely construing the words of the Constitution according to the established canons of literalism. The contrast could not be starker, nor more revealing of the essentially political character of the Court's proceedings.

6. The High Court and Implied Rights

Introduction

It is now appropriate to consider the whole question of the High Court's recent jurisprudence of implied rights. This has been the Court's most prominent contribution to its own constitutional jurisprudence of the 1990s, and to such judges as Sir Anthony Mason and Sir William Deane, undoubtedly represents their constitutional legacy. Moreover, implied rights theory, to a very real extent, now reigns as the Court's dominant constitutional methodology, and partial successor to literalism, at least within its own, increasingly important sphere. For these reasons, it is critical to analyse the High Court's theory of implied rights, its basic plausibility and true character.

I should first of all make clear my general attitude to implied rights under the Australian Constitution. There is a great tradition of judicial respect in Australia. No matter what one thinks of a decision of a court, and particularly of the High Court, we never allow ourself any epithet more censorious than "puzzling", or "not fully thought out". The most extreme criticism imaginable is that the Court's decision seems "confused", by which we mean that the Chief Justice began to take off his clothes while delivering judgment.

However, when a constitutional court begins to re-write the Constitution in defiance of its mandated role, true judicial respect does not demand silence, but rather vociferous encouragement for the relevant court to revert to its constitutionally sanctioned path. Consistently with this approach, I find the High Court's endorsement of implied constitutional rights neither "puzzling" nor "confused", nor indeed any other polite euphemism. On the contrary, I call it for what it is worth: in Jeremy Bentham's immortal phrase, "nonsense on stilts", and without any defendable basis in historical or constitutional principle.

The Nature of Constitutional Implications

The first step on the way to this conclusion is to observe that the exact constitutional basis of the supposedly implied right to freedom of political communication is profoundly unclear. Of course, we all know that this right is said to derive from the fundamental implication in the Australian Constitution of "representative democracy". To this extent, the process by which the right is arrived at sounds reassuringly familiar, as we have always been used to the concept of constitutional implications, at least since the more bizarre excesses of the *Engineers' Case* were disavowed by the High Court.

More specifically, implications from the Australian Constitution typically have been derived via a two-step process. First, a primary implication is drawn from one of the more general characteristics of the constitutional settlement achieved by the Founding Fathers: for example, that the Australian polity is to be strongly federal in character. Secondly, a derivative implication

is then made from that primary implication: thus, in the present example, from the primary implication of strong federalism is drawn a consequent subsidiary implication that the Commonwealth may not discriminate against the States, nor inhibit the discharge of their essential functions (see the *Melbourne Corporation Case*).

However, this description of the usual two-step process for the drawing of implications says little about the nature of implications as such. Put simply, what is the true basis of a constitutional implication? How do implications arise from the Constitution?

To this crucial question, the High Court has given a bewildering array of answers in the context of its enunciated freedom of political communication. Sometimes, and with a degree of implausibility rivalled only by the wartime announcement of German victories on the Russian front by the late Josef Goebbels, certain Justices of the Court have attempted to base the existence of implied freedoms upon the intentions of the Founding Fathers. A theoretical alternative would be to rest the implied right directly upon the constitutional text, as has sometimes been done in respect of other implications, such as the separation of powers doctrine. However, even those Justices most committed to the implied freedom of political communication have hesitated to claim they discern its existence in, or at least out of, the very words of the Constitution.

Most commonly, therefore, the implied right is said to be "structural" in character. The idea here is that the implication arises mysteriously from the arrangement of the sections and subjects of the Constitution as a whole, and centres upon the immediately attractive, yet ultimately metaphysical, concept that the sum of the Constitution is greater than its parts: which might be rendered in mathematical terms by saying that when the High Court divides the Constitution by one, the answer is 473.5, or whichever Sir William Deane says is the greater.

Yet another possible foundation for the implied freedom has been said to lie in the supposed sovereignty of the Australian people, and so much was urged in argument by Counsel in the *Duck Shooters' Case*. In actual fact, the sovereignty of the Australian people, and whatever legal incidents it may engender, have all the obvious relevance to the implication of rights into the Constitution as saying that the United Nations oil embargo on Iraq is justified because the Amazon River is longer than the Nile.

Nevertheless, the implied rights reasoning based upon popular sovereignty does tend to shade into a final argument, that the implied right is justified as a constitutional phenomenon on the basis that it is the duty of the High Court to up-date the Australian Constitution in line with the aspirations of the Australian people, and that an appropriate vehicle for this process is the drawing of "constitutional implications". This argument, which will be considered below under the brand-name `progressivism', is rarely expressed overtly by the Court, but is present in all the implied rights cases.

It is appropriate to pause at this point to consider the basic question of the true foundation of constitutional implications, before going on to consider whether the implied freedom of political communication properly is referable to such a concept.

The general proposition which needs to be made here is that as a matter of linguistics, law, and constitutional interpretation, if one maintains that something is implied by a statement, one is indicating one's belief that the party making that statement intended to convey such a meaning, even in the absence of express words encapsulating it. Thus, to take a simple example, were I to say to this gathering, "All men stand up", then the implication would be that all women should remain seated, and your appreciation of this implication would be based upon your understanding of the intent behind my utterance.

This is as true in a non-constitutional legal context, as it is in the context of everyday speech. It has long been recognised that it is possible to draw implications from statutes of Parliament, and that these implications are to be based upon the presumed intention of Parliament. The usual test is that the courts will draw an implication from a statute where it is necessary to give effect to the intent of Parliament. Once again, the implication is clearly based upon the supposed intention of the author, in this case, the collective intent of the legislature.

Historically, the position in relation to constitutional implications has been essentially similar. Thus, for example, in the *Melbourne Corporation Case*, the implication that the Commonwealth could not utilise its power to inhibit the exercise of the essential functions of the States was based upon the presumed intention of the Founding Fathers to that effect, an intention the existence of which was plausible to the point of being self-evident. Much the same may be said of such doctrines as the separation of powers. It may be noted that neither of these implications are based directly upon the text of the Constitution, although it is equally true that they do the text no obvious violence. Rather, they are based squarely upon an understanding of the intentions of those who wrote the Constitution, and thus are clear kin to the everyday implications of ordinary life, as with the historically well-founded implications of statutory interpretation.

Consequently, our working hypothesis properly may be that constitutional implications, like any others, are based upon intention. The essential question in deriving them, therefore, must be whether they were intended outcomes of the constitutional settlement envisaged by the Australian Founders. Such an approach follows the general principle for the interpretation of legal documents, including contracts, statutes and Constitutions, that implications represent an attempt to divine the intention of the relevant authors.

Thus, in the present context, we may turn to the question of whether the Australian Founders did indeed intend to create a judicially enforceable right of political communication. When the question is framed in this way, as it necessarily must be in light of our understanding of the nature of implications, it virtually answers itself in the negative. Notwithstanding the fantastic attempts of Sir William Deane to outline an intentional pedigree for implied rights in cases like *Theophanous* and *Leeth*, largely on the basis of a determined misinterpretation of a few phrases in the work of Andrew Inglis Clark, the kindest thing that one can say of such a view is that it is wildly implausible: or, to put it in the language of Sir Humphrey Appleby, a constructive re-application of a modified form of the subjective truth in a re-synthesised format.

We do not merely surmise that the Founding Fathers did not intend to create judicially enforceable rights outside the explicit guarantees of the Constitution: we know that they had no such intention. Firstly, they had before them the compelling example of the United States Bill of Rights, which they consciously chose not to follow. Secondly, and even more importantly, they were absolutely and explicitly committed to Parliament and the common law as protectors of human rights, and frequently said as much. One may disagree with the position of the Founders on this crucial point, but they unquestionably put their faith in a self-regulating parliamentary democracy when it came to the vindication of human rights. In the event that one does wish to repudiate the wisdom or folly of the Founders, then the appropriate place for this repudiation is the ballot box at referendum, and not upon the bench of the High Court.

The result of this analysis must be that the `implied' freedom of political communication is, on any ordinary constitutional basis, simply bogus. As a purported implication it is not authorised by constitutional intention, and thus, unless one were to develop an entirely new, non-intentional basis for constitutional implications, the implied right must be dismissed as fundamentally anti-

constitutional. It is the possibility that there might exist some non-intentional means of justifying constitutional implications that this paper will now address.

Essentially, there are two lines of reasoning which might be relied upon to support the somewhat oxymoronic notion of non-intentional constitutional implications. One is comprised in the idea of structural implications, briefly referred to above. The second is embodied in the idea of "progressivism", which previously has been identified as maintaining that it is the role of the High Court to progressively up-date the Constitution in accordance with the demands posited by the passage of time.

Structural Implications

The concept of structural implications has been relied upon heavily in the context of implied rights by judges such as Sir Anthony Mason, in cases like *Australian Capital Television* and *Theophanous*, and is probably the most "respectable" alternative theory for the basis of constitutional implications. The central idea is that the provisions of the Constitution collectively imply such broad concepts as representative democracy, from which implication one can in turn derive a right to freedom of political communication.

It should be noted from the outset that, on the assumption that we do indeed regard intention as an indispensable element in any implicatory process, these `structural implications' are not `implications' in any sense that we ordinarily would understand: that is, they do not arise out of some over-arching intention of the Framers of the Constitution, running through and above its specific provisions.

Rather, structural implications are at best `implications' by courtesy, in the sense that they are perceived as arising mechanically from the inter-relationship between provisions of the Constitution, thus giving rise (in the minds of individual judges) to particular constitutional precepts, which exist quite independently of any intention behind the relevant provisions, or indeed behind the Constitution as a whole. So much is clearly seen in the *Australian Capital Television Case*, where Sir Anthony Mason strongly divorces structural implications from actual intent.

At this point, it is clear at the very least that so-called structural implications cannot be justified on the same basis as ordinary implications, given that they not only fail to base themselves on constitutional intent, but also (as in the specific case of the implied freedom of political communication) may be explicitly opposed to such intent. Structural implications are, in essence, founded upon random relationships between sections of the Constitution as subjectively perceived through the eyes of individual judges, without even the support of any specific interpretation to be ascribed to particular words, as McHugh J. has trenchantly observed.

However, this lack of any principled intentional base is far from being the only interpretative deficiency in the concept of structural implications. The first point which must be made here is one of basic intellectual honesty. Consistently with what has been argued above, structural implications - as entirely non-intentional phenomena - are not implications at all. As has been seen, this is a simple matter of definition. But if they are not implications, what are they?

My own view is that they would be better described as `extrapolations' or `evocations'. That is, according to the theory of structural implication, judges read the Constitution not to get its meaning, in the sense of the intent which underlies it, but to produce on their own part generalised reactions to it, which naturally will vary from judge to judge. From these generalised reactions, a judge will then deduce particular, and highly subjective constitutional principles, such as the implied freedom of political communication. With considerable accuracy, this could

be termed the `literary criticism' theory of constitutional interpretation, at least since that other branch of human learning has groaned beneath the burden of post-modernism.

According to this theory, the Constitution is read not so much as a law, but as a book. Judges say not what the Constitution means - as they would in the case of a statute - but what it is about, in much the same way as you or I might have very various views concerning what Jane Austen's *Pride and Prejudice* is about. Thus, just as one reader may believe that *Pride and Prejudice* is about forgiveness, while to another it may concern morality, so to a first judge the Constitution may be about representative democracy, while to a second it is a text on equality, and to a third a charter for the free investment of capital. Whatever, from such constitutional evocations as they choose to enjoy, judges are then free to derive such multifarious subsidiary principles as seem appropriate.

The chief problem with this intensely personally satisfying view of constitutional interpretation is that the Constitution is not, in point of fact, a book. It may be acknowledged that the author of a book is not, within certain limits, primarily concerned with evoking a particular and precise response from a reader: generally speaking, what the writer is looking for is some intelligent response. However, a Constitution - like any other law - is not about (or not primarily about) the emotional response of judges. On the contrary, it is about the securing of specified results. Obviously, the results to be secured by a Constitution will be rather more general than those to be produced by a Dog Act, but they will nevertheless be determinate and intended.

In essence, therefore, unlike a book, a Constitution is not evocative in character, but instructional. The Australian Constitution exists to effect the broad dispositions intended by those who wrote it, and endorsed by those who approved it at referendum. Consequently, constitutional extrapolations of the type represented by the so-called `structural implications' must be regarded as inherently illegitimate.

The second difficulty with structural implications is that they do not, in fact, impose the restraint upon judicial creativity sometimes envisaged by their supporters. Here, Sir Anthony Mason (and even Justice McHugh) sometimes display a fondness for structural implications, which apparently is based partly upon the perception that they allow the High Court to be bold, but not too bold. There is, after all, something reassuring about implications that are said to be `structural': they sound solid and concrete, and their potential deployment presumably is not unlimited.

Thus, the language of structure tends to be used as a riposte to those who would argue that such constitutional `implications' pave the road to unlimited judicial law-making. The argument is that there is a clear limit to the `structural' implications that may be made under the Constitution, in the sense that unless they are evident as part of the so-called `structure', they are inadmissible.

This is, however, a quite mistaken view of the nature of structural implications. In reality, there is virtually no limit to the implications which conceivably might be drawn from the perceived `structure' of the Constitution. The reason for this lies in the true character of structural implications as mere `extrapolations' from the Constitution. In this connection, it would not be unfair to say that the variety of the themes which might be structurally extrapolated from the Constitution is limited only by the imagination (or perhaps the psychology) of the Justices of the High Court themselves.

Thus, for example, we have already observed the concept of representative democracy, whose derivative freedom of political communication has grown exponentially during its short span of existence since the *Nationwide News* case. We also have seen the attempt by Justice Deane in *Leeth* to generate a free-standing right of equality, whose eventual boundaries are simply

unguessable. But there are almost innumerable other structural implications which could, with varying degrees of plausibility, be said to arise from the Constitution.

For example, can we not discern, lurking behind the text of s.92, a guarantee of a capitalistic, free market-society? Or, if this does not strike one's fancy, is it not possible to make out a procrustean requirement of redistributive social justice in the powers of the Commonwealth over trade and commerce, taxation and industrial relations? Or, if one's taste runs in more hawkish directions, why does not the defence power point to a high structural duty upon the Commonwealth to maintaining large and capable armed forces? Such examples may seem far-fetched, but to be perfectly frank, are no more obviously devoid of constitutional authority than the implied freedom of political communication so sententiously propounded by the Court.

Yet a further difficulty with structural implications is that, even if one accepts the plausibility of the particular head implication (for example, representative democracy), there frequently will be no necessary or even tenable link between that implication and the proximate constitutional principle being enunciated by the Court. In other words, even if the so-called structural implication seems reasonable, the secondary inference drawn from that implication will be highly tendentious.

A good example occurs in the case of the implied freedom of political communication. As has been seen, this freedom is derived from the more general implication of representative democracy. Let us accept for the moment that the Founders intended that representative democracy should suffuse our Constitution, or in the terminology of Sir Anthony Mason, that this institution arises from the structure of the Constitution. Let us further accept that representative democracy requires the existence of `free speech', whatever that is, for its effective operation. Yet even accepting all this, how can it be said necessarily to follow that there must exist a judicially enforceable right of freedom of political speech within every representative democracy?

As should be self-evident, there will be many other ways in which the necessary freedom of speech conceivably might be secured under the Constitution. To take merely one (and the most pertinent) example, free speech may be secured via the political process as encapsulated in the operations of free and representative Parliaments, which was precisely the course chosen by the Founding Fathers.

How, then, can it be said - whatever view one may take as to the wisdom of the Founders' choice - that either representative democracy or freedom of speech cannot exist in the absence of a judicially enforceable right? Were one seriously to attempt to argue so ludicrous a proposition, it presumably would follow that neither representative democracy nor freedom of speech existed in Australia prior to the free speech cases; in Canada prior to the enactment of the Charter of Rights; and in the United Kingdom to the present day. Consequently, even if one can go so far as to accept such primary implications as representative democracy, and such intrinsic manifestations of this phenomenon as freedom of speech, the further `implication' of a judicially enforceable right of political communication remains a logical nonsense.

A further difficulty with structural implications brings us back to the idea that the Constitution is not a literary text from which themes are to be generalised. It is a central feature of the interpretation of legal documents in the Anglo-Australian tradition that they are to be interpreted according to their author's intention, as manifested through their text and any necessary implications, rather than through the extrapolation out of the document of general values, followed by the distillation of specific principles based upon those values.

It is worth remembering that, were the recent approach of the High Court to constitutional implications to be adopted in relation to any other law, hysteria justly would reign throughout the legal community. Thus, one can only imagine what would occur were the *Income Tax Assessment Act* to be treated by the High Court as the legal equivalent of *Gone with the Wind*, and interpreted as disclosing a structural implication to the effect that matters not specifically dealt with under the Act were nevertheless to be dealt with according to a principle of `fair, just, socially distributive taxation'. Once again, the point must be that the Constitution, like a tax act, is basically instructional in character, and must depend for its effect upon its terms and its intent, not the values of the judges reading it.

This leads me to the final point concerning structural implications. The effect of the High Court's insistence that implied rights may not be trespassed upon by the legislature, in the absence of a finding that a law so intruding is reasonably and appropriately adapted to the achievement of legitimate ends, has had the undeniable effect that the High Court is now involved in the making of purely political and policy decisions, however fastidiously they may be cloaked in legal rhetoric. Whether or not a legislative measure is reasonably or appropriately adapted to the achievement of a legitimate end is not ordinarily a question of law, but a question of policy, involving as it does not only the identification of an end which is `legitimate', but even more problematically, the assessment by the Court of whether particular policy tools are appropriate to the achievement of that end.

To take the particular example presented by the present litigation in *Duck Shooters'*, the balancing of such policy interests as safety, order, and the right to protest is intrinsically a matter of political decision, yet the technique of structural implication as employed by the Court has enabled it to be subsumed within an essentially spurious legal construct.

There are two obvious questions to be asked here. The first is the old one, as to why judges and lawyers should be entrusted with the making of political decisions within an undoubted parliamentary democracy? The second is an even more practical question, which relies upon issues of competence rather than political theory for its sting. Even if one accepts that there is no democratic impropriety in judges assuming a political and legislative function, why would we believe that relatively elderly and cloistered male barristers, sequestered all their lives from the making of any policy decision larger than that concerning the purchase of office stationery, should upon elevation to the High Court bench become qualified for the taking of the most fundamental political decisions in our society?

Given, then, the utter logical implausibility of so-called structural implications as a basis for the implied freedom of political communication, is there some alternative, more ingenuous explanation for the High Court's most spectacular juridical experiment?

This question must be answered unequivocally in the affirmative. On any dispassionate analysis, the language of structural implication has been little more than a polite judicial camouflage for the real constitutional agenda of the Court. The true basis of the Court's rights jurisprudence is not any process of implication, structural or otherwise, but crude progressivism.

Progressivism

As has been noted before, `progressivism' is the view that the High Court, in interpreting the Constitution, should consciously mould it in line with perceived modern needs. It goes without saying that there is not the slightest constitutional warrant for this view, as the power of constitutional alteration resides exclusively in the organism contemplated in s.128 itself.

Thus, properly understood, progressivism is neither a legal nor a logical phenomenon, but rather a political position. This essentially is why it was necessary for the High Court to invent the

constitutional decency of structural implications, in order to cloak what was, in effect, the birth of a constitutional monstrosity of the first order.

Indeed, this is where the whole implied rights debate becomes decidedly irritating. Virtually everybody concerned in Australian constitutional discussion knows perfectly well that the supposed implied freedoms do not arise from the words of the Constitution, were not intended by the Founding Fathers, and cannot be implied out of the Constitution by any logically sustainable process.

Equally, it is universally understood (at least within the privacy of one's study) that the said rights were consciously invented by the High Court, and welcomed by many commentators, for much the same types of reasons: adherence to the current international fashion for constitutional guarantees of human rights, concern over the perceived expansion of executive power, and the pervasive influence of North American jurisprudence, to name just three. Consequently, almost everybody knows - but almost no-one is saying - that it is this highly élite desire for constitutional change, and not any genuine genuine interpretative process applied to the Constitution, that is the true foundation of implied freedoms. However, this uncomfortable reality must be clothed in the respectable robes of legal interpretation, and the language of constitutional implication, if it is to appear in any way consistent with conventional notions of parliamentary and constitutional democracy.

This is not the place for a sustained attack on the constitutionally and democratically illegitimate notion of progressivism, although some discussion of its possible justifications will occur below. However, it may be noted for present purposes that the desire for constitutional change embodied in that doctrine is not commonly encountered outside of the superior courts and law school common rooms. Indeed, far from being democratic in character, as is constantly suggested by the ringing appeals to representative democracy by the chief judicial proponents of progressivism in the implied rights cases, progressivism as a constitutional position is strikingly élite and aristocratic in nature. Thus, when last confronted with proposals for changes to the Constitution in the direction of entrenched human rights (in 1988), the Australian people voted resoundingly against them. The jurisprudence of implied rights is a sneering dismissal of this popular verdict, and far from representing a constitutional triumph for the population at large, rather represents their rejection as intellectual incompetents by a narrow legal élite.

One crucial point to emerge from all this is that, if we are to debate `implied' freedoms, then let us debate their reality, and not their sham justifications. Thus, in any genuine debate over the implied freedom of political communication, what we must be addressing is the phenomenon of judicial progressivism, not the mock implications within which that phenomenon is embodied as a matter of rhetoric. For obvious reasons, supporters of the implied freedoms tend not to enjoy this debate, but it is one upon which I will now touch briefly.

Essentially, there are three possible lines of reasoning to which resort might be had in order to justify progressivism. The first, and probably the least plausible, is that the Founders themselves intended that the High Court should consciously modify the Constitution in line with perceived and developing social needs. Some attempt seems to have been made by Sir William Deane to pursue this line of thought in *Leeth.*

The short answer, of course, is that there is absolutely no evidence that the Founders enjoyed any such hope. Obviously, they recognised that there was scope for judicial interpretation in the construction of the Constitution, as in any other legal document. However, it is clear beyond all argument that the Founders regarded the referendum process contained in s.128, and not a

reformist High Court, as the means by which the Constitution was to be adapted to changing social needs.

Another attempt to found progressivism, albeit in a somewhat indirect manner, has been resort to the developing theory of Australian popular sovereignty. The argument seems to be that as the Australian people are now sovereign, and in particular enjoy full constitutional competence, it follows that the High Court should progressively amend the Constitution via judicial interpretation to bring it into line with the developing needs of the populace - as perceived, of course, by the judiciary.

The exact logic of this curious argument is not immediately obvious, and need not be unravelled here. Suffice to say that, to the extent that emerging popular sovereignty does indeed bear upon particular constitutional dispositions, it might be thought that such a consideration would operate dramatically to underline the people's ownership of the intensely popular amendment process provided for under s.128, rather than its peremptory appropriation by the judicial arm of the Commonwealth.

The final argument in justification of progressivism is at once the least palatable and the most disingenuous. This is that the High Court has no choice but to alter the Constitution by a process of judicial interpretation, simply because the Australian people have proven themselves unequal to the task by their repeated record of voting against proposed constitutional amendments at referenda. This argument could aptly be encapsulated in the aphorism that "the High Court will save us from democracy", and is a sardonic counter-point to the Court's own rhetoric of representative democracy. Given its utter paucity of democratic legitimacy, it is not surprising that the Court itself has been loth to expose such a popularly repugnant justification for progressivism, although it occasionally is voiced in less discriminating academic circles.

In any event, the broader conclusion, in light of this assessment of the possible justifications for progressivism, must be that the approach enjoys no principled constitutional basis. Consequently, it is little wonder that the Court has been loth to expose progressivism as the true foundation of its so-called implied rights.

Judicial Opposition to Implied Rights

For the sake of completeness, it should be noted that, notwithstanding the intellectual bankruptcy of the High Court's jurisprudence of implied rights, judicial attempts to rein in this spurious process of implication have so far themselves proved pitifully unequal to the task, although this assessment may not survive the outcome of *Duck Shooters'*. The primary reason for this is that the opponents of the freewheeling use of constitutional "implications", such as Justices Dawson and McHugh, have tended to proceed on a false premise in attempting to invalidate the use of such implications. Thus, in *McGinty*, Justice McHugh argued that the deficiencies of Mason-style implications lay in the fact that they were based not upon the text or structure of the Constitution, but rather upon extraneous values, and (incredibly) upon the untextualised assumptions of the Founders.

In fact, such an approach reveals a basic misunderstanding of the drawing of implications from the Australian Constitution, both historically and theoretically. In reality, all implications into the Australian Constitution have to some extent been based upon extraneous considerations, at least in the sense that those implications cannot be said to have been derived exclusively from the explicit words of the Constitution. Thus, the federal implications expounded in the *Melbourne Corporation Case* cannot honestly be said to emerge merely from a reading of the words of the constitutional text, or from some geometric assessment of the Constitution's `structure'. Instead,

their existence necessarily is predicated upon some understanding of the intentional and historical realities which lie behind those words.

The real difference between `old' implications and `new' implications, and thus between legitimate and illegitimate implications, does not rest upon the extent of their textual or structural derivation, except incidentally and indirectly. Rather, as has been seen, the true point of delineation between valid and invalid implications is the extent to which any purported implication is based upon the intentions of those who formulated the Australian Constitution. Necessarily, therefore, this is the standard around which any attempt to repel the bogus implications now in favour must be centred. Fundamentally, Justice McHugh should be looking not for words or structures to justify implications, but for intent.

Moreover, given what was said previously in relation to the enormously broad potential for the deduction of structural implications from the Australian Constitution, it should clearly be recognised that any attempt to restrain High Court progressivism by insisting that implications be `structural' is doomed to failure. As was seen, almost any principle may be discovered in the structure of the unfortunate Australian Constitution, provided that the judge looking for it is determined enough to discern its existence. The result is that seeking to restrain the use of implications by insisting that they be structural is like attempting to reduce the use of water by saying that people should drink only when they are thirsty.

A new Framework for constitutional Implications

The question which therefore must be squarely faced, in light of the illegitimate character of the freedom of political communication, and the implication upon which it purportedly is based, concerns the correct approach to the drawing of implications under the Australian Constitution. Consistently with what has been argued throughout this paper, a principled approach to implications under the Australian Constitution would require the High Court to adopt a number of positions.

The first, and perhaps the most important, would be comprehensively to articulate the basis upon which implications are to be drawn from the Constitution. Clearly, and in line with what has been said above concerning constitutional and general interpretative principles, this would lead to the basic proposition that constitutional implications flow from constitutional intent. This intent might be manifested in a variety of ways: for example, where an implication arises inexorably from the text itself, that text would comprise virtually irrefutable evidence of the relevant intention. Non-textual implications, however, obviously would be based upon extra-textual historical sources, particularly such sources as the Convention Debates and the draft Constitution Bills.

Secondly, before an implication would be regarded as having been established, it would have to be `necessary'. `Necessary' in this context does not mean merely plausible, let alone not absolutely outrageous. What it means is that strong evidence would be required to exist supporting any claim that the Framers of the Australian Constitution intended a particular constitutional result. Once again, textual support for a mooted implication would be highly relevant, but in its absence, what would be required would be clear supporting evidence from available contemporary materials. In the event that such evidence was not available, the case for the suggested implication simply would not be made out.

Thirdly, an implication would need to be not merely necessary, but comprehensively necessary. By this is meant that not only would there be required for any implication strong evidence of intent supporting the general proposition upon which the particular implication was grounded (for example, representative democracy or federalism), but also a comprehensive demonstration

of intent supporting the drawing of the secondary or proximate implication being proposed (for example, non-discrimination against the States, or a judicially enforceable right of freedom of political communication). In the specific context of the drawing of a secondary or proximate implication, intention ordinarily would be shown either by reference to specific supporting material, or by demonstrating that once the primary implication were accepted, the secondary implication was logically inevitable. Again, by `inevitable' here is meant unavoidable, not merely possible.

Finally, the Court should expressly disavow for itself any role in the conscious up-dating of the Constitution. There is only one authority entitled to pursue a program of progressivism under the Australian Constitution, and that is the entity created under s.128.

7. The Future of Constitutional Literalism in Australia

What has come before in this paper has sought to illustrate the actual position of literalism in Australian constitutional interpretation: that is, that literalism has been a dominant methodology with a profoundly unsatisfactory theoretical basis, which is now under threat from an alternative methodology which is equally devoid of theoretical justification.

The question to be asked, therefore, is whether literalism has any legitimate future in the interpretation of the Australian Constitution. To this question, the answer must be a hesitant `yes', but on the strictly limited basis set out below.

The first step here must be to ask precisely what the High Court is doing when it interprets the Constitution. Only through posing this fundamental question, concerning the precise nature of the task facing the Court, can one assess the legitimacy or otherwise of any particular method of constitutional interpretation. Indeed, as has been noted elsewhere in this paper, it has been precisely the failure of judges to face this most basic of questions that has lain at the heart of the deficiencies of the High Court's entire approach to constitutional construction.

The issue, then, is to isolate and expose the inarticulate premise of constitutional interpretation in Australia: what does the High Court do when it "interprets the Constitution?" This is the theoretical bedrock that the Court itself has been loth to expose throughout its history. It is precisely because of this convenient reticence that the Court has been able for so long to persevere with such threadbare interpretative methodologies as literalism, and now, implied rights theory.

In my view, as was made clear in relation to constitutional implications, the fundamental starting point for the Court in interpreting the Constitution must be an acknowledgment that it is indeed seeking to elucidate the intention behind that document. This intentional approach is consistent with the underlying premise of the interpretation of all documents, including such legal documents as Acts of Parliament; with the essentially democratic character of the Australian Constitution, as embodying the intentions of the Founding Fathers, which were themselves ratified at popular referenda; and with the underlying rationale of both literalism and of true constitutional implications, properly understood.

The real question, therefore, is how the Court should set about finding the relevant intent. More particularly, the question of intent will most commonly resolve itself in practice into an issue of what evidence may be relied upon by the Court for the purpose of discerning this or that intent. It is in this context that "literalism" has some legitimate role to play.

This is because the lonely truth of Australian constitutional literalism has always been that the plain words will, not infrequently, prove a good guide to the intentions of those who wrote them. After all, within a variety of limitations that have already been considered, people use words precisely because they do believe that they accurately express their intention.

Thus, at least where the words of the Constitution are utterly clear and unambiguous, there can be no objection to their being given effect according to their ordinary tenor. Moreover, it can hardly be denied, as a matter of simple definition, that the starting point for the High Court in the interpretation of the Constitution should always be the written text of that document. Thus far, no serious controversy can arise over the legitimacy of a literal approach to the Constitution.

Consistently with what has been said previously, however, a difficulty immediately arises where the constitutional language in question is anything other than transparently clear, which arguably is the natural condition of such language. Consequently, even the blushing literalism outlined here must be subject to a series of qualifications.

The first operates even before any finding of ambiguity. Words must always be understood in context, and the critical context in case of the Constitution is the historical context. Words which may appear entirely clear on their face, may in fact bear a completely different meaning once they are understood within their historical setting. In these circumstances, the only sure way to ascertain the actual intention of the Founders will not be through a slavish recourse to the words, but by the consideration of those words in their full contemporary setting. Thus, to coin a paradox, it may be necessary to clarify clear constitutional words by the introduction of the haze of history.

Secondly, it has to be conceded that constitutional language is typically a good deal less than unambiguous in character. Large portions of the Constitution are susceptible of more than one meaning even in a textual sense, or at the very least, of more than one shade of meaning. Again, it will be necessary in these circumstances to sieve the bare language through the mesh of contemporary evidence in order to arrive at a true understanding of the intention that lies behind that language. To do anything less is to adopt a constitutional method which, in essence, randomly privileges the subjective semantic preferences of individual Justices at the expense of the legitimate constitutional intent. Naturally, the range of evidence that will need to be induced in circumstances of constitutional ambiguity may include the Convention Debates, draft constitutional bills and - potentially - a wide range of popular literature.

Thirdly, even the import of clear words must give way before genuine implications. It has been accepted in Australia at least since the *Melbourne Corporation Case* that constitutional language is no different from any other in giving way to - or perhaps absorbing - implications strongly founded upon intentions lying behind that language.

The best example of this in an Australian constitutional context undoubtedly lies in the implications drawn from federalism, and at least conceptually, the separation of powers cases. Consequently, even the qualified place conceded to literalism in this paper must be further adumbrated by the operation of any true implications to be drawn from the Constitution. Of course, it does not follow from this that literalism, within its properly conceded ambit, is in any way subject to the bogus implications involved in the implied rights cases.

The final point to be made here is that, to the extent that literalism does enjoy any legitimate place within Australian constitutional interpretation, it must enjoy that place in respect of the interpretation of all aspects of the Constitution equally. Thus, it simply is not possible for the High Court to apply a literal approach to constitutional interpretation in the context of federalism, while resorting to sweeping "implications" in the case of human rights. If literalism is a legitimate element of constitutional interpretation, then it must operate impartially across the entire Constitution.

Conclusion

The essence of this paper has been that literalism, as expounded by the Australian High Court, has always been an intellectual fraud.

It has been a fraud in the sense that it is in reality based upon political considerations, but has always asserted its independence of precisely such matters.

It has likewise been a fraud in the sense that it has sought to provide a methodology for the interpretation of the Constitution, without being able to offer a principled basis for that methodology. Now, literalism has been substantially replaced by implied rights theory, which is just as political in its genesis, and equally devoid of intellectual justification.

Literalism has its place within Australian constitutional interpretation, but that is a relatively humble place, as a servant of the search for constitutional intent, rather than as a substitute for that search.
