View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Washington University St. Louis: Open Scholarship

Washington University Global Studies Law Review

Volume 6 | Issue 2

January 2007

Australian Judicial Review

Kathleen E. Foley
Orrick, Herrington & Sutcliffe LLP

Follow this and additional works at: https://openscholarship.wustl.edu/law_globalstudies

 Part of the Comparative and Foreign Law Commons, and the Constitutional Law Commons

Recommended Citation

Kathleen E. Foley, *Australian Judicial Review*, 6 WASH. U. GLOBAL STUD. L. REV. 281 (2007), https://openscholarship.wustl.edu/law_globalstudies/vol6/iss2/4

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Global Studies Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

AUSTRALIAN JUDICIAL REVIEW

KATHLEEN E. FOLEY*

INTRODUCTION

Judicial review has long been considered an "axiomatic" part of Australia's legal system,[1] despite the lack of any express provision in the Australian Constitution conferring such a power on the High Court. In Mark Tushnet's terms, Australian judicial review is "strong-form," as the High Court maintains "*general* authority to determine what the Constitution means" and its "constitutional interpretations are authoritative and binding" on the legislatures and executives at the federal, State, and Territory levels.[2] With the United States acting as the paradigmatic example of the "strong-form" model, one might assume that Australian judicial review operates similarly to judicial review in the United States. However, such an assumption is mistaken.[3] A unique creature with its own distinctive history, Australian judicial review deserves greater scholarly attention than it has been given. With that in mind, this Article endeavors to evaluate the development of judicial review of legislation in Australia.[4]

Part I outlines the basic structure of Australia's constitutional system and considers the source and operation of Australian judicial review. Part II examines the High Court's approach to judicial review by considering three phases in the Court's history. First, this Part surveys the formative years of the High Court and the development of its legalistic approach to judicial review, with particular attention given to the High Court's earliest

---

* B.A., LL.B. (Hons) (U.W.A.), LL.M. (Harv.). Associate, Orrick, Herrington & Sutcliffe LLP. I wish to thank Rosalind Dixon for her valuable insights and support, as well as the following members of the Harvard Law School faculty for their comments and encouragement: Professor Charles Fried, Professor Richard Fallon, and Dean Elena Kagan. The opinions expressed in this Article are those of the author alone and do not necessarily represent the views of Orrick, Herrington & Sutcliffe LLP or any of its clients.

1. Austl. Communist Party v. Commonwealth (1951) 83 C.L.R. 1, 262–63 (Fullagar, J.) [hereinafter *Communist Party Case*].

2. Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2784 (2003).

3. Mary Crock & Ronald McCallum, *Australia's Federal Courts: Their Origin, Structure, and Jurisdiction*, 46 S.C. L. REV. 719, 733 (1995).

4. This Article uses the term "judicial review" to refer to the High Court's exercise of its power to declare statutes passed by federal, state, or territory legislatures to be unconstitutional. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). As will be discussed, the High Court often refers to *Marbury* when seeking to establish the basis of Australian judicial review. *E.g.*, *Communist Party Case* (1951) 83 C.L.R. at 262. This Article will not examine judicial review of executive or administrative action.

Washington University Open Scholarship

years, from 1903 to 1919, and Sir Owen Dixon's tenure as Chief Justice from 1952 to 1964.[5] Second, this Part considers the Mason Court (1987-1995),[6] which was the first High Court to conduct its work without the oversight of the Privy Council.[7] Widely regarded as Australia's most activist High Court, the Mason Court took a very different view of its judicial review power,[8] making its work of particular interest in this Article. Finally, Part II studies the contemporary High Court, the Gleeson Court, and its attempt to reign in the perceived activism of the Mason years. Examining the High Court's constitutional jurisprudence beginning in 1998, the year of Chief Justice Gleeson's appointment,[9] this Article contends that the Gleeson Court's approach to judicial review bears many hallmarks of the legalistic approach adopted by the early High Court.

I. AUSTRALIAN JUDICIAL REVIEW: BUILDING BLOCKS

A. The Australian Constitution's Basic Structure

By a legislative act of the United Kingdom Parliament,[10] the Australian Constitution joined "the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania" to make "one indissoluble Federal Commonwealth."[11] The Australian colonies chose to federate, not out of revolutionary desires to separate from the United Kingdom but instead under the belief that they might benefit from a central government with the

5. Leslie Zines, *Dixon Court*, *in* THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA 220 (Tony Blackshield et al. eds., 2001) [hereinafter OXFORD COMPANION].

6. At the outset, it is important to emphasize Sir Gerard Brennan's observation that, although describing phases of the Court by reference to the presiding Chief Justice is "a useful shorthand," it is not meant to diminish the contribution of each member of the Court during any particular period of time. Sir Gerard Brennan, *A Tribute to Sir Anthony Mason*, *in* COURTS OF FINAL JURISDICTION: THE MASON COURT IN AUSTRALIA 10 (Cheryl Saunders ed., 1996) [hereinafter COURTS OF FINAL JURISDICTION]. Moreover, it should be noted that the eras of the High Court's work discussed in this Article certainly have blurred edges. For example, some of the hallmarks of the Mason Court's approach can certainly be seen in cases decided prior to Mason's appointment as Chief Justice.

7. Keith Mason, *Citizenship*, *in* COURTS OF FINAL JURISDICTION, *supra* note 6, at 43.

8. Cheryl Saunders, *The Mason Court in Context*, *in* COURTS OF FINAL JURISDICTION, *supra* note 6, at 7.

9. Bret Walker, *Gleeson, (Anthony) Murray*, *in* OXFORD COMPANION 305 (Tony Blackshield et al. eds., 2001).

10. *See* COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT 1900, § 9 (U.K.).

11. AUSTL. CONST. pmbl. It should be noted that there are no references to Western Australia in the preamble. There was a good deal of uncertainty about whether Western Australia would join the Federation, and the Western Australian referendum on the question was not held until three weeks after the enactment of Australia's Constitution. Consequently, Covering Clause 3 of the Constitution provided for Western Australia's possible late entry. Documenting a Democracy: Australia's Story, http://www.foundingdocs.gov.au/item.asp?dID=11 (last visited Sept. 8, 2007).

https://openscholarship.wustl.edu/law_globalstudies/vol6/iss2/4

power to legislate on matters of common concern.[12] The Australian Constitution was "drafted by a select group of delegates to a series of constitutional conventions held in Australia during the late 1890s, and then endorsed by the voters at referenda."[13]

The Australian constitutional framers were influenced by both the English legal tradition, under which the Australian colonies were established and governed, and the United States Constitution.[14] Like the United States Constitution, the Australian Constitution establishes a federal system of government, consisting of the federal government (referred to in the Constitution as "the Commonwealth"), States, and Territories.[15] The Australian Constitution gives the federal legislature enumerated powers,[16] leaving state parliaments with residual powers.

Like its American counterpart, the Australian Constitution devotes separate chapters to the federal legislature (Chapter I), executive (Chapter II), and judiciary (Chapter III). However, unlike the United States Constitution, the Australian Constitution describes a parliamentary system of government.[17] The Federal Parliament is comprised of the Queen, Senate, and House of Representatives.[18] The two Houses of Parliament consist of members "directly chosen by the people,"[19] with each State sending an equal number of senators.[20] In accordance with the parliamentary system, section 64 of the Australian Constitution provides that "no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives."[21] The framers viewed responsible government as a

12. JOHN A. LA NAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION 1–2 (1972). *See also* N.K.F. O'Neill, *Constitutional Human Rights in Australia*, 17 FED. L. REV. 85, 85 (1987).

13. PETER J. HANKS & DEBORAH CASS, AUSTRALIAN CONSTITUTION LAW: MATERIALS AND COMMENTARY 4 (6th ed. 1999).

14. *See* Stephen Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, 17 FED. L. REV. 162, 164 (1987).

15. Contemporary Australia has six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia), two mainland territories (the Australian Capital Territory and the Northern Territory), and a number of external territories. CIA—The World Factbook—Australia, http://www.cia.gov/library/publications/the-world-factbook/geos/as.html (last visited Sept. 8, 2007).

16. Although this Article uses the word "federal," the Constitution itself employs the term "the Parliament of the Commonwealth." AUSTL. CONST. § 1. Section 51 is the principal provision granting and outlining the federal legislature's powers. AUSTL. CONST. § 51.

17. Simply put, this form of government involves "an executive government chosen from and responsible to Parliament." Sir Anthony Mason, *The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience*, 16 FED. L. REV. 1, 3 (1986).

18. AUSTL. CONST. § 1.

19. *Id*. § 7 (regarding the Senate), § 24 (regarding the House of Representatives).

20. *Id*. § 7.

21. *Id*. § 64.

Washington University Open Scholarship

critical concept underlying the new constitutional framework, creating "the British heart in an otherwise American federal body."[22] As discussed by Stephen Gageler, incorporating a parliamentary system into a constitution firmly modeled on the United States Constitution creates a tension,[23] in part because a parliamentary system is inconsistent with a strict separation of powers.[24]

Importantly, the Australian Constitution also established a federal supreme court, the High Court of Australia.[25] Although modeled on the United States Supreme Court, the High Court differs significantly from its United States cousin in that the Australian Constitution expressly confers jurisdiction on the High Court to hear and determine appeals from both state and federal courts.[26] It should be noted that under the original Australian Constitution, High Court decisions could be appealed to the Privy Council.[27] In fact, the High Court did not truly become the apex of Australia's judicial system until 1986, when the last of a number of legislative enactments aimed at abolishing appeals to the Privy Council was passed.[28] However, the most important connection between Australia and the United Kingdom remains: Australia is a constitutional monarchy.[29] Its head of state, the Governor-General, is the representative of the Queen of England in her capacity as Queen of Australia.[30]

---

22. Gageler, *supra* note 14, at 172. Bruce Ackerman describes the Australian Constitution as a "fascinating hybrid of British and American elements." Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 674 (2000).

23. *See* Gageler, *supra* note 14, at 164.

24. *See* Mason, *supra* note 17, at 4.

25. AUSTL. CONST. § 71.

26. *Id*. § 73; Erin Daly, *United States Supreme Court*, *in* OXFORD COMPANION 693 (Tony Blackshield et al. eds., 2001).

27. However, cases relating to "the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States" required, pursuant to § 74 as originally enacted, a certificate from the High Court to be appealed. AUSTL. CONST. § 74.

28. The passage of the Australia Acts, 1986 (Austl.) and (U.K.) marked the final step in the abolition of appeals from Australian courts to the Privy Council. This abolition process began with the Privy Council (Limitation of Appeals) Act, 1968 (Austl.) and the Privy Council (Appeals from the High Court) Act, 1975 (Austl.). Mason, *supra* note 17, at 3; JM Bennett, *Establishment of Court*, *in* OXFORD COMPANION 247 (Tony Blackshield et al. eds., 2001). Although in theory an avenue remains to bring appeals to the Privy Council, the possibility is foreclosed for all practical purposes. *See* HANKS & CASS, *supra* note 13, at 27.

29. *See* HANKS & CASS, *supra* note 13, at 28.

30. Section 61 of the Australian Constitution vests the executive power of the Commonwealth in the Queen, exercisable by the Governor-General as the Queen's representative. AUSTL. CONST. § 61. In a 1999 referendum, Australians voted against amending the Constitution to change Australia from a constitutional monarchy to a republic. Australian Election Commission, http://www.aec.gov.au/Elections/referendums/1999_Reforendum_Reports_Statistics/key_Results.htm (last visited Sept. 8, 2007).

The framers of the Australian Constitution did not include a Bill of Rights.[31] This decision, which subsequent generations have left unchanged, leaves Australia an outlier in modern constitutional systems.[32] This does not mean that the Australian Constitution confers no rights. It confers a number of express rights[33] and has been interpreted to confer implied freedoms.[34]

However, the framers' decision to not include a Bill of Rights has had an enormous impact on the direction of Australian constitutional law. In stark contrast to other constitutional systems, Australia's constitutional jurisprudence does not include a large body of work in the field of individual rights.[35] Rather, it is principally concerned with the relationships between federal and state parliaments, executives, and courts.[36]

B. Source of Judicial Review in Australia

The legitimacy of the High Court's power of judicial review is well established and rarely questioned.[37] Surprisingly, however, its exact constitutional source is unclear. No provision in the Australian

---

31. Disagreement exists regarding the framers' intentions in not including a written Bill of Rights. The conventional view is that the framers considered the possibility of including a written Bill of Rights but decided against it, believing that rights would be adequately protected by the common law and legislatures. Tony Blackshield, *Bill of Rights*, *in* OXFORD COMPANION 62 (Tony Blackshield et al. eds., 2001). However, some scholars take issue with this view. *See, e.g.*, GEORGE WILLIAMS, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION 25 (1999).

32. Blackshield, *supra* note 31, at 62–63.

33. Adrienne Stone notes that the constitutional provisions most often categorized as "express rights" include sections 116 (the free exercise of religion), 80 (the right to a jury trial), 51(xxxi) (the "just terms" requirement of the acquisition power), and 117 (the prevention of discrimination based on state residence). Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 29, 31 (2005).

34. An example is the implied freedom of political communication. *See, e.g.*, Lange v. Austl. Broad. Corp. (1997) 189 C.L.R. 520.

35. *See* David S. Bogen, *The Religion Clauses and Freedom of Speech in Australia and the United States: Incidental Restrictions and Generally Applicable Laws*, 46 DRAKE L. REV. 53, 56 (1997).

36. *See* Collins J. Seitz, *Judicial Review and the American Constitution*, 17 FED. L. REV. 1, 3 (1987).

37. Mason states there has been "unqualified acceptance" of judicial review's legitimacy. Mason, *supra* note 17, at 6. *See also* Gerhardy v. Brown (1985) 159 C.L.R. 70, 157–58 (Dawson, J.); In the Marriage of Cormick (1984) 156 C.L.R 170, 177 (Gibbs, C.J.); Vict. v. Commonwealth (1975) 134 C.L.R. 338, 364 (Barwick, C.J.) [hereinafter *Victoria v. Commonwealth*]. However, some scholars question the constitutionality of judicial review in Australia. *See, e.g.*, P.H. LANE, LANE'S COMMENTARY ON THE AUSTRALIAN CONSTITUTION 14 (2d ed. 1997) [hereinafter LANE'S COMMENTARY]; James A. Thomson, *Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution*, *in* THE CONVENTION DEBATES 1891–1898: COMMENTARIES, INDICES AND GUIDE 173 (Gregory Craven ed., 1986).

Washington University Open Scholarship

Constitution expressly authorizes judicial review. Rather, the power of judicial review is said to arise by implication from several different constitutional provisions.[38] No generally accepted view exists regarding which provisions support this implication.[39]

The strongest case for implying a power of judicial review relies upon Covering Clause 5 of the Australian Constitution, which states that "[t]his Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State."[40] The power of judicial review supposedly springs from Covering Clause 5's requirement that federal laws made "under the Constitution" are binding.[41] According to this argument, courts, charged with administering the law, must be able to determine whether a law is made "under the Constitution" to decide if that law is binding.[42] A similar argument is made with respect to section 76(i) of the Australian Constitution, which empowers the Federal Parliament to confer jurisdiction upon the High Court in matters "[a]rising under this Constitution, or involving its interpretation."[43] It is contended that this provision "impliedly acknowledges the Court's responsibility for judicial review of federal statutes for constitutional validity."[44]

Section 75 of the Australian Constitution, which provides for the High Court's original jurisdiction, is also relied upon as a basis for the judicial review power. In *Plaintiff S157/2002 v. Commonwealth*,[45] Justices Gaudron, McHugh, Gummow, Kirby and Hayne relied upon section 75, particularly section 75(v), as "introduc[ing] into the Constitution of the Commonwealth an entrenched minimum provision of judicial review."[46] Although the joint Justices were principally concerned with judicial review of administrative action, their Honors seemed to rely on section 75 as supporting the judicial review power generally,[47] going on to state that

38. *See* Justice Michael Kirby, *Judicial Review in a Time of Terrorism—Business as Usual*, 22 S. AFR. J. HUM. RTS. 21, 22–24 (2006).

39. *See generally id.*

40. AUSTL. CONST. covering clause 5.

41. O'Toole v. Charles David Proprietary Ltd. (1991) 171 C.L.R. 232, 251 (Mason, C.J.); *id*. at 272 (Brennan, J.).

42. Although Lane sees no constitutional basis for judicial review, his outline of this argument is useful. LANE'S COMMENTARY, *supra* note 37, at 13–14.

43. AUSTL. CONST. § 76(i).

44. Mason, *supra* note 17, at 6. In this regard, Mason also refers to section 74 of the Constitution. *Id*.

45. (2003) 211 C.L.R. 476 (Gleeson, C.J.).

46. *Id*. at 513.

47. *Id*. at 513–14.

"[u]nder the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is [the High] Court."[48]

Another constitutional provision relied upon to support the judicial review power is section 109, which provides that a state law inconsistent with a federal law shall be invalid to the extent of the inconsistency.[49] It is contended that section 109 "contemplated that the courts would strike down inconsistent state laws," thus providing a basis for the judicial review power.[50]

Apart from textual arguments, the most common justification for the existence of the High Court's judicial review power is originalist, contending that the framers intended the High Court to possess such a power.[51] Certainly, support for this conclusion is readily found in the Convention debates.[52] For example, at the 1897 Convention in Adelaide, Edmund Barton, who would become Australia's first Prime Minister and then Justice of the first High Court, argued the new Federation needed a court that could arbitrate disputes under the Constitution, including disputes among States and disputes between States and the federal government.[53]

Although foreign to the British parliamentary system, Barton's proposal sparked little controversy at the Convention.[54] For the framers, federalism was new, and potentially dangerous, territory.[55] The delegates were clearly conscious of the need for a strong court which would protect the States from any over-reaching by the Federal Parliament of its constitutional powers.[56] Moreover, by the time the framers were debating the form the new Australian Constitution should take, the Australian colonial courts had already been exercising a power of judicial review for some time.[57] In addition, judicial review was an established element of the

48. *Id*.

49. Section 109 is the equivalent of the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI, para. 2. *See* THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA 140 (Tony Blackshield et al. eds., 2001).

50. Mason, *supra* note 17, at 6.

51. Brian J. Galligan, *Judicial Review in the Australian Federal System: Its Origin and Function*, 10 FED. L. REV. 367, 381 (1979); Mason, *supra* note 17, at 3; HANKS & CASS, *supra* note 13, at 20; George Winterton, *The Communist Party Case*, *in* AUSTRALIAN CONSTITUTIONAL LANDMARKS 108, 127 (H.P. Lee & George Winterton eds., 2003).

52. *See* Galligan, *supra* note 51, at 379 (citing Federal Convention Debates (Adelaide, 1897)).

53. *Id*.

54. *Id*. at 379–80; Gageler, *supra* note 14, at 174. *But see* Thomson, *supra* note 37.

55. Galligan, *supra* note 51, at 372. Galligan notes that while federalism was a "mature and well-tried" system of government in North America, it was new to Australians. *Id*.

56. *See id*. at 381.

57. Mason, *supra* note 17, at 6.

Washington University Open Scholarship

American constitutional model, which had a good deal of influence on the framers' views.[58] Ultimately, the leaders of the 1897 Adelaide Convention "came out strongly in favor of judicial review,"[59] and the framers affirmed their commitment to judicial review at the Convention's final 1898 session in Melbourne.[60]

Clearly, from the earliest days of the new Federation, constitutional scholars thought courts possessed "the right to declare that a law of the Commonwealth or of a State is void by reason of transgressing the Constitution."[61] Sir John Quick and Sir Robert R. Garran, writing in 1901, explained:

> This is a duty cast upon the courts by the very nature of the judicial function. The Federal Parliament and the State Parliaments are not sovereign bodies; they are legislatures with limited powers, and any law which they attempt to pass in excess of those powers is no law at all it is simply a nullity, entitled to no obedience. The question whether those powers have in any instance been exceeded is, when it arises in a case between parties, a purely judicial question, on which the courts must pronounce. This doctrine was settled in the United States in 1803 by the great case of Marbury v. Madison . . .[62]

This 1901 reference to *Marbury* is not unusual. Since Federation, Chief Justice Marshall's famous decision has often been invoked as a justification for judicial review in Australia.[63] For example, in 1951, Justice Fullagar stated that "in [Australia's] system the principle of *Marbury v. Madison* is accepted as axiomatic . . . ."[64] This is not to say that Australian judges are unaware of the many criticisms of *Marbury*.[65] However, given the long standing acceptance of *Marbury*'s holding, dwelling upon those criticisms may justifiably be viewed as futile.[66]

---

58. *See id*.
59. Galligan, *supra* note 51, at 384.
60. *Id*. at 385.
61. SIR JOHN QUICK & SIR ROBERT R. GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 791 (1901).
62. *Id.*
63. *See, e.g.*, *Communist Party Case* (1951) 83 C.L.R. at 262; *Victoria v. Commonwealth* (1975) 134 C.L.R. 338, 379 (Dixon, J.) (Rich, J., concurring); Commonwealth v. Mewett (1997) 191 C.L.R. 471, 496 (Dawson, J.); Kartinyeri v. Commonwealth (1998) 195 C.L.R. 337, 381 (Gummow and Hayne, JJ.); Att'y Gen. (W. Austl.) v. Marquet (2003) 217 C.L.R. 545, 570 (Gleeson, C.J., Gummow, Hayne and Heydon, JJ.).
64. *Communist Party Case* (1951) 83 C.L.R. at 262.
65. *See, e.g.*, Harris v. Caladine (1991) 172 C.L.R. 84, 134–35 (Toohey, J.).
66. *See, e.g.*, *id*.

The High Court has also relied on the nature of federalism in contending that the power of judicial review comprises a necessary part of Australia's constitutional structure.[67] Thus, in *Boilermakers*[68] a majority stated:

> In a federal form of government a part is necessarily assigned to the judicature which places it in a position unknown in a unitary system or under a flexible constitution where Parliament is supreme. A federal constitution must be rigid. The government it establishes must be one of defined powers; within those powers it must be paramount, but it must be incompetent to go beyond them. The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the government were placed in the federal judicature.[69]

Indeed, the notion that federalism necessarily requires judicial review has become as axiomatic in the Australian constitutional system as the acceptance of *Marbury*. However, while federalism might be seen as requiring the creation of an institution empowered to adjudicate between the federal and state governments,[70] federalism certainly does not require—as a necessary matter—rights-based judicial review. Moreover, even accepting that federalism requires an institution to adjudicate between federal and state governments, the question remains as to why that institution should be a court.

Despite the absence of an express constitutional provision conferring the power of judicial review, Federation judges and scholars have largely accepted that Australian courts, including the High Court, possess such a power.[71] Before turning to consider how the High Court has exercised its

---

67. *See, e.g.*, The Queen v. Kirby; Ex parte Boilermakers' Soc'y of Austl. (*Boilermakers*) (1956) 94 C.L.R. 254, 267–68 (Dixon, C.J., McTiernan, Fullagar, and Kitto, JJ.).

68. *Id*.

69. *Id*. This excerpt is cited with approval in *Victoria v. Commonwealth* (1975) 134 C.L.R. at 379 (Gibbs, J.).

70. *See, e.g.*, *Re* Wakim; *Ex parte* McNally (1999) 198 C.L.R. 511, 569 (Gummow and Hayne, JJ.). In outlining the basis of the judicial review power, Chief Justice Gleeson also considers it relevant that written constitutions are usually difficult to amend. *See* Chief Justice Murray Gleeson, Legality-Spirit and Principle: The Second Magna Carta Lecture (Nov. 20, 2003), *available at* http://www.hcourt.gov.au/speeches/cj/cj_20nov.html (discussing implied rights in the Australian Constitution). *See also* P.H. LANE, A MANUAL OF AUSTRALIAN CONSTITUTIONAL LAW 16 (4th ed. 1987) [hereinafter LANE].

71. To American constitutional scholars this fact must seem remarkable, given the enormous amount of jurisprudential interest in judicial review in the United States. *See, e.g.*, Gordon S. Wood,

Washington University Open Scholarship

power, however, it is useful to outline the operation of judicial review in Australia.

C. The Operation of Australian Judicial Review

As a preliminary issue, in Australia, the power of judicial review does not reside exclusively with the High Court. Instead, lower courts also possess and exercise the power to decide constitutional questions.[72] However, the High Court is the focus of attention regarding judicial review because it stands at the apex of Australia's judicial system, deciding the most important constitutional cases.[73]

Unlike some constitutional courts, the High Court does not exercise its power through any special referral mechanism.[74] Rather, constitutional questions come before the High Court in the form of cases instituted by parties that, as part of the litigation, request the court to review the validity of federal, state, and territorial legislation.[75] The party bringing the action must have standing.[76] A case may be initiated in a lower court and removed to the High Court,[77] or may be determined by a lower court and then appealed to the High Court.[78] Alternatively, a case may be initiated in the High Court based on its original jurisdiction.[79] When a party with the appropriate standing challenges the validity of legislation, the High Court "not only may declare acts of the Parliament to be void but . . . is under a duty to do so."[80]

Additionally, there is no overt deference to legislative judgments about constitutionality because the High Court determines "for itself any facts on which constitutional validity depends."[81] Thus, as Sir Anthony Mason

---

Oliver Wendell Holmes Devise Lecture: The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less, 56 WASH & LEE L. REV. 787 (1999).

72. Brian Opeskin, *Australian Constitutional Law in a Global Era*, *in* REFLECTIONS ON THE AUSTRALIAN CONSTITUTION 171, 177–78 (Robert French et al. eds., 2003).

73. *Id*. at 178. In the United States, as in the Australian system, all courts may also exercise the judicial review power, whereas in countries such as France and Germany a single judicial body is granted exclusive power to invalidate legislation. Ackerman, *supra* note 22, at 668 n.75.

74. *See* LANE, *supra* note 70, at 16–17.

75. *See id*.

76. *Id.* at 29–30.

77. Judiciary Act § 40 (1903) (Austl.).

78. AUSTL. CONST. § 73(ii); *see also* Judiciary Act §§ 35, 35AA (1903) (Austl.); Federal Court of Australia Act § 33 (1976) (Austl.); Family Law Act § 95 (1975) (Austl.). *See* LANE, *supra* note 70, at 16–17.

79. AUSTL. CONST. §§ 75, 76; Judiciary Act § 30 (1903) (Austl.); *See* LANE, *supra* note 70, at 16–17.

80. *Victoria v. Commonwealth* (1975) 134 C.L.R. at 364 (Barwick, C.J.).

81. Mason, *supra* note 17, at 6. *See also In the Marriage of Cormick* (1984) 156 C.L.R. at 177

aptly points out, "the federal government does not argue for a presumption of constitutionality" and the Federal Parliament (in contrast to the U.S. Congress) neither makes legislative findings on issues of constitutionality nor includes such findings in legislation.[82] It must be kept in mind, however, that in some particular areas of its constitutional jurisprudence the High Court gives the federal legislature a large degree of discretion in choosing the means by which to achieve a legislative purpose, which is itself within the legislature's power.[83]

Finally, as to the effect of a statute being declared unconstitutional, it has long been accepted that an unconstitutional statute "is not and never has been a law at all. . . . [I]t is invalid ab initio."[84]

Having outlined the various arguments about the source of the judicial review power, and its operation in Australia, this Article next examines the High Court's exercise of its judicial review power.

II. THE HIGH COURT'S EXERCISE OF ITS JUDICIAL REVIEW POWER

In discussing how the High Court exercises its judicial review power, this Article examines three phases of the High Court. First, the High Court's formative years are considered, focusing on how the Court came to develop its legalistic approach to judicial review. This approach would dominate the Court from 1903 until 1987, when Sir Anthony Mason became Chief Justice.[85]

Second, this Article examines the Mason Court (1987–1995). Under Chief Justice Mason's influence, the High Court broke with its traditional approach to judicial review, adopting a more radical view of how its power should be exercised.[86] Focusing on major cases, this section will illustrate the Mason Court's style.

Lastly, this Part considers the approach taken by the Gleeson Court (1998–present) in the post-Mason era. This Article argues that the Gleeson

(Gibbs, C.J.).

82. Mason, *supra* note 17, at 6–7. On whether a presumption of constitutionality should play a role in Australian constitutional law, see Henry Burmester, *The Presumption of Constitutionality*, 13 FED. L. REV. 277 (1983).

83. Mason, *supra* note 17, at 7.

84. LANE'S COMMENTARY, *supra* note 37, at 194 (citing *Ex rel* McKellar v. Commonwealth (1977) 139 C.L.R. 527, 550, 560 (Gibbs, J.); *Victoria v. Commonwealth* (1975) 134 C.L.R. at 361 (Barwick, C.J.); Cormack v. Cope (1974) 131 C.L.R. 432, 464–65 (Barwick, C.J.); S. Austl. v. Commonwealth (1942) 65 C.L.R. 373, 408 (Latham, C.J.)).

85. Kristen Walker, *Mason, Anthony Frank, in* OXFORD COMPANION 459 (Tony Blackshield et al. eds., 2001).

86. *See id*. at 460.

Washington University Open Scholarship

Court has largely and successfully endeavored to retreat from the Mason Court's style, returning to a more legalistic approach to exercising judicial review. However, this Part also shows that the Gleeson Court's work is more complex than the label "legalistic" suggests.

A. The Formative Years: Development of the High Court's Approach to Judicial Review

The formative years of the High Court marked the development of its legalistic approach to judicial review.[87] Separating this era into two distinct halves, this section addresses the High Court's early years (1903–1919), and the subsequent consolidation of the legalistic approach under Chief Justice Dixon (1952–1964).

At the outset, it is necessary to clarify what is meant by a "legalistic" approach to constitutional decision making. Gageler describes the High Court's constitutional legalism as having two elements.[88] First, its constitutional legalism assumes that "federalism necessarily requires the Court to play a unique role in determining the constitutionality of governmental action."[89] Second, the judiciary's role consists of no more than interpreting and enforcing limitations on government power embodied in the Constitution's text.[90]

To understand this second element, it is important to emphasize that Australian legalism is deeply rooted in the English common law tradition. Thus, it is rule–driven, precedent-focused, and greatly prizes certainty in the law.[91] Moreover, questions of policy and matters of politics are considered best left to legislators: judges must only apply the law.[92] Australia's most influential proponent of legalism, Sir Owen Dixon, strenuously advocated the application of the common law method to the interpretation of the Constitution.[93] In doing so, he adopted Sir James Parke's (later Baron Parke) classic description of common law methodology.[94] This description gives useful background regarding the development of Australian constitutional legalism:

---

87. *See id*.
88. Gageler, *supra* note 14, at 175.
89. *Id*.
90. *Id*.
91. *See* Sir Daryl Dawson & Mark Nicholls, *Sir Owen Dixon and Judicial Method*, 15 MELB. U. L. REV. 543, 544–45 (1986).
92. *See id*.
93. *See id.* at 545.
94. *See* Owen Dixon, *Concerning Judicial Method*, *in* JESTING PILATE 152, 159 (2d ed. 1997). *See also* Dawson & Nicholls, *supra* note 91, at 545.

> [The English] common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them . . . because we think that the rules are not as convenient and reasonable as ourselves could have devised.[95]

Australian judges largely seem to embrace, rather than shy away from, this description.[96] For example, in his frequently cited address upon being sworn in as Chief Justice of the High Court of Australia, Dixon stated, "it may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism."[97]

In examining the development of the High Court's legalistic approach, and in particular how that approach related to the High Court's exercise of its judicial review power, the primary focus of this Article is on Sir Samuel Griffith's tenure as Chief Justice (1903–1919).[98] This period has been described as mostly "years of strict and complete legalism."[99]

However, in its earliest constitutional law decisions,[100] the approach of the High Court, consisting at the time of Chief Justice Griffith, and Justices Barton and O'Connor, does not appear overly legalistic. For example, in *D'Emden v. Pedder*,[101] which concerned whether a state law could interfere with a federal agency or instrumentality, Chief Justice Griffith indicated that "in considering the validity of legislation under the Constitution, the substance and not the form of the legislation is to be regarded . . . ."[102] In this case, the Chief Justice also indicated the Court's approach to interpreting federal grants of legislative power under the

95. Mirehouse v. Rennell (1833), 1 Cl. & F. 527, 546; 6 Eng. Rep. 1015, 1023 (Eng.).

96. *See, e.g.*, Owen Dixon, *Upon Taking the Oath of Office as Chief Justice*, *in* JESTING PILATE, *supra* note 94, at 249.

97. *Id*.

98. Anthony Mason, *Griffith Court*, *in* OXFORD COMPANION 311 (Tony Blackshield et al. eds., 2001).

99. Justice Michael Kirby, *Sir Anthony Mason Lecture 1996: A. F. Mason—From Trigwell to Teoh*, 20 MELB. U. L. REV. 1087, 1093 (1996).

100. The first bench of the High Court could not be appointed until the enactment of the Judiciary Act (1903) (Austl.). The High Court first convened on October 6, 1903. High Court of Australia—About the High Court—History of the High Court, http://www.hcourt.gov.au/about_02.html (last visited Sept. 16, 2007).

101. (1904) 1 C.L.R. 91.

102. *Id*. at 108 (Griffith, C.J.).

Washington University Open Scholarship

Constitution:[103] "[W]here any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor . . . every power and every control the denial of which would render the grant itself ineffective."[104] Among the earliest cases outlining the first High Court's approach to constitutional interpretation, these statements are not those of a strict legalist.

Similarly, in *Municipal Council of Sydney v. Commonwealth*,[105] a case decided two months after *D'Emden*, Justice O'Connor outlined very clearly an approach to constitutional interpretation not confined to the text's express words.[106] In favoring a broad construction of the word "tax" in § 114 of the Constitution, Justice O'Connor stated:[107]

> But to get at the real meaning [the High Court] must go beyond [the Constitution's words], [it] must examine the context, consider the Constitution as a whole, and its underlying principles and any circumstances which may throw light upon the object which the Convention had in view, when they embodied it in the Constitution.[108]

D'Emden established two elements of the High Court's conception of the Constitution which would remain central to the Court's constitutional vision until 1920.[109] First, the Court made clear that when "considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State."[110] Following from this, "the Commonwealth is entitled, within the ambit of its authority, to exercise its legislative and executive powers in absolute freedom, and without any interference or control whatever except that prescribed by the Constitution itself."[111] The effect on the States was clear: any legislative attempt to interfere with the federal exercise of constitutional powers was invalid.[112] Second, *D'Emden* emphasized that it

103. *Id*. at 109–10.
104. *Id*. at 110.
105. (1904) 1 C.L.R. 208.
106. *Id*. at 238–42 (O'Connor, J.).
107. *Id*. at 238–39.
108. *Id*. at 239.
109. *D'Emden* (1904) 1 C.L.R. at 109, 117 (Griffith, C.J.).
110. *Id*. at 109. *See also Municipal Council* (1904) 1 C.L.R. at 231 (Griffith, C.J.).
111. *D'Emden* (1904) 1 C.L.R. at 110–11.
112. *Id*. at 111. This principle was affirmed in *Deakin v. Webb* (1904) 1 C.L.R. 585 [hereinafter *Deakin*].

was the Court's duty to determine the validity of federal and state legislation.[113]

Regarding both of these elements, American jurisprudence very much influenced the Court. Highly influential was Chief Justice Marshall's pivotal decision in *McCulloch v. Maryland*,[114] which dealt in part with the "conflicting powers of the government of the Union and of its members."[115] Indeed, Chief Justice Griffith's judgment for the High Court in *D'Emden* devotes over seven pages to discussing *McCulloch*, including a debate about whether constitutional decisions of the United States Supreme Court should be given any weight in Australian constitutional law.[116]

D'Emden's holding that a state legislature cannot "fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth . . . unless expressly authorized by the Constitution"[117] was not based on any express provision of the Constitution. Rather, the limitation was implied in the Constitution.[118] Thus, it is possible to argue that the High Court took a flexible approach to constitutional interpretation. Even so, the Court clearly viewed its methodology as orthodox, considering itself to be acting entirely within the principles of ordinary statutory interpretation that formed part of the English legal canon.[119]

Interestingly, the Judicial Committee of the Privy Council did not agree.[120] In *Webb v. Outtrim*,[121] the Privy Council considered the question of whether a federal officer, who lived in the State of Victoria and earned and received his salary in Victoria, was liable to pay tax under Victorian income tax legislation.[122] This question required the Privy Council to

113. *D'Emden* (1904) 1 C.L.R. at 117.

114. 17 U.S. (4 Wheat.) 316 (1819).

115. *Id*. at 400.

116. *D'Emden* (1904) 1 C.L.R. at 111–18. *See also Municipal Council* (1904) 1 C.L.R. at 236 (Barton, J.). It is interesting to compare these debates to recent controversy in the U.S. over the use of foreign domestic law and international law in U.S. constitutional adjudication. *See, e.g.*, Mark Tushnet, *When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006).

117. *D'Emden* (1904) 1 C.L.R. at 111 (Griffith, C.J.).

118. *See id*.

119. *See, e.g.*, *Municipal Council* (1904) 1 C.L.R. at 239 (O'Connor, J.). For insight into the approach to constitutional interpretation favored by Justice Barton but discussed in the context of U.S. decisions, see *id*. at 237–38.

120. *See* Webb v. Outtrim (1906) 4 C.L.R. 356 [hereinafter *Webb*].

121. *Id*.

122. *Id*. at 356–57.

Washington University Open Scholarship

examine the High Court's *D'Emden* decision.[123] The Privy Council disapproved of *D'Emden*, holding that the federal officer was liable to assessment under the state income tax legislation.[124] The Privy Council's reasons are interesting, particularly because what seems to principally aggrieve the Privy Council is the Court's reliance on Chief Justice Marshall's opinion in *McCulloch*.[125] Moreover, the Privy Council specifically took issue with the High Court's approach to constitutional interpretation outlined in *D'Emden*.[126] Specifically, their Lordships were "not able to acquiesce" in the High Court's "expansion of the canon of interpretation . . . to consider the knowledge of those who framed the Constitution and their supposed preferences for this or that model which might have been in their minds."[127] In disapproving of *D'Emden*, the Privy Council not only gave the High Court Justices a serious rebuke, but delegitimized the High Court's claim that it merely applied conventional English common law methods of statutory interpretation to the Constitution.

The High Court responded forcefully to *Webb*. In *Baxter v. Commissioners of Taxation (N.S.W.)*,[128] Chief Justice Griffith (writing also for Justices Barton and O'Connor) penned what has been described as "the most vitriolic judgment in the Commonwealth Law Reports."[129] Concluding that a Privy Council decision regarding the parameters of the Australian Constitution could not "be put any higher than a decision on foreign law as a question of fact," the joint Justices held the High Court not bound by *Webb*.[130]

Ultimately, however, the implied immunity doctrine did not survive, and with its death also came the demise of the more flexible approach to constitutional interpretation it supported. The High Court rejected the implied immunity doctrine, as well as another doctrine developed in the early years of the Court, the "reserved powers doctrine," in one of its most famous decisions, *Amalgamated Society of Engineers v. Adelaide*

123. *Id*. at 358–60.
124. *Id*. at 361 (The Earl of Halsbury delivered their Lordships' judgment).
125. *See, e.g.*, *id*. at 358–60.
126. *Id*. at 360–61.
127. *Id*. at 360.
128. (1907) 4 C.L.R. 1087.
129. Chief Justice Murray Gleeson, The Centenary of the High Court: Lessons from History (Oct. 3, 2003), *available at* http://www.hcourt.gov.au/speeches/cj/cj_3oct.html.
130. *Baxter* (1907) 4 C.L.R. at 1118 (Griffith, C.J., Barton and O'Connor, JJ.). Justice Isaacs also held *Webb* not binding but for different reasons. *Id*. at 1148 (Isaacs, J.). Justice Higgins dissented. *Id*. at 1161 (Higgins, J.).

Steamship Co. Ltd. (*Engineers' Case*).[131] It is important, however, to first emphasize that the approach taken in *D'Emden* was not wholly representative of the early Court's approach to constitutional interpretation. Indeed, in other cases, the High Court demonstrated its unwillingness to interpret the Constitution more flexibly than conventional methods of statutory interpretation might otherwise allow.[132]

The High Court delivered the *Engineers' Case* decision in 1920.[133] Chief Justice Knox presided over the Court after becoming Chief Justice in 1919.[134] The *Engineers' Case* began when the Amalgamated Society of Engineers, a union, lodged a claim under the Commonwealth Conciliation and Arbitration Act (1904) (Austl.).[135] The respondents included the Western Australian Minister for Trading Concerns, the State Implement and Engineering Works, and the State Sawmills.[136] Consequently, the question that arose regarded whether an award under the federal legislation could bind the State of Western Australia.[137] In making his case for the Union, Robert Menzies, who later became Prime Minister of Australia, challenged the *Railway Servants' Case*.[138] The High Court seized this opportunity to reconsider the implied immunity doctrine, holding in a five–to–one decision that the Federal Parliament had the power to enact laws binding the States.[139]

The High Court's rejection of the implied immunity doctrine proved a critical step in the Court's development of its approach to constitutional interpretation.[140] In rejecting the doctrine, the High Court made clear that it considered the *D'Emden* approach erroneous and outlined its view regarding the correct method.[141] For the *Engineers' Case* Court, a principal difficulty with *D'Emden* and its ilk was the Constitution's

131. (1920) 28 C.L.R. 129.

132. *See, e.g.*, Tas. v. Commonwealth (1904) 1 C.L.R. 329, 333, 338, 340 (Griffith, C.J.), 348 (Barton, J.), 358 (O'Connor, J.); Federated Amalgamated Gov't Ry. and Tramway Serv. Ass'n v. N.S.W. Ry. Traffic Employees Ass'n (*Railway Servants Case*) (1906) 4 C.L.R. 488, 534 (Griffith, C.J., Barton and O'Connor, JJ.).

133. *Engineers' Case* (1920) 28 C.L.R. at 129. Six Justices heard the case: Chief Justice Knox, and Justices Isaacs, Higgins, Gavan Duffy, Rich, and Starke; Justice Powers did not hear the case. *Id*.

134. Sir Adrian Knox served as Chief Justice from 1919 until 1930. Graham Fricke, *Knox Court*, *in* OXFORD COMPANION 403 (Tony Blackshield et al. eds., 2001).

135. *Engineers' Case* (1920) 28 C.L.R. at 131–32 (Knox, C.J., Isaacs, Rich, and Starke, JJ.).

136. *Id*.

137. *Id*.

138. *Id*. at 132–34. *See also* Keven Booker & Arthur Glass, *The* Engineers *Case*, *in* AUSTRALIAN CONSTITUTIONAL LANDMARKS 34, 40 (H.P. Lee & George Winterton eds., 2003).

139. *Engineers' Case* (1920) 28 C.L.R. at 129, 140, 171. Justice Gavan Duffy dissented.

140. *See, e.g.*, Booker & Glass, *supra* note 138, at 36, 47.

141. *Engineers' Case* (1920) 28 C.L.R. at 145–46, 148–50 (Knox, C.J., Isaacs, Rich, and Starke, JJ.).

Washington University Open Scholarship

interpretation by reference to implications drawn from outside the Constitution's text or any "acknowledged common law constitutional principle."[142] Thus, the joint Justices chided their predecessors for interpreting the Constitution by reference to an implication "formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution."[143]

Moreover, an extremely disapproving view was taken of the early High Court's reliance on decisions of the United States Supreme Court in its development of the implied immunities doctrine.[144] For the joint Justices, two "cardinal features" of the Australian political system—"the common sovereignty of all parts of the British Empire," and the principle of responsible government—fundamentally distinguished the Australian system from that of the United States.[145] Therefore, reliance on American constitutional law when interpreting the Australian Constitution constituted "profound error."[146] Looking beyond the rhetoric, one wonders whether the High Court's resistance to the use of American case law is really attributable to the more purposive style of constitutional interpretation exhibited in decisions such as *McCulloch*.[147]

According to the *Engineers' Case*, the correct approach to constitutional interpretation was not found in the developing jurisprudence of the United States, but instead by reference to the "settled rules of construction . . . very distinctly enunciated by the highest tribunals of the Empire."[148] Applying these established rules to the interpretation of the Australian Constitution, the joint Justices emphasized the need to give constitutional words their natural meaning,[149] taking guidance from "the circumstances in which [the Constitution] was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it . . . ."[150] In determining whether a statute exceeded a grant of power, the joint Justices adopted the approach taken by the Privy Council. Namely, affirmative grants of power should be limited only by express conditions or restrictions in the granting instrument itself.[151] By focusing

142. *See, e.g.*, *id*. at 145.
143. *Id*. at 145.
144. *Id*. at 145–47.
145. *Id.* at 146.
146. *Id*.
147. *See generally McCulloch*, 17 U.S. (4 Wheat.) 316 (1819).
148. *Engineers' Case* (1920) 28 C.L.R. at 148 (Knox, C.J., Isaacs, Rich, and Starke, JJ.).
149. *Id*. at 149, 152.
150. *Id*. at 149.
151. *Id*. (approving of The Queen v. Burah, 3 App. Cas. 889, 904–05 (U.K.)).

upon the text's express words and insisting that constitutional interpretation not draw upon extra-constitutional matters, the *Engineers' Case* has been viewed as casting an unfavorable light on the drawing of constitutional implications generally.[152] Applying "ordinary principles of construction" to the Constitution,[153] the joint Justices construed the Constitution's grant of legislative power to the Federal Parliament as plenary, but "within [] prescribed limits . . . ."[154] The joint Justices held that federal legislative power could not be limited by reference to a doctrine which "finds no place" where those "ordinary principles" are applied.[155] Therefore, the *Engineers' Case* held that States were subject to applicable and validly enacted federal legislation.[156]

The *Engineers' Case* represents a seminal moment in the High Court's constitutional jurisprudence.[157] Particularly, its affirmation of the application of traditional principles of statutory construction to constitutional interpretation has had a lasting impact on Australian jurisprudence.[158] Development of the Australian approach to judicial review, however, cannot be fully understood without reference to Australia's preeminent jurist, Sir Owen Dixon.

Dixon, a forceful proponent of "strict and complete legalism"[159] during his tenure as Chief Justice (1952–64), served to consolidate legalism as the Australian High Court's dominant approach to constitutional interpretation.[160] In advocating his brand of legalism, Dixon saw himself as applying the historic judicial method developed over time in the English courts.[161] Because this method reveres "uniformity, consistency, and certainty,"[162] the doctrine of stare decisis was of fundamental importance to Dixon.[163] He was enormously reluctant to depart from precedent, even in significant constitutional cases.[164]

Relevant to this Article, Dixon chose to apply the traditional common law method to the adjudication of constitutional cases.[165] Dixon thought it

152. Booker & Glass, *supra* note 138, at 44.
153. *Engineers' Case* (1920) 28 C.L.R. at 155 (Knox, C.J., Isaacs, Rich, and Starke JJ.).
154. *Id*. at 153.
155. *Id*. at 155.
156. *Id*.
157. Booker & Glass, *supra* note 138, at 36.
158. *Id*.
159. Dixon, *supra* note 96, at 249.
160. Zines, *supra* note 5, at 220, 222.
161. *See* Dawson & Nicholls, *supra* note 91, at 545.
162. *Mirehouse* (1833) 1 Cl.& F. 527, 546; 6 ER 1015, 1023 (Eng.).
163. Dawson & Nicholls, *supra* note 91, at 547–48.
164. *Id*. at 548–49.
165. *See id*. at 544–45.

Washington University Open Scholarship

"of particular importance that the technique of the common law should be applied to the construction of what he described more than once as a 'rigid' Constitution, in order to maintain public confidence in the Court's judgments in areas of political conflict."[166] Thus, as a general proposition, Dixon considered questions arising under the Constitution as not requiring a different judicial method than questions arising under the general law.

An important theme emerges from the decisions previously discussed. From the very earliest High Court decisions to Dixon's enunciation of the preferred approach to constitutional interpretation, there existed a clear insistence on the application of ordinary principles of statutory interpretation to the interpretation of the Constitution. Given that "[s]tatutes more readily lend themselves to a legalistic approach,"[167] it is unsurprising that legalism became such a dominant force in Australian constitutional interpretation.

However, the High Court's application of statutory interpretation principles to the Constitution's interpretation is problematic, given the obvious differences between them. For example, while constitutions tend to be broadly framed so that they can be judicially adapted over time, statutes generally use more specific language and are usually tailored to deal with a narrower set of issues or circumstances.[168] Why did the Court not instead develop different principles of constitutional interpretation which took into account the Constitution's unique purpose and characteristics? One possible answer, that will not be explored here, is that the Court invoked statutory interpretation methodology—an established part of English common law—as a way to legitimize its constitutional interpretation.

1. Section 117 of the Australian Constitution

A salient example of the early Court's legalistic approach to the exercise of judicial review is its interpretation of section 117 of the Constitution. This provision provides that, "[a] subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."[169]

166. *Id.* at 545.
167. Mason, *supra* note 17, at 5.
168. *Id*.
169. AUSTL. CONST. § 117.

Clearly, section 117's object is to prohibit States from imposing a disability upon or discriminating against a person by virtue of that person's residency in a different State.[170] Moreover, section 117 is distinctive because, unlike other express rights provisions in the Constitution, it directly confers an individual right.[171] Specifically, it gives persons an immunity from laws falling within the provision's terms.[172] However, the early High Court adopted a legalistic interpretation of section 117 which greatly narrowed its scope.[173] For example, *Davies and Jones v. Western Australia*,[174] a 1904 Griffith Court decision, held that while section 117 applied to prohibit legislation which discriminated solely on the basis of residence, it did not preclude discrimination based on residence and some other factor, such as domicile.[175] *Lee Fay v. Vincent*,[176] decided in 1908, confirmed the Court's legalistic approach to section 117. *Lee Fay* concerned a prosecution in Western Australia for a breach of section 46 of the Factories Act (1904) (W. Austl.), which provided that "no person of the Chinese or other Asiatic race shall be employed in a factory unless the employer satisfies the inspector that such person was so employed or engaged on or immediately before 1st November 1903."[177] Before that date, the appellant worked in a factory in Victoria, a different state.[178] An argument was made that if the word "factory" in section 46 did not include factories outside Western Australia, it was invalid under section 117 of the Constitution.[179] The Court immediately dismissed the argument, viewing section 117 as only applying to a resident of one State seeking to assert rights in another.[180] Because the appellant was a resident of Western Australia trying to assert rights in Western Australia,[181] section 117 did not apply.[182] Although the High Court's interpretation of section 117 in *Lee Fay* is clearly made on the basis of section 117's text, this interpretation fails to take into account section 117's purpose, working to undermine the provision's potential to

170. WILLIAMS, *supra* note 31, at 120.
171. *See id*.
172. *Id*.
173. *Id*.
174. (1904) 2 C.L.R. 29.
175. *Id*. at 42–43 (Griffith, C.J.), 46–47 (Barton, J.), 48–49, 53 (O'Connor, J.).
176. (1908) 7 C.L.R. 389.
177. *Id*. at 391 (Griffith, C.J.).
178. *Id*.
179. *Id*. at 390–91.
180. *Id*. at 391–92.
181. *Id*. at 392.
182. *Id*.

Washington University Open Scholarship

operate as a substantial protection of individual human rights.[183] Thus, as in *Davies and Jones*, the adoption of a legalistic approach in *Lee Fay* further narrowed section 117's scope.

These cases demonstrate how the early High Court's insistence on strict legalism reduced judicial review's potential to protect individual rights. However, this discussion raises a further question. Namely, in what kinds of cases was the High Court willing to strike down federal legislation? The best example from this phase of the Court's history is its 1951 decision in the *Communist Party Case*.[184]

2. The Communist Party Case

The *Communist Party Case* held unconstitutional the Communist Party Dissolution Act (1950) (Austl.), which dissolved the Communist Party and forfeited its property, provided means for the dissolution of affiliated organizations, and enabled the restriction of certain civil liberties of individuals with Communist associations (subject to a declaration by the Governor-General).[185] This case has been described as one of Australian constitutionalism's "greatest triumphs."[186]

By way of background, in 1940, the Australian Communist Party's opposition to World War II provoked the Menzies Liberal Government to dissolve it under regulations subsequently held invalid.[187] Despite the Communist Party's decision to support the war after Germany invaded the Soviet Union on June 22, 1941, the ban was not lifted until December 18, 1942.[188] The war's end, and the concomitant end of the alliance with the Soviets, "saw relations between the Communist Party and the main political parties revert to their more normal position of mutual enmity."[189] Industrial unrest, involving unions led by Communist Party members, intensified political pressure to ban the Communist Party.[190] In March 1948, the Liberal Party, at the time the opposition party, adopted a policy to ban the Communist Party.[191] In December 1949, the Liberal-Country

183. WILLIAMS, *supra* note 31, at 121–22.
184. (1951) 83 C.L.R. 1.
185. *Id*. at 3, 129–31 (Latham, C.J.).
186. Winterton, *supra* note 51, at 108.
187. Adelaide Co. of Jehovah's Witnesses Inc. v. Commonwealth (1943) 67 C.L.R. 116. *See* Winterton, *supra* note 51, at 110. *Compare* Communist Party v. Control Bd., 367 U.S. 1 (1961).
188. Winterton, *supra* note 51, at 110. Winterton writes that after coming into office on October 7, 1941, Prime Minister John Curtin, leader of the Labor Government, lifted the ban. *Id*.
189. *Id*. at 111.
190. *Id*.
191. *Id.* at 112.

Party coalition won a national election on a platform that included banning the Communist Party.[192] Prime Minister Menzies faced a tough battle with the Labor Party–controlled Senate, which resisted his proposal to ban the Communist Party.[193] In fact, Menzies's first attempt to pass the Communist Party Dissolution Bill failed.[194] Menzies reintroduced the Bill on September 28, 1950, this time raising the prospect of double dissolution of the Federal Parliament under section 57 of the Constitution if the Senate again obstructed the Bill's passage.[195] The Labor Party, while still divided over the issue, ultimately allowed the Bill to pass.[196]

The plaintiffs in the *Communist Party Case* immediately challenged the new Act's constitutional validity,[197] arguing that the Act was unsupported by any constitutional grant of power.[198] Specifically, the plaintiffs contended the Federal Parliament's military defense power[199] and its incidental power[200] were incapable of supporting the legislation.

After twenty-four days of argument before the High Court[201] and almost three months of deliberation, a six-to-one majority of the Court invalidated the Act. Each Justice delivered a separate judgment.[202] For a majority of the Justices, the critical issue was whether this legislation was sufficiently connected to the defense power to be regarded as incidental or ancillary to that power.[203] The legislation's particular form required a negative answer. Specifically, the problem with the Act's operation, most succinctly described by Justice Williams, was that "[o]n the basis of an assertion by [the Federal] Parliament or the [Federal] Executive that communist bodies and communist persons are acting and are likely to act

192. *Id*. at 115.
193. *Id*. at 115–17.
194. *Id*. at 121.
195. *Id.* at 123.
196. *Id.* at 124.
197. *Id*.
198. *Communist Party Case* (1951) 83 C.L.R. at 34.
199. Section 51(vi) of the Australian Constitution confers legislative power on the Commonwealth with respect to "the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth." AUSTL. CONST. § 51(vi) *See also Communist Party Case* (1951) 83 C.L.R. at 34.
200. AUSTL. CONST. § 51(xxxix). *See also Communist Party Case* (1951) 83 C.L.R. at 34.
201. The length of oral argument before the High Court has now been greatly reduced. However oral argument is not subject to strict time limits as in the U.S. Supreme Court. David Bennett, *Argument before the Court*, *in* OXFORD COMPANION 31 (Tony Blackshield et al. eds., 2001).
202. *See Communist Party Case* (1951) 83 C.L.R. 1.
203. *See id*. at 193 (Dixon, J.), 206–07 (McTiernan, J.), 226–27 (Williams, J.), 243 (Webb, J.), 278 (Kitto, J.). Justice Fullagar took a slightly different approach in this regard. *See id*. at 266–67 (Fullagar, J.). His Honor considered whether the legislation could be sustained under the "extended" or "secondary" aspect of the defense power, which he saw as coming into existence "by virtue of a judicially noticed emergency." *Id.*

Washington University Open Scholarship

in a manner prejudicial to security and defen[s]e the Act proceeds to dissolve these bodies and deprive communists of certain contractual rights."[204] For the majority, the fact that the legislation's operation depended on the Federal Parliament's "opinion that the persons to whom it applies are indiscriminately *per se* a danger,"[205] rather than on "the actual existence or occurrence of any act, matter or thing having a specific relation to the purposes of the power with respect to defen[s]e,"[206] was fatal.[207] Unsurprisingly, the Court reiterated the role of judicial review within Australia's legal system,[208] with Justice Fullagar emphasizing that the constitutional limits placed on the exercise of federal legislative power must be finally decided by the courts, not the legislature.[209]

The *Communist Party Case*[210] is the clearest expression in Australian jurisprudence of the judiciary's willingness to assert its supremacy over the Federal Parliament in the determination of the constitutionality of legislation. For that reason it arguably deserves description as "probably the most important [decision] ever rendered by the High Court."[211]

There is no doubt that in some contexts, such as section 117's interpretation, the High Court's legalistic approach to judicial review reduced the ability of the Court to rigorously enforce the Constitution's rights-protective provisions. Nevertheless, the *Communist Party Case*[212] demonstrates the High Court's deep commitment to the rule of law and its willingness to invalidate legislation, even in very politically charged circumstances, if it concludes that the legislature has overstepped the boundaries of its constitutional authority.

Having considered the development and consolidation of the High Court's legalism, the next section considers a different approach to the Court's constitutional work: that of the Mason Court.

---

204. *See id*. at 225 (Williams, J.).
205. *Id*. at 206 (McTiernan, J.).
206. *Id.* at 200 (Dixon, J).
207. *See id.* at 193–200 (Dixon, J.), 206–07, 212 (McTiernan, J.), 225–27 (Williams, J.), 244–45 (Webb, J.), 277–83 (Kitto, J.).
208. *Id.* at 262–63 (Fullagar, J.).
209. *Id*.
210. *See generally id*.
211. Winterton, *supra* note 51, at 129. Winterton points to the *Communist Party Case*'s "confirmation of fundamental constitutional principles such as the rule of law, its impact on civil liberties, its symbolic importance as a reaffirmation of judicial independence, and its political impact." *Id*.
212. (1951) 83 C.L.R. 1.

B. The Mason Court

The High Court entered a new phase under Sir Anthony Mason, Chief Justice from 1987 to 1995.[213] The Justices who served with Mason were Justice Wilson, who retired in February 1989,[214] and Justices Brennan, Deane, Dawson, Toohey, Gaudron, and McHugh (who replaced Justice Wilson).[215] Lasting nearly a decade, and described as "among the most exciting and important in the Court's history,"[216] this period was a time of significant change for Australian law, particularly Australian constitutional law.[217] It was also a time characterized by controversy over many of the High Court's decisions.[218]

Diverging from previous High Courts, the Mason Court's approach to constitutional adjudication possessed several important distinguishing characteristics.[219] For example, the Mason Court decidedly favored substance over form.[220] The Court placed more importance on the purpose of constitutional provisions,[221] often resulting in an increased reliance on historical material.[222] Moreover, the Mason Court was more open to questioning English precedent[223] and demonstrated greater willingness to consider questions of policy.[224]

Cole v. Whitfield[225] exemplifies this purposive approach and willingness to question precedent. In *Cole*, one of the Mason Court's most significant constitutional decisions, the defendants were charged with

213. Michelle Dillon & John Doyle, *Mason Court*, *in* OXFORD COMPANION 459–60 (Tony Blackshield et al. eds., 2001). Mason served as a Justice of the High Court from 1972–1987. During Mason's early years on the Court he pursued a more orthodox judicial approach. Kirby, *supra* note 99, at 1089–91.

214. Dillon & Doyle, *supra* note 213, at 461.

215. *Id.*

216. Michael Lavarch, *The Court, the Parliament and the Executive*, *in* COURTS OF FINAL JURISDICTION, *supra* note 6, at 15.

217. *E.g.*, Kirby, *supra* note 99, at 1088.

218. *See id.* at 1087–88.

219. Cheryl Saunders, *The Mason Court in Context*, *in* COURTS OF FINAL JURISDICTION, *supra* note 6, at 3. *But cf.* Justice Michael McHugh, The Inaugural Sir Anthony Mason Lecture in Constitutional Law, The Constitutional Jurisprudence of the High Court: 1989–2004 9, 29 (Nov. 26, 2004), *available at* http://www.law.usyd.edu.au/news/docs_pdfs_images/2004/MasonLecture2004.pdf.

220. For example, in *Cole v. Whitfield* (1988) 165 C.L.R. 360, 407–08 (the Court), the Mason Court emphasized that it would look beyond a statute's form and consider its effect when determining whether the statute infringed section 92 of the Constitution. *See also* Saunders, *supra* note 219, at 3; McHugh, *supra* note 219, at 31.

221. Leslie Zines, *Sir Anthony Mason*, 28 FED. L. REV. 171, 174 (2000) [hereinafter Zines II].

222. Dillon & Doyle, *supra* note 213, at 462.

223. *Id.*; McHugh, *supra* note 219, at 32. *See also* Saunders, *supra* note 219, at 3.

224. Zines II, *supra* note 221, at 174; McHugh, *supra* note 219, at 32.

225. (1988) 165 C.L.R. 360.

Washington University Open Scholarship

possession of undersized crayfish in violation of Tasmanian Sea Fisheries Regulations.[226] However, the crayfish, brought from South Australia to Tasmania in the course of interstate trade, were not considered undersized under the relevant South Australian Regulations.[227] In pleading not guilty, the defendants relied upon section 92 of the Australian Constitution, which provides that, "[o]n the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."[228]

Over the years, the Court had shifted "uneasily between one interpretation and another" of section 92.[229] Rather than reconcile the precedents, a unanimous Court in *Cole* took a fresh look at section 92, adopting a dramatically different interpretation based on the Court's understanding of the provision's purpose.[230] The Court held section 92's purpose was to create "a free trade area throughout the Commonwealth," and to deny both federal and state parliaments the "power to prevent or obstruct the free movement of people, goods and communications across State boundaries."[231] In ascertaining this purpose, the Mason Court relied on section 92's history, delving into the political climate which prevailed prior to the Constitutional Conventions and giving detailed consideration to the Convention Debates.[232]

Considered by some to be a more "creative" High Court,[233] the Mason Court certainly used more "open-ended" concepts in its constitutional interpretation,[234] and was more willing to refer to foreign case law and consider developments in international law in its decision making.[235]

While the above paragraphs highlight the differences in the Mason Court's judicial method, the Mason Court also differed from its predecessors in its focus.[236] In the period immediately prior to Mason's 1987 appointment as Chief Justice, the Court handed down a number of

226. *Id.* at 361–62. The defendants were charged with contravention of Regulations 31(1)(d)(ix) and (x) and 44(3) of the Sea Fisheries Regulations (1962) (Tas.). *Id*.

227. *See id*. at 362–63.

228. AUSTL. CONST. § 92.

229. *Cole* (1988) 165 C.L.R. at 384 (the Court).

230. *See id.* at 385, 391–92, 403–04, 407.

231. *Id.* at 391.

232. *Id.* at 385–93.

233. Dillon & Doyle, *supra* note 213, at 462.

234. *Id*.

235. *See generally* Mabo v. Queensl. II (1992) 175 C.L.R. 1; Dietrich v. The Queen (1992) 177 C.L.R. 292; Minister for Immigration & Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273; Saunders, *supra* note 219, at 3; Dillon & Doyle, *supra* note 213, at 462.

236. *See* Lavarch, *supra* note 216, at 15–16.

significant decisions expanding federal legislative power.[237] Against this background, the Mason Court turned its gaze from federalism concerns to a very different field, namely, the protection of individuals under the Australian Constitution.[238] For this reason, the Mason Court has been credited with dramatically altering the way in which the Australian Constitution is conceived.[239] Indeed, the Mason Court era was heralded as a "new constitutional law of individual (citizens') rights that is profound and far-reaching."[240]

In considering the Mason Court's development of constitutional rights and freedoms jurisprudence, two prominent examples ought to be examined. First, the Court's reconsideration of section 117, the "discrimination based on state residence" provision.[241] Second, the Court's work in the context of implied rights and freedoms, particularly its recognition of the implied freedom of political communication.

1. Section 117 of the Constitution

As discussed, in 1904 the High Court adopted a narrow interpretation of section 117 of the Constitution, dramatically reducing its constitutional protection for individuals.[242] The Barwick Court maintained the narrow interpretation in *Henry v. Boehm*,[243] which by majority held that section 117 did not prohibit the imposition of a residency requirement upon persons seeking admission to practice law in South Australia who were admitted to practice in other states.[244] However, in 1989 the Mason Court overruled *Henry v. Boehm* in a decision which breathed new life into section 117 and demonstrated the Mason Court's dramatically different approach to constitutional interpretation.

---

237. *See, e.g.*, Koowarta v. Bjelke-Petersen (1982) 153 C.L.R. 168; Commonwealth v. Tas. (*Tasmania Dams Case*) (1983) 158 C.L.R. 1.

238. Dillon & Doyle, *supra* note 213, at 462.

239. Lavarch, *supra* note 216, at 16. *See generally* M.J. Detmold, *The New Constitutional Law*, 16 SYDNEY L. REV. 228, 228 (1994).

240. Detmold, *supra* note 239, at 228, 230. It should be noted, however, that much of the Court's "rights-protective" work occurred through the development of the common law without reliance on express constitutional rights provisions. *See, e.g.*, *Mabo* (1992) 175 C.L.R. 1; *Dietrich* (1992) 177 C.L.R. 292.

241. AUSTL. CONST. § 117.

242. *See* text accompanying notes 169–84.

243. (1973) 128 C.L.R. 482.

244. *Id.* at 489–90 (Barwick, C.J.) (McTiernan, J., agreeing), 493–94 (Menzies, J.), 497–98 (Gibbs, J.). Justice Stephen dissented.

Washington University Open Scholarship

Like *Henry v. Boehm*, *Street v. Queensland Bar Association*[245] also dealt with requirements for admission to practice law, namely, the Queensland Rules of Court (Queensland Rules). The Queensland Rules imposed requirements and conditions on out-of-state barristers wanting to practice law in the State of Queensland.[246] Mr. Street, a New South Wales barrister,[247] was refused admission to practice in Queensland because he failed to comply with two requirements of the Queensland Rules: first, that he be a resident of Queensland; and second, that he cease practicing law in Queensland.[248] Street challenged the validity of the Queensland Rules, contending they violated sections 92 and 117 of the Constitution. Prior to the matter coming before the High Court, the Queensland Rules were amended to require that an applicant state that he or she intended to "practice principally" in Queensland and imposing a one year period of conditional admission on out-of-state applicants.[249] The High Court unanimously upheld Street's challenge to the Queensland Rules (in both their original and amended forms) based on section 117, overruling *Henry v. Boehm* and rejecting the narrow interpretation of section 117.

Chief Justice Mason, drawing an analogy between section 117 and the United States Constitution's Privileges and Immunities Clause,[250] referred to the Australian framers' awareness of "the need for a provision which, by guaranteeing to out-of-State residents who were British subjects an individual right to non-discriminatory treatment, would bring into existence a national unity and a national sense of identity transcending colonial and State loyalties."[251] Justice Deane spoke of the early High Court's tendency to "distort the content of some of [the Constitution's] guarantees by restrictive legalism or by recourse to artificial formalism"[252] and considered previous section 117 decisions to constitute "a triumph of form over substance."[253] Each Justice emphasized that section 117's protection must extend to laws which, although not necessarily facially

245. (1989) 168 C.L.R. 461.

246. Rule 38(d) of the Rules Relating to the Admission of Barristers of the Supreme Court of Queensland required out-of-state barristers wishing to practice in Queensland to sign an affidavit swearing that they had ceased to practice as a barrister in the courts to which they were previously admitted, and state the day on which they "arrived" in Queensland. *Id.*

247. Street was a resident of New South Wales and was admitted to practice as a barrister in New South Wales, Victoria, South Australia, and the Australian Capital Territory. *Id.* at 463.

248. *Id.* at 477 (Mason, C.J.).

249. *Id.* at 494.

250. U.S. CONST. art. IV, § 2.

251. *Street* (1989) 168 C.L.R. at 485.

252. *Id.* at 522 (Deane, J.).

253. *Id.* at 523.

discriminatory, produce a discriminatory impact.[254] Justices Brennan, Gaudron, and McHugh also considered it relevant that such an interpretation was consistent with developments in anti-discrimination law.[255] Thus, the judgments in *Street* represent a clear attempt by the Mason Court to break away from the legalistic approach traditionally taken by the High Court.[256] The Mason Court in *Street* wanted to distinguish itself, particularly in the area of constitutional guarantees of rights and immunities. It accomplished this by adopting a more radical approach to constitutional decision making.[257]

2. The Implied Freedom of Political Communication

Any lingering doubts as to whether the Mason Court intended to forge a new and different path were obliterated by two 1992 decisions: *Nationwide News Proprietary Ltd. v. Wills*[258] and *Australian Capital Television Proprietary Ltd. v. Commonwealth* (*A.C.T.V.*).[259] In simultaneous judgments, the Mason Court invalidated federal legislation on the basis that the legislation infringed on a newly recognized freedom implied into the Constitution, specifically, a freedom of communication about government matters. Recognition of this freedom and its development in *Lange v. Australian Broadcasting Corp.*[260] represents an important stage in the Court's history and exemplifies the Mason Court's approach to judicial review.

Notably, this recognition of an implied constitutional freedom of communication had two important precursors.[261] First, in *Davis v. Commonwealth*,[262] the Mason Court invalidated part of a federal law[263] that, as part of a scheme to commemorate the bicentenary of the 1788 European settlement of Australia, licensed the use of certain expressions relating to the bicentenary. The Court's basis for invalidation was the familiar ground that the relevant part of the law was not "reasonably and

254. *Id.* at 487–88 (Mason, C.J.), 508 (Brennan, J.), 528 (Deane, J.), 545–46 (Dawson, J.), 554–55, 559 (Toohey, J.), 566, 568–70 (Gaudron, J.), 581–82 (McHugh, J.).

255. *Id.* at 509–10 (Brennan, J.), 566 (Gaudron, J.), 581 (McHugh, J.).

256. *See also id.* at 527 (Deane, J.), 554 (Toohey, J.).

257. *Cf.* WILLIAMS, *supra* note 31, at 128 (arguing that after *Street*, the hope that other constitutional rights might be reinterpreted has not yet been realized).

258. (1992) 177 C.L.R. 1.

259. (1992) 177 C.L.R. 106.

260. (1997) 189 C.L.R. 520.

261. Detmold, *supra* note 239, at 231–32.

262. (1988) 166 C.L.R. 79.

263. The Court invalidated section 22(6)(d)(i) of the Australian Bicentennial Authority Act, 1980 (Austl.) to the extent that it referred to the expression "200 years." *Id.* at 101.

Washington University Open Scholarship

appropriately adapted" to the achievement of constitutionally permissible ends. However, two of the judgments contain telling references to the law's "extraordinary intrusion into freedom of expression."[264]

Second, in June 1992, Justices Deane and Toohey recognized the existence of an implied constitutional right of equality in *Leeth v. Commonwealth*,[265] with Justice Gaudron indicating a degree of sympathy for the idea.[266] Justices Deane and Toohey suggested that the implied right to equality had two aspects: first, "subjection of all persons to the law;" and second, the "inherent theoretical equality of all persons under the law and before the courts."[267] Although the recognition of this implied right did not result in the invalidation of the federal legislation at issue,[268] it signaled the Mason Court's increased willingness to interpret the Constitution in a more "creative" or "activist" fashion. Thus, both *Davis* and *Leeth* provide context for the direction taken by the Mason Court in *Nationwide News* and *A.C.T.V.*

Nationwide News concerned section 299(1)(d)(ii) of the Industrial Relations Act, 1988 (Austl.) which made it an offense to use words "calculated . . . to bring a member of the [Australian Industrial Relations] Commission or the Commission into disrepute." The appellant, the proprietor of *The Australian* newspaper, was charged with offending section 299(1)(d)(ii) by publishing an article critical of the Commonwealth "Arbitration Commission." The article, entitled "Advance Australia Fascist," described the Commission as a "Soviet-style" "corrupt and compliant 'judiciary'" and labeled its members as "corrupt labour 'judges.'"[269] The appellant's defense challenged the validity of section 299(1)(d)(ii), claiming it was beyond the Federal Parliament's legislative powers.

In *A.C.T.V.* several holders of commercial television licenses and license warrants under the Broadcasting Act, 1942 (Austl.) challenged the constitutional validity of Part IIID of the Act, which sought to ban political advertising during election periods and applied to federal, state, territory,

264. *Davis* (1988) 166 C.L.R. at 100 (Mason, C.J., Deane and Gaudron, JJ.), 116 (Brennan, J.). *See also* Detmold, *supra* note 239, at 231.

265. (1992) 174 C.L.R. 455, 483–93 (Deanne and Toohey, JJ.). *See also* Queensl. Elec. Comm'n v. Commonwealth (1985) 159 C.L.R. 192, 247–48 (Deane, J.); Kruger v. Commonwealth (1997) 190 C.L.R. 1, 94–97 (Toohey, J.). *See generally* Wendy Lacey, *Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the Constitution*, 31 FED. L. REV. 57 (2003).

266. *Leeth* (1992) 174 C.L.R. at 501–03 (Gaudron, J.).

267. *Id.* at 485 (Deanne and Toohey, JJ.).

268. Chief Justice Mason and Justices Brennan, Dawson and McHugh upheld the validity of section 4(1) of the Commonwealth Prisoners Act, 1967 (Austl.). *Id.* at 503.

269. *Nationwide News* (1992) 177 C.L.R. at 62 (Deane and Toohey, JJ.).

https://openscholarship.wustl.edu/law_globalstudies/vol6/iss2/4

and local government authority elections, and to federal referenda. In both cases, the submissions challenging the federal legislation's constitutional validity reveal attempts by counsel to formulate a constitutional right or guarantee arising out of Australia's system of representative democracy and protecting the voters' free expression regarding public or political matters. For example, in *Nationwide News*, counsel argued that in a representative democracy legislatures could "regulate but not abrogate political criticism."[270] Similarly, counsel in *A.C.T.V.* contended that the legislation contravened "an implied guarantee of freedom of access to, participation in, and criticism of, federal and state institutions amounting to a freedom of communication in relation to the political and electoral processes."[271]

Despite having raised these arguments, there was little hope that the Court would agree. Gageler, who was counsel in both cases, observed that "at the time there were few academics, and even fewer practicing lawyers, who gave the argument that the Australian Constitution contained an implication of freedom of speech any real prospect of success."[272]

As a result, the Court's decision in both cases was shocking.[273] In *Nationwide News*, the Court unanimously held that section 299(1)(d)(ii) was invalid, with four Justices recognizing an implied freedom of communication about governmental matters.[274] A majority in *A.C.T.V.* struck down Part IIID (or at least its operative provisions) as invalid,[275] with four Justices doing so on the basis that Part IIID infringed upon a constitutional freedom of political or governmental communication.[276] Another Justice recognized the existence of the freedom, but did not invalidate the legislation on that basis.[277] In two subsequent decisions, the

---

270. *Id.* at 8. The case was argued by J.R. Sackar Q.C., with G.O'L. Reynolds for the applicant.

271. *A.C.T.V.* (1992) 177 C.L.R. at 109. The case was argued by Sir Maurice Byers Q.C., with S.J. Gageler, for the plaintiffs in the first action.

272. *See* Stephen Gageler, Comment on Implied Rights, *in* THE CAULDRON OF CONSTITUTIONAL CHANGE 83, 84 (Michael Coper & George Williams eds., 1997).

273. *Id.*

274. *Nationwide News* (1992) 177 C.L.R. at 50–52 (Brennan, J.), *id*. at 72–80 (Deane and Toohey, JJ.), *id.* at 94–95 (Gaudron, J.). The Court relied upon multiple grounds to invalidate the legislation. *See generally* Dean Bell et al., *Implying Guarantees of Freedom into the Constitution:* Nationwide News *and* Australian Capital Television, 16 SYDNEY L. REV. 288 (1994).

275. Chief Justice Mason held the entire Part invalid, *A.C.T.V.* (1992) 177 C.L.R. at 146–47 (Mason, C.J.), as did Justices Deane and Toohey. *Id.* at 176 (Deane and Toohey, JJ.). Justice Gaudron held that the operative provisions of the Part were invalid in their entirety. *Id.* at 224 (Gaudron, J.). Justice McHugh held that the Part was invalid except in its application to the territories. *Id*. at 246 (McHugh, J.). Justice Brennan held that the Part was valid except for sections 95D(3) and (4). *Id*. at 167 (Brennan, J.). Justice Dawson dissented. *Id*. at 108 (Dawson, J.).

276. *Id*. at 106, 145–46 (Mason, C.J.), 171–76 (Deane and Toohey, JJ.), 214–17 (Gaudron, J.).

277. *Id.* at 149–67 (Brennan, J.). Justice McHugh saw a strong case for recognizing the implied

Washington University Open Scholarship

newly recognized implied freedom was held (by majority) to have implications for judicial development of the common law of defamation.[278] However, the precise form and scope of the implied freedom remained uncertain until *Lange*, a unanimous High Court decision delivered on July 8, 1997, two years after Mason's retirement from the bench.[279]

Lange substantially remodeled the emerging political communication doctrine. The *Lange* Court reaffirmed the existence of a constitutional freedom of communication about matters of government and politics, describing it as "an indispensable incident" of Australia's system of representative government.[280] However, the Court significantly narrowed the scope of this freedom. The Court carefully tied the implied freedom to the Constitution's text and structure,[281] in particular the provisions requiring that members of the Federal Parliament be "directly chosen by the people."[282] This limited the implied freedom's reach and restricted the possibility of recognizing other implied rights.

Moreover, *Lange* rejected any possibility of this implied freedom conferring personal rights on individual persons. Rather, *Lange* held that the Constitution merely "preclude[s] the curtailment of the protected freedom by the exercise of legislative or executive power."[283] For this reason, *Lange* establishes a freedom from governmental interference with political communication and not a personal "right" to free speech. The distinction, which has been questioned by scholars,[284] was explained by Justice Brennan in *A.C.T.V.*:

> [U]nlike freedoms conferred by a Bill of Rights in the American model, the freedom [of political communication] cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative

---

freedom, but found it unnecessary to do so in the case at hand. *Id*. at 233 (McHugh, J.).

278. Theophanous v. Herald & Weekly Times Ltd. (1994) 182 C.L.R. 104; Stephens v. W. Austl. Newspapers Ltd. (1994) 182 C.L.R. 211.

279. *Lange* (1997) 189 C.L.R. 520. Mason retired in 1995. Walker, *supra* note 85, at 459.

280. *Lange* (1997) 189 C.L.R. at 559 (the Court).

281. *Id*. at 557–61 (the Court). *See also* Adrienne Stone, Lange, Levy *and the Direction of the Freedom of Political Communication Under the Australian Constitution*, 21 U.N.S.W. L.J. 117, 122 (1998).

282. AUSTL. CONST. §§ 7, 24.

283. *Lange* (1997) 189 C.L.R. at 560.

284. *See, e.g.*, Adrienne Stone, *Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication*, 25 MELB. U. L. REV. 374 (2001).

> regulation; rather, it is . . . an immunity consequent on a limitation of legislative power.[285]

Importantly, in holding that this freedom is not absolute,[286] the *Lange* Court formulated a test for determining the validity of communication-burdening legislation that gave a large amount of discretion to legislatures. Under this test, a law would not be invalid for burdening political communication if its object is compatible with the maintenance of the constitutionally prescribed system of government, and if the law is "reasonably appropriate and adapted to achieving that legitimate object or end."[287] Arguably, the test announced by the *Lange* Court greatly weakened the freedom of political communication's potential bite.[288]

Although post-*Lange* litigants relying on the implied freedom to invalidate legislative or executive action have had limited success,[289] the Mason Court's development of the notion of an implied right to political communication in *Nationwide News* and *A.C.T.V.* raised the possibility of a new approach to constitutional interpretation and judicial review in Australia, a possibility which has significance beyond the scope of freedom of political communication itself. The implied freedom is now an established part of Australia's constitutional doctrine, which, given the absence of an express right to free speech in the Constitution, is remarkable. Moreover, the Mason Court's development of the implied freedom of political communication provided the foundation for a different conception of Australian constitutional law, whereby the High Court may imply a constitutional freedom and then use this implication to invalidate legislative and executive actions as well as to develop the common law.

---

285. *A.C.T.V.* (1997) 177 C.L.R. at 150 (Brennan, J.).
286. *Lange* (1997) 189 C.L.R. at 561 (the Court).
287. *Id.* at 561–62.
288. *See generally* Stone, *supra* note 281, at 122–26.
289. *See, e.g.*, Levy v. Vict. (1997) 189 C.L.R. 579 (rejecting the plaintiff's challenge to Victorian legislation on grounds including that the legislation infringed the implied freedom of communication). *See also* Coleman v. Power (2004) 220 C.L.R. 1 (finding the legislation at issue not invalid, even though a majority of the High Court set aside certain convictions of the appellant on implied freedom of political communication grounds); Austl. Broad. Corp. v. Lenah Game Meats Proprietary Ltd. (2001) 208 C.L.R. 199 (revealing that only Justices Kirby and Callinan considered an argument that Tasmanian legislation authorizing the granting of an injunction was inconsistent with the implied freedom of communication).

Washington University Open Scholarship

3. Conclusion

The Mason Court marked a new era of constitutional decision-making in the High Court of Australia. By rejecting the legalistic approach which characterized the High Court's earlier jurisprudence, the Mason Court created new possibilities for Australian constitutional adjudication, including the rise of constitutional rights and freedoms jurisprudence, specifically recognizing an implied freedom of political communication.

The Mason Court's new direction did not go unnoticed. For example, media interest in the High Court's work increased towards the end of Chief Justice Mason's tenure on the Court.[290] In fact, one scholar notes that "during this period, decision-making by the Court became increasingly controversial and the legitimacy of the Court was increasingly subject to challenge."[291] Part of the increased public interest in the High Court was due to Chief Justice Mason's view, somewhat unusual in Australia, that it was important for judges to improve public awareness of the judiciary, exemplified in his public speeches about the High Court's work.[292]

Before considering the High Court in the post-Mason era, it is useful to briefly consider some of the factors that may have influenced the Mason Court to challenge the accepted wisdom of Australian constitutional law.[293]

First, Mason's ascent to the position of Chief Justice occurred shortly after Australia took an important step towards independence from the United Kingdom.[294] The passage of the Australia Acts, 1986 (Austl.) and (U.K.), by abolishing the last avenues for appeals to the Privy Council, finally established the High Court's position as Australia's ultimate court of appeal.

Second, the Mason Court operated during a time of significant social, economic, and political change in Australia. There was increasing awareness of Australia's need to become active in the international community. Australia was becoming part of the global economy, which carried with it pressure for Australia to become a better economic performer in the international market.[295] Australia, particularly during

290. Kirby, *supra* note 99, at 1088.
291. WILLIAMS, *supra* note 31, at 74.
292. Brennan, *supra* note 6, at 13.
293. *See, e.g.*, Kirby, *supra* note 99, at 1092–1101.
294. COURTS OF FINAL JURISDICTION, *supra* note 6, at 2–3.
295. *Id.* at 2.

Keating's Labor Government, attempted to become more integrated within the Asia-Pacific region.[296]

Finally, there was a heightened interest in (and concern about) international law and international law-making institutions,[297] including whether and how international law might impact Australian law.[298] Thus, the Whitlam Labor Government enacted the Racial Discrimination Act, 1975 (Austl.) and ratified and brought into force three international human rights treaties.[299] The Fraser Liberal-Country Government ratified the International Covenant on Civil and Political Rights in 1980.[300] As Saunders points out, a number of significant constitutional decisions of the Mason Court reflected this growing interest in international law.[301] Although beyond the scope of this Article, the question of how these and other factors may have influenced the Mason Court warrants further inquiry.

Having considered the different direction pioneered by the Mason Court with respect to its constitutional decision-making, this Article now turns to the third and final phase of the Court considered here: the Gleeson Court.

C. The Gleeson Court

This section addresses the High Court's approach to judicial review under the current Chief Justice, Murray Gleeson, who was appointed in May 1998 and must retire at the age of seventy in 2008 unless he elects to do so earlier.[302] When Chief Justice Gleeson was appointed, four members of the Court were also relatively recent appointees: Justice Gummow in 1995, Justice Kirby in 1996, Justice Hayne in 1997, and Justice Callinan in February 1998.[303] Two Justices, Gaudron and McHugh, were appointed

296. *Id*.

297. *Id.* at 4; *see also* Kirby, *supra* note 99, at 1101.

298. COURTS OF FINAL JURISDICTION, *supra* note 6, at 4.

299. O'Neill, *supra* note 12, at 123. The three international treaties were: the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Political Rights of Women; and the International Covenant on Economic Social and Cultural Rights.

300. *Id*.

301. COURTS OF FINAL JURISDICTION, *supra* note 6, at 4 (citing *Teoh* (1995) 183 C.L.R. 273; *Dietrich* (1992) 177 C.L.R. 292; Mabo v. Queensl. (1988) 166 C.L.R. 186). *See also* Kirby, *supra* note 99, at 1101.

302. Walker, *supra* note 9, at 305. High Court Justices cannot continue to serve past the age of seventy by virtue of an amendment to section 72 of the Australian Constitution made as a result of a 1977 referendum. *See* Rebecca Craske, *Retirement of Justices*, *in* OXFORD COMPANION 604 (Tony Blackshield et al. eds., 2001).

303. Leslie Zines, *Gleeson Court*, *in* OXFORD COMPANION 307 (Tony Blackshield et al. eds.,

Washington University Open Scholarship

considerably earlier: in 1987 and 1989, respectively. When Justice Gaudron retired in 2003, she was replaced by Justice Heydon. The work of these seven Justices, together with that of Chief Justice Gleeson, is considered in this Part. Although Justices McHugh and Callinan have now retired and have been replaced by Justices Crennan and Kiefel (in November 2005 and September 2007, respectively), at the time this Article was written, any assessment of the new appointees' contribution would have been of negligible benefit.

The Gleeson Court's constitutional work is markedly different from that of the Mason Court. First, the individual rights and freedoms jurisprudence developed by the Mason Court has steadily declined under the Gleeson Court. Second, the Gleeson Court has placed greater emphasis on Chapter III of the Constitution and its implications for the scope of federal and state legislative power. This section addresses both of these issues and discusses one of the most important constitutional cases arising during the Gleeson period, *Austin*.[304] It is contended that the Gleeson Court, excepting Justice Kirby, has returned to a more legalistic approach in the exercise of judicial review, reestablishing legalism's dominance in Australian constitutional law.

Before analyzing case law, it is important to address the Gleeson Court's approach to constitutional interpretation generally. In particular, the different views which have emerged concerning the drawing of constitutional implications are considered.

In discussing the Justices' approaches to constitutional interpretation, it is unhelpful to use labels such as "originalist" or "progressivist." Rarely will a Justice's approach fit neatly into such categories. Constitutional interpretation is too intricate and nuanced for such simplistic classifications.[305] Also, the originalism/progressivism debate is overstated in the High Court's jurisprudence because "the relevance or otherwise of the framers' intentions has been decisive in very few, if any, of the constitutional cases decided by the Gleeson Court."[306] However, to the extent such labels have some use, the Gleeson Court's dominant approach to constitutional interpretation is textualism combined with a form of

2001) [hereinafter Zines III].

304. (2003) 215 C.L.R. 185.

305. A similar point is made by Justice Gummow in *SGH Ltd. v. Comm'r of Taxation* (2002) 210 C.L.R. 51, 75. *See also* Justice Susan Kenny, *The High Court on Constitutional Law: The 2002 Term*, 26 U.N.S.W. L.J. 210, 214 (2003).

306. Dan Meagher, *Guided by Voices?—Constitutional Interpretation on the Gleeson Court*, 7 DEAKIN L. REV. 261, 283 (2002).

"soft" originalism.[307] The Gleeson Court's approach is primarily textualist in that it tends to place considerable emphasis on the Constitution's text and structure. The approach is originalist because it is considered relevant to ascertain the meaning attributed to constitutional provisions at the time the Constitution was framed.[308] However, the Gleeson Court's originalism is appropriately described as "soft" in that it does not attempt to answer questions of constitutional interpretation by ascertaining the framers' subjective intentions.[309] Moreover, the original understanding of a constitutional provision is not considered to be absolutely determinative: it is accepted that the interpretation of a constitutional provision can change over time.[310] However, one member of the Gleeson Court, Justice Callinan, has occasionally indicated that he might favor a stricter version of originalism than the other Justices.[311]

Justice Kirby has taken a different approach, consistently advocating for judges to progressively interpret the Constitution so it may be adaptable to changing times and values.[312] In Justice Kirby's view, "the Constitution is to be read according to contemporary understandings of its meaning, to meet, so far as the text allows, the governmental needs of the Australian people."[313] Importantly, however, Justice Kirby's "progressive" method of constitutional interpretation does not always lead him to a different result than that reached by his colleagues.[314]

---

307. *See generally* Kenny, *supra* note 305; Meagher, *supra* note 306.

308. *See, e.g.*, Brownlee v. The Queen (2001) 207 C.L.R. 278, 284–85 (Gleeson, C.J. and McHugh, J.); *SGH Ltd*. (2002) 210 C.L.R. at 75 (Gummow, J.).

309. *See, e.g.*, Eastman v. The Queen (2000) 203 C.L.R. 1, 46 (McHugh, J.); *Brownlee* (2001) 207 C.L.R. at 285 (Gleeson, C.J. and McHugh, J.). *See also* Meagher, *supra* note 306, at 283.

310. *See, e.g.*, Sue v. Hill (1999) 199 C.L.R. 462, 487–90 (Gleeson C.J., Gummow and Hayne, JJ.), 524–28 (Gaudron, J.); Grain Pool of W. Austl. v. Commonwealth (2000) 202 C.L.R. 479, 493–97 (Gleeson, C.J., Gaudron, McHugh, Gummow, Hayne and Callinan, JJ.). For a discussion of the High Court's "moderate" originalism, see Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1, 1 (1997).

311. *Austl. Broad. Corp.* (2001) 208 C.L.R. at 331–32 (Callinan, J.), 336–37. *See also* Meagher, *supra* note 306, at 265, 283.

312. *See, e.g.*, Abebe v. Commonwealth (1999) 197 C.L.R. 510, 581–82 (Gleeson, C.J., and McHugh, J.); *Grain Pool* (2000) 202 C.L.R. at 522–25 (Gleeson, C.J., Gaudron, McHugh, Gummow, Hayne and Callinan, JJ.); *Eastman* (2000) 203 C.L.R. at 79–81 (Gleeson, C.J.); A.P.L.A. Ltd. v. Legal Serv. Comm'r N.S.W. (2005) 224 C.L.R. 322, 442–43 (Kirby, J.). *See generally* Justice Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1 (2000) (discussing whether the Australian Constitution should be read according to original intent or modern interpretation).

313. *Eastman* (2003) 203 C.L.R. at 80.

314. *See, e.g.*, *Abebe* (1999) 197 C.L.R. at 510 (Gleeson, C.J., Callinan, Kirby, and McHugh, JJ.) (upholding the validity of sections 476(1), (2), (3), 481(1)(a), 485 and 486 of the Migration Act, 1958 (Austl.)). Justices Gaudron, Gummow and Hayne dissented.

Washington University Open Scholarship

The Gleeson Court's approach to drawing constitutional implications is illustrated by *A.P.L.A. Ltd. v. Legal Services Commissioner (A.P.L.A.)*.[315] Here, the plaintiffs challenged the constitutionality of Part 14 of the Legal Profession Regulation, 2002 (N.S.W.) (Part 14), prohibiting advertising of personal injury legal services.[316] One of the grounds on which the plaintiffs challenged Part 14 was that it infringed upon an implication drawn from Chapter III of the Constitution.[317] In a five-to-two decision, the Court upheld Part 14.[318] The judgments provide valuable insight into the Gleeson Court's varying approaches to drawing constitutional implications.

The strictest approach, exemplified in the joint judgment of Chief Justice Gleeson and Justice Heydon, and in Justice Callinan's separate judgment, allows only "necessary" implications to be drawn from the Constitution's text or structure.[319] A less strict approach was adopted by Justice Gummow,[320] who applied Chief Justice Mason's *A.C.T.V.* formulation, whereby implications derived from constitutional text are allowed if the "relevant intention is manifested according to the accepted principles of interpretation," but implications derived from constitutional structure must be "logically or practically necessary."[321] Similarly to Justice Gummow, Justice Hayne also relied on Chief Justice Mason's *A.C.T.V.* judgment, emphasizing that "any implication must be securely based."[322] However, Justice Hayne left open the question of whether "necessity" is always required when a judge attempts to draw a structural implication.[323] The minority Justices, McHugh and Kirby, found for the plaintiffs, holding that Part 14 infringed upon an implication drawn from Chapter III of the Constitution (although each Justice relied on a different implication).[324] Both minority judgments apply a looser method of

315. (2005) 224 C.L.R. 322.

316. The Legal Profession Regulation, 2002 (N.S.W.) was made under the Legal Profession Act, 1987 (N.S.W.).

317. *A.P.L.A.* (2005) 224 C.L.R. at 326.

318. *Id*. at 345, 355 (Gleeson, C.J., and Heydon, J.), 412 (Gummow, J.) 463 (Hayne, J.), 489–90 (Callinan, J.). Justices McHugh and Kirby dissented.

319. *Id*. at 352 (Gleeson, C.J. and Heydon, J.), 484–85 (Callinan, J.).

320. *Id*. at 409 (Gummow, J.).

321. *A.C.T.V.* (1992) 177 C.L.R. at 135. This was adopted by Chief Justice Brennan in *McGinty v. W. Austl.* (1996) 186 C.L.R. 140, 168–69, and applied in *A.P.L.A.* (2005) 224 C.L.R. at 409 (Gummow, J.).

322. *A.P.L.A.* (2005) 224 C.L.R. at 453 (Hayne, J.) (quoting *A.C.T.V.* (1992) 177 C.L.R. at 134 (Mason, C.J.)).

323. *A.P.L.A.* (2005) 224 C.L.R. at 453 (Hayne, J.).

324. *Id*. at 366–67 (McHugh, J.), 444–45 (Kirby, J.). Justice Kirby also held that Part 14 was invalid by virtue of section 109 of the Constitution. *Id*. at 437, 448.

drawing constitutional implications. Yet, neither judgment contains an express statement of the principles applied.[325]

Finally, the Gleeson Court, consistent with its focus on constitutional text and structure, exhibits far less overt reliance on policy considerations than the Mason Court, indeed often expressly rejecting policy-based arguments.[326] For example, in *Re Wakim*, Justices Gummow and Hayne disapproved of the use of "perceived convenience as a criterion of constitutional validity," preferring "legal analysis and the application of accepted constitutional doctrine."[327] Similarly, Chief Justice Gleeson and Justice Heydon reiterated in *A.P.L.A.* "[w]e are concerned . . . not with . . . questions of policy, but with a legal question which is to be resolved, not as a matter of opinion or personal preference, but as a matter of judgment upon a defined issue."[328] It has been suggested, however, that the Gleeson Court's rejection of a policy-based approach and its emphasis on constitutional text may be "more a matter of tone and style than of substance."[329]

1. Individual Rights & Freedoms—Decline, Stagnation or Progress?

In the context of this Article, it is useful to consider the Gleeson Court's approach to constitutional rights and freedoms in two ways. First, has the Court been willing to recognize any new implied rights or freedoms? Second, what is the Court's attitude towards existing express and implied constitutional rights or freedoms?

Answering the first question is simple. Since Chief Justice Gleeson's appointment in 1998, the High Court has not recognized any new implied rights or freedoms. However, the trend against implying rights into the Constitution began before 1998. For example, although *Leeth* potentially promised a new implied constitutional right to equality,[330] only five years later in *Kruger*,[331] Justice Toohey was alone in recognizing the general equality right framed in *Leeth*.[332]

---

325. It would appear, however, that Justice Kirby believes he is doing no more than extending the *Lange* principle to protect Chapter III. *Id.* at 440 (Kirby, J.).

326. *See, e.g.*, Zines III, *supra* note 303, at 307–08 (also quoting the material cited *infra* note 327).

327. *Re Wakim* (1999) 198 C.L.R. at 581–82 (Gummow and Hayne, JJ.).

328. *A.P.L.A.* (2005) 224 C.L.R. at 352 (Gleeson, C.J. and Heydon, J.).

329. Zines III, *supra* note 303, at 308 (looking to *Sue v. Hill* (1999) 199 C.L.R. 462, and Egan v. Willis (1998) 195 C.L.R. 424, as examples).

330. *Leeth* (1992) 174 C.L.R. at 483–93 (Deane and Toohey, JJ.).

331. (1997) 190 C.L.R. 1.

332. It should be noted, however, that Justice Gaudron did express support for a constitutional guarantee of equality framed in more limited terms. *Id.* at 112–14.

Washington University Open Scholarship

Al-Kateb v. Godwin[333] illustrates the Gleeson Court's reluctance to develop constitutional rights-based jurisprudence. *Al-Kateb* involved two issues. First, as a matter of statutory interpretation, whether the Migration Act, 1958 (Austl.)[334] authorized indefinite detention of "unlawful non-citizens." And, if so, whether those provisions were constitutionally invalid. In a four-to-three decision, a majority, consisting of Justices McHugh, Hayne, Callinan and Heydon, held that the Migration Act authorized and required indefinite detention of unlawful non-citizens and that the relevant provisions were valid.[335] The majority's approach to the constitutional issue in *Al-Kateb* is classic Gleeson Court: squarely focused on precedent and reluctant to develop existing constitutional law in different ways or to assert new principles.[336] Justice McHugh devoted a substantial part of his judgment to rebutting Justice Kirby's invocation of rules of international law to construe the Constitution[337] and concluded that "desirable as a Bill of Rights may be, it is not to be inserted into our Constitution by judicial decisions drawing on international instruments that are not even part of the law of this country."[338]

Al-Kateb and *A.P.L.A.* demonstrate the Gleeson Court's strong resistance to implying rights or freedoms into the Australian Constitution. Indeed, in 2007 the judicial movement to imply rights into the Constitution has virtually halted, much to the chagrin of those who saw the Mason Court as heralding a new era of rights-based constitutional law in Australia.

The second question, which seeks to understand the Gleeson Court's attitude towards constitutional rights and freedoms recognized by previous Courts, is more complicated. The Gleeson Court has continued to recognize and apply the implied freedom of political communication, but it has not extended the doctrine.[339] Moreover, the Court has taken some tentative steps toward developing an implied constitutional guarantee of procedural due process.[340] The overarching sense, however, is that the

333. (2004) 219 C.L.R. 562.

334. The relevant provisions were sections 189, 196, and 198.

335. *Al-Kateb* (2004) 219 C.L.R. 562.

336. *Id*. at 586–87, 589–95 (McHugh, J.), 645–50 (Hayne, J.) (Heydon, J. agreeing), 658–62 (Callinan, J.).

337. *Id.* at 589–95 (McHugh, J.). Justice McHugh, however, would allow reference to international law rules existing prior to 1900. *Id*.

338. *Id.* at 594.

339. *See, e.g*., *Coleman* (2004) 220 C.L.R. 1.

340. *See generally* Fiona Wheeler, *Due Process, Judicial Power and Chapter III in the New High Court*, 32 FED. L. REV. 205 (2004).

https://openscholarship.wustl.edu/law_globalstudies/vol6/iss2/4

Gleeson Court has a limited interest in developing existing implied freedoms.

With respect to express rights, the Gleeson Court has given some attention to section 80 of the Constitution, which protects the right to trial by jury.[341] However, although a number of cases have presented the Gleeson Court with an opportunity to provide some much needed depth to section 80 jurisprudence,[342] the Court has chosen instead to reaffirm its commitment to the common law method underlying Australian constitutional legalism. Thus, in *Cheng v. The Queen*[343] there are clear demonstrations of the Gleeson Court's preference for incremental case law development, and a concomitant reluctance to decide questions which are not strictly necessary on the facts of the case.[344]

In a different context, however, the Gleeson Court delivered a decision of particular importance to criminal appellants, even though the judgments are not framed in the language of individual rights. *Crampton v. The Queen*[345] confirmed that there was no constitutional barrier preventing the High Court from hearing an appeal under section 73 of the Constitution on grounds not previously raised, although the Court would grant special leave only in exceptional circumstances.[346] Thus, criminal appellants are not automatically deprived of the opportunity to raise a ground of appeal before the High Court because their counsel failed to raise it in earlier proceedings. Given *Crampton*, it would be wrong to assume that the Justices of the Gleeson Court are unconcerned with the protection of vulnerable persons merely because their judgments are not obviously informed by the discourse of individual rights.

Although the Gleeson Court has focused less on rights-based constitutional law than the Mason Court,[347] another field of constitutional law has received a good deal of attention: Chapter III.

---

341. It should be noted however, that scholars question whether section 80 is best understood as a "rights-protective" provision. James Stellios, *The Constitutional Jury—"A Bulwark of Liberty"?*, 27 SYDNEY L. REV. 113 (2005).

342. *Id*. at 142.

343. (2000) 203 C.L.R. 248.

344. *Id*. at 268–70 (Gleeson, C.J., Gummow and Hayne, JJ.), 344–45 (Callinan, J.).

345. (2000) 206 C.L.R. 161.

346. *Id.* at 170–71 (Gleeson, C.J.), 184 (Gaudron, Gummow and Callinan, JJ.), 205–06 (Kirby, J.), 216 (Hayne, J.). Justice McHugh dissented on this issue. *Id*. at 188.

347. Wheeler, *supra* note 340, at 206.

Washington University Open Scholarship

2. Chapter III of the Constitution under the Gleeson Court

Chapter III of the Australian Constitution, like Article III of the U.S. Constitution, deals with "The Judicature." It establishes the High Court of Australia,[348] including provisions for the appointment, removal, and remuneration of High Court Justices.[349] Chapter III also contains provisions describing the High Court's jurisdiction[350] and dealing with the Federal Parliament's powers with respect to the Court's jurisdiction.[351] The jury trial provision, section 80, is also found in Chapter III.[352]

The Gleeson Court has shown a substantial amount of interest in Chapter III. This section addresses some of the key developments in this area.[353]

Historically, the separation of powers doctrine has been an important aspect of the High Court's Chapter III jurisprudence. This doctrine centers on two related prohibitions:

> First, that federal judicial power cannot be exercised by bodies other than the 'courts' identified in section 71 of the Constitution (the 'first limb' of the separation doctrine) and, secondly, that federal courts cannot exercise legislative or executive functions unless those functions are incidental to judicial power (the 'second limb' of the separation doctrine).[354]

The Constitution does not expressly adopt the separation of powers doctrine, though it is firmly established as an implication from the Constitution's text and structure.[355] The Gleeson Court has been

348. AUSTL. CONST. § 71.
349. *Id*. § 72.
350. *Id*. §§ 73, 75.
351. *Id*. §§ 76, 77.
352. *Id*. § 80.
353. In addition to the cases addressed here, see *Abebe* (1999) 197 C.L.R. 510, an important case dealing with the validity of federal legislation purporting to limit the grounds upon which the Federal Court of Australia could examine the validity of decisions of the Refugee Review Tribunal. The High Court upheld the validity of the legislation in a four-to-three decision. The majority consisted of Chief Justice Gleeson, and Justices McHugh, Kirby and Callinan. Justices Gaudron, Gummow and Hayne dissented. *Id*.
354. Wheeler, *supra* note 340, at 207 (internal citations omitted). With respect to the first limb, Wheeler cites *N.S.W. v. Commonwealth* (1915) 20 C.L.R. 54 and *Waterside Workers' Fed'n of Austl. v. J.W. Alexander Ltd*. (1918) 25 C.L.R. 434. With respect to the second limb, Wheeler cites *Boilermakers* (1956) 94 C.L.R. 254. That case was affirmed by the Privy Council in *Att'y Gen. (Cth) v. The Queen* (1957) 95 C.L.R. 529.
355. Wheeler, *supra* note 340, at 207–08.

particularly interested in strengthening this doctrine,[356] best illustrated by *Re Wakim*.[357]

At issue in *Re Wakim* was a national cooperative legislative scheme for the transfer of jurisdiction among federal, state and territory courts, implemented to obviate many of the "jurisdictional disputes and gaps which plagued litigation [in Australia] during the 1980s."[358] This "cross-vesting scheme," so-called because it involved the vesting of state jurisdiction in federal courts and courts of different States, was enacted by the federal and state parliaments after a plan for a unified court system failed.[359] *Re Wakim* involved two related schemes. Under the first, which commenced in 1987, the Federal Parliament and all state parliaments enacted legislation to establish a cross-vesting system for general civil matters.[360] Essentially, the federal legislation empowered the Federal Court, the Family Court (also a federal court), and the Territory Supreme Courts to exercise original or appellate jurisdiction "conferred on that court by a provision of this Act or of a law of a State relating to cross-vesting of jurisdiction."[361] State legislation empowered those courts, and Supreme and Family Courts of other States, to "exercise original and appellate jurisdiction with respect to State matters," except in criminal proceedings.[362] Under the second scheme brought into effect during 1989 and 1990, legislation provided specifically for the cross-vesting of jurisdiction with respect to corporations law and securities matters.[363] The applicants in the *Re Wakim* cases challenged the validity of: first, provisions of the first scheme which purported to enable the Federal Court to hear "State matters";[364] second, provisions of the second scheme which purported to enable the Federal Court to exercise powers under the Corporations Law of a state;[365] and third, provisions of the Federal

356. *Id*.

357. (1999) 198 C.L.R. 511.

358. Dung Lam, *Case Note:* Wakim, 22 SYDNEY L. REV. 155, 156 (2000). Lam provides a comprehensive discussion of the jurisdictional issues prior to cross-vesting at 156–59.

359. *Id.* at 159.

360. In each jurisdiction the short title of the Act was the Jurisdiction of Courts (Cross-Vesting) Act, 1987. The relevant provisions are set out in *Re Wakim* (1999) 198 C.L.R. at 565–66 (Gummow and Hayne, JJ.).

361. Jurisdiction of Courts (Cross-Vesting) Act, 1987, § 9(2)(a) (Austl.).

362. Section 4 of the state Cross-Vesting Acts.

363. This scheme was given effect by the Corporations Act, 1989 (Austl.); the Australian Securities Commission Act, 1989 (Austl.); and the Corporations Act of each state. *See Re Wakim*, 198 C.L.R. at 566–68 (Gummow and Hayne, JJ.).

364. *See supra* note 361.

365. In the *Re* Brown; *Ex parte* Amann matter.

Washington University Open Scholarship

Corporations Act which purported to enable the Federal Court to exercise powers under the Corporations Law of the Australian Capital Territory.[366]

The cross-vesting scheme's constitutional validity was of concern even before the scheme commenced,[367] with unease centering principally on whether the federal and state parliaments could confer state jurisdiction on Chapter III courts. The scheme was directly challenged in *Gould v. Brown*,[368] where the Court divided three-to-three on the constitutional question. With the retirements of Chief Justice Brennan and Justice Toohey, both of whom had supported the scheme's validity, a dark constitutional cloud loomed over the scheme.[369] What kind of difference would result from the new appointments of Chief Justice Gleeson, and Justices Hayne and Callinan?[370]

The *Re Wakim* cases were more clear-cut. In a six-to-one decision (Justice Kirby dissented), the Gleeson Court held that section 9(2) of the Federal Cross-Vesting Act was invalid. The majority held that the Constitution limited the jurisdiction that could be conferred on a federal court to those matters identified in sections 75 and 76 of the Constitution, and only the Federal Parliament could confer such jurisdiction.[371] In so holding, the majority relied upon precedents describing Chapter III as "an exhaustive statement" of the manner in which federal judicial power may be vested.[372] The state jurisdiction which section 9(2) purported to confer was not found in sections 75 or 76 and was therefore invalidly conferred.[373]

In reaching its conclusion, the Court considered two major arguments in favor of the scheme's validity: first, that any lack of express constitutional authority to confer jurisdiction on federal courts could be

366. *In Re* Spinks v. Prentice (1999).

367. Lam, *supra* note 358, at 155. Lam notes that prior to the scheme's commencement, the Constitutional Commission had recommended that its validity be "secured" by referendum, and refers to a number of scholarly articles published on the question in 1988–1989. *Id*. at n.2.

368. (1998) 193 C.L.R. 346.

369. Lam, *supra* note 358, at 155.

370. Justice Hayne was appointed in September 1997 in order to replace Justice Dawson, who retired prior to the delivery of *Gould*. Graeme Hill, *Hayne, Kenneth Madison*, *in* OXFORD COMPANION 316–17 (Tony Blackshield et al. eds., 2001). Justice Callinan's appointment in February 1998 (replacing Justice Toohey) was soon followed by the appointment of Chief Justice Gleeson, who replaced Chief Justice Brennan in May 1998. *See* Zines III, *supra* note 303, at 307.

371. *Re Wakim* (1999) 198 C.L.R. at 555, 557–9 (McHugh, J.), 575 (Gummow and Hayne, JJ.) (Gleeson, C.J., and Gaudron, J., agreeing), 626 (Callinan, J.).

372. *Boilermakers* (1956) 94 C.L.R. at 270 (Dixon, C.J., McTiernan, Fullagar and Kitto, JJ.), *cited in Re Wakim* (1999) 198 C.L.R. at 575 (Gummow and Hayne, JJ.) (Gleeson, C.J., and Gaudron, J., agreeing). *See also Re Wakim* (1999) 198 C.L.R. at 557 (McHugh, J.).

373. *Re Wakim* (1999) 198 C.L.R. at 555, 562–3 (McHugh, J.), 582 (Gummow and Hayne, JJ.) (Gleeson, C.J., and Gaudron, J., agreeing), 625–6 (Callinan, J.).

overcome by enacting co-operative federal/state legislation; and second, that the Constitution empowered the Federal Parliament to consent to the States' conferral of jurisdiction on federal courts.[374] With respect to the first argument, the majority made it clear that "no amount of co-operation can supply power where none exists."[375] In short, policy-based arguments could not overcome a lack of constitutional authority. The second argument was based on the contention that the Federal Parliament was empowered to consent to conferral of jurisdiction under the Constitution's express incidental power,[376] or section 71's implied incidental power. This argument was also rejected. For Chief Justice Gleeson, the conferral of state jurisdiction on federal courts was not made "in aid of the execution of the principal power," but rather effected a "substantial addition" to federal judicial power, and constituted "an attempt to circumvent" constitutional limitations on that power.[377] Similarly, Justices Gummow and Hayne saw the purported conferral of state jurisdiction as an attempt to "supplement" federal judicial power rather than an attempt to "complement" that power.[378] Justice McHugh gave different reasons for rejecting the argument, explaining that although the conferral of state jurisdiction upon federal courts might make the exercise of *state* jurisdiction more effective, it could not make the exercise of *federal* jurisdiction more effective.[379]

Re Wakim makes abundantly clear that despite strong public policy reasons for upholding the scheme's validity, the Court (or at least the majority) was not swayed from its legalistic approach to constitutional decision-making. In the Gleeson Court's view, the well-established nature of the scheme and the consequences of declaring it unconstitutional should not be treated as factors relevant to the determination of the scheme's constitutionality. Moreover, the Court's willingness to invalidate a scheme which had resulted from cross-polity political consensus and had been in place for over a decade illustrates the seriousness with which the Court views its constitutional role.

---

374. *Id.* at 556–63 (McHugh, J.) (Callinan, J. agreeing), 576–82 (Gummow and Hayne, JJ.) (Gleeson, C.J., and Gaudron, J., agreeing), 600–616 (Kirby, J.).

375. *Id*. at 556 (McHugh, J.) (Callinan, J., agreeing), 577 (Gummow and Hayne, JJ.) (Gleeson, C.J., and Gaudron, J., agreeing).

376. AUSTL. CONST. § 51.

377. *Re Wakim* (1999) 198 C.L.R. at 546 (Gleeson, C.J.).

378. *Id.* at 580–81 (Gummow and Hayne, JJ.) (Gleeson, C.J., and Gaudron, J., agreeing).

379. *Id.* at 562 (McHugh, J.) (Callinan, J., agreeing).

Washington University Open Scholarship

3. Kable *and the Gleeson Court*

Another important facet of the Gleeson Court's Chapter III work is its treatment of the *Kable* principle. *Kable v. Director of Public Prosecutions (N.S.W.)*,[380] decided eighteen months prior to Gleeson's appointment as Chief Justice, concerned New South Wales legislation empowering that State's Supreme Court to make an order for the imprisonment of one named person, Gregory Wayne Kable, for a specified period of time to prevent him from committing future crimes.[381] A majority of the High Court held the New South Wales legislation was unconstitutional on the basis of a principle, formulated differently by each Justice, derived from Chapter III of the Constitution.

Justice Toohey held that a state court exercising federal jurisdiction (which he concluded had occurred in *Kable*) may not act in a manner "incompatible" with Chapter III.[382] In Justice Toohey's opinion, the issue of incompatibility arose in *Kable* because the state legislation directed the Supreme Court to act inconsistently with "traditional judicial process," particularly because the legislation was aimed at one named person and would therefore diminish public confidence in the judiciary.[383]

Justice Gummow, also emphasizing that the State Supreme Court in this case was exercising federal jurisdiction,[384] agreed that the New South Wales legislation directed the Supreme Court to act in a manner "repugnant to judicial process."[385] Pointing out that the legislation required the Supreme Court to punish Kable "without any anterior finding of criminal guilt by application of the law to past events," Justice Gummow expressed concern that the judiciary would be "seen as but an arm of the executive which implements the will of the legislature."[386] Justice Gummow held that the *Kable* legislation attempted to impair the New South Wales Supreme Court in contravention of a mandate arising from the constitution and which operated to protect federal judicial power "as and when it may be invested."[387]

---

380. (1996) 189 C.L.R. 51.

381. Community Protection Act, 1994, § 5(1) (N.S.W.). Kable's release had become a matter of political and public interest due in part to threatening letters he had written while in prison, and which were directed to his children's caregivers. Paul Ames Fairall, *Imprisonment Without Conviction in New South Wales:* Kable v. Director of Public Prosecution, 17 SYDNEY L. REV. 573, 573–74 (1995).

382. *Kable* (1996) 189 C.L.R. at 94 (Toohey, J.).

383. *Id.* at 98.

384. *Id.* at 136 (Gummow, J.).

385. *Id.* at 134.

386. *Id*.

387. *Id.* at 143.

Justices Gaudron and McHugh, in separate judgments, suggested a more stringent limitation on state legislative power. According to Justice Gaudron, the integrated judicial system established by Chapter III prohibited state parliaments from conferring powers on state courts that "are repugnant to or incompatible with" the exercise of federal judicial power by those courts.[388] The constitutional prohibition on state legislative conferral of incompatible functions on state courts was not restricted to the exercise of federal jurisdiction: "[i]f Ch III requires that State courts not exercise particular powers, the Parliaments of the States cannot confer those powers upon them."[389] In Justice Gaudron's view, the functions the *Kable* legislation conferred on the New South Wales Supreme Court were so contrary to what is ordinarily involved in the judicial process that the "integrity of the judicial system" created by Chapter III was compromised.[390] Similarly, Justice McHugh determined that no parliament—state or federal—could legislate "in a way that might undermine the role of [state courts] as repositories of federal judicial power."[391] Finding it irrelevant that the *Kable* legislation was aimed at the exercise of state jurisdiction,[392] Justice McHugh held that the legislation infringed upon Chapter III because it would "inevitably" impair public confidence in the state judiciary by virtue of the fact that "ordinary reasonable members of the public" might perceive the Supreme Court as "an instrument of executive government policy."[393]

Obviously, *Kable* created a good deal of concern among the States. Its implications were potentially very broad and threatened to inhibit state legislative power with respect to state courts, even on purely State matters (especially according to Justices Gaudron and McHugh's approach).[394]

The Gleeson Court has had several opportunities to consider the development and application of *Kable*.[395] For a period of time, however,

388. *Id*.
389. *Id.* at 102 (Gaudron, J.).
390. *Id.* at 107.
391. *Id.* at 116 (McHugh, J.).
392. *Id*.
393. *Id.* at 124.
394. *See generally* Elizabeth Handsley, *Do Hard Laws Make Bad Cases?—The High Court's Decision in* Kable v. Director of Public Prosecutions (N.S.W.), 25 FED. L. REV. 171 (1997); Peter Johnston & Rohan Hardcastle, *State Courts: The Limits of* Kable, 20 SYDNEY L. REV. 216 (1998); Rohan Hardcastle, *A Chapter III Implication for State Courts:* Kable v. Director of Public Prosecutions, 3 NEWCASTLE L. REV. 13 (1998–1999).
395. In addition to the cases considered in this section, see also *H.A. Bachrach Proprietary Ltd. v. Queensl.* (1998) 195 C.L.R. 547, a *Kable* case regarding Queensland legislation which had the effect of permitting a proposed land development. The Court unanimously upheld the legislation's validity. *Id*.

Washington University Open Scholarship

the Court appeared reluctant to fully tackle *Kable* and its potential ramifications. For example, in *McGarry v. The Queen*,[396] a case in which the appellant sought to raise a *Kable* challenge to the validity of Western Australia's indefinite imprisonment legislation,[397] the Court considered it unnecessary to deal with the *Kable* issue because the appeal was allowed on other non-constitutional grounds.[398] Subsequently, in *Silbert v. Director of Public Prosecutions (W. Austl.)*,[399] the Court rejected a *Kable* challenge to Western Australia's criminal confiscation legislation, yet gave only brief reasons for doing so. If the Gleeson Court was, as has been suggested, reluctant to confront *Kable*, such reluctance was entirely understandable. Although much of the legal reasoning in *Kable* appeared to sit uncomfortably with the Gleeson Court, the Court's respect for precedent meant that overruling *Kable* was not really an option. Arguably there was only one answer: *Kable* would have to be narrowed.[400]

A clear opportunity for the Gleeson Court to deal with *Kable* arose in *Fardon v. Attorney General (Queensl.)*.[401] *Fardon* concerned a constitutional challenge to Queensland legislation that empowered the Queensland Supreme Court to order terms of indefinite imprisonment for prisoners already serving prison terms for a "serious sexual offence."[402] *Fardon* was delivered simultaneously with *Baker v. The Queen*,[403] in which the Court rejected a weaker *Kable* challenge to legislation concerning the New South Wales Supreme Court's power to make an indeterminate life sentence a determinate sentence. In *Fardon*, the

396. (2001) 207 C.L.R. 121.

397. The applicant sought to challenge the validity of section 98 of the Sentencing Act, 1995 (W. Austl.).

398. *McGarry* (2001) 207 C.L.R. at 124 (Gleeson, C.J., Gaudron, McHugh, Gummow and Hayne, JJ.), 149–50 (Kirby, J.). Although Justice Callinan dissented on the non-constitutional question, he declined to address the constitutional issue. *Id.* at 164 (Callinan, J.).

399. (2003) 217 C.L.R. 181. *Silbert* concerned the validity of the Crimes (Confiscation of Profits) Act, 1988 (W. Austl.) which in this case operated to empower the court to make confiscation orders in relation to the estate of a person who died after being charged with, but not convicted of, serious crimes within the meaning of the legislation. The Court unanimously upheld the validity of the relevant legislative provisions.

400. In *Baker v. The Queen* (2004) 223 C.L.R. 513, 544 (Kirby, J.), Justice Kirby questioned the legitimacy of narrowing *Kable* in circumstances where it was not suggested that *Kable* was wrongly decided or in need of reconsideration.

401. (2004) 223 C.L.R. 575.

402. Dangerous Prisoners (Sexual Offenders) Act, 2003, §§ 8, 13 (Queensl.).

403. (2004) 223 C.L.R. 513. The New South Wales legislation at issue in *Baker* provided that certain prisoners serving life sentences were not eligible to have their indefinite prison sentence effectively changed to a definite sentence unless the Supreme Court was satisfied that "special reasons" existed. Sentencing Act, 1989, § 13A(3A) (N.S.W.), as amended by the Sentencing Legislation Further Amendment Act, 1997 (N.S.W.). The Court upheld the validity of the relevant legislative provisions by a six-to-one majority (Justice Kirby dissented).

appellant's *Kable* challenge was that the Queensland legislation contravened Chapter III of the Constitution by conferring on the Supreme Court of Queensland a function repugnant to the Court's "institutional integrity."[404] The *Kable* challenge was rejected by the Court by a vote of six-to-one (Justice Kirby dissented).[405]

For a number of reasons, it is apparent from *Fardon* that the majority Justices were intent upon narrowing *Kable*'s scope. First, great emphasis was placed on the extraordinary nature of the *Kable* legislation—especially that it was *ad hominem*.[406] In fact, the judgments of Chief Justice Gleeson and Justice McHugh (himself a member of the *Kable* majority) are so focused on the fact that the *Kable* legislation was directed to one named individual that one wonders whether any legislation applying to more than one person would contravene the principle. Justice McHugh is alive to this possibility, indicating that *Kable* was the result of such unusual circumstances that it was "unlikely to be repeated."[407]

Second, in a substantial constitutional victory for the States,[408] the majority emphasized that Chapter III imposes less stringent requirements on state legislation purporting to confer jurisdiction and powers upon state courts when exercising state jurisdiction.[409] Indeed, in Justice McHugh's opinion, state legislation directed to state courts would be invalidated by Chapter III "only in very limited circumstances"—a significant shift from his judgment in *Kable*.[410] Although slightly different formulations were used, the majority indicated that the *Kable* principle would only invalidate state legislation that purports to confer a function upon a state court that compromises or is incompatible with the institutional integrity of state courts.[411]

---

404. *Fardon* (2004) 223 C.L.R. at 586 (Gleeson, C.J.).

405. *Id.* at 593 (Gleeson, C.J.), 601–02 (McHugh, J.), 621 (Gummow, J.) (Hayne, J. agreeing), 658 (Callinan and Heydon, JJ.).

406. *Id.* at 591 (Gleeson, C.J.), 595–96, 601 (McHugh, J.), 658 (Callinan and Heydon, JJ.). *See also id.* at 617 (Gummow, J.) (Hayne, J. agreeing). Justice Kirby takes issue with this approach in *Baker* (2004) 223 C.L.R. at 535–36.

407. Fardon (2004) 223 C.L.R. at 601 (McHugh, J.).

408. Various State Solicitors—General, on behalf of their Attorneys-General, intervened in *H.A. Bachrach* (1998) 195 C.L.R. 547, *Silbert* (2003) 217 C.L.R. 181, *Baker* (2004) 223 C.L.R. 513, and *Fardon* (2004) 223 C.L.R. 575, to argue that *Kable* did not apply or, to offer a narrower interpretation of *Kable*. The Commonwealth Solicitor General also intervened regularly.

409. *Fardon* (2004) 223 C.L.R. at 598 (McHugh, J.), 614 (Gummow, J.) (Hayne, J., agreeing), 655–56 (Callinan and Heydon, JJ.).

410. *Id.* at 598 (McHugh, J.).

411. *Id*. at 591 (Gleeson, C.J.) (asking whether the function "substantially impairs [the court's] institutional integrity"), 598–99 (McHugh, J.) (asking whether the legislation "compromises the institutional integrity of State courts and affects their capacity to exercise federal jurisdiction . . . impartially and competently"), 617 (Gummow, J.) (Hayne, J., agreeing) (stating that the "essential

Washington University Open Scholarship

In the result, each member of the majority held that the *Fardon* legislation did not purport to confer a function on the Queensland Supreme Court that was incompatible with that Court's institutional integrity.[412] In reaching this conclusion, the form of the legislation was critical, in particular that the State Supreme Court's function under the legislation was "consistent with its judicial character" because the Court had substantial discretion whether to make an order and, if so, what type of order to make.[413] Additionally, the legislation included several procedural safeguards, such as requiring annual reviews by the Supreme Court of continuing detention orders.[414]

Although there remains a degree of disagreement among the majority Justices about how far *Kable* should be restricted,[415] it is clear that the Gleeson Court has significantly narrowed the scope of the *Kable* principle—to the great relief of the States.

4. Austin v. Commonwealth

In *Austin* the Gleeson Court considered an important question: what power (if any) did the legislature of one polity within the Australian Federation possess to bind the executive government of another?[416]

The pivotal *Engineers' Case* rejected the implied immunities doctrine,[417] thereby beginning a new era of constitutional interpretation and development in Australia. Thus, after 1920 the Federal Parliament could legislate to bind state executives, and vice-versa, subject to constitutional authority that supported the exercise of legislative power and also to section 109 of the Constitution. However, the Federal

---

notion is that of repugnancy to or incompatibility with [the] institutional integrity of the State courts"), 656 (Callinan and Heydon, JJ.) (asking whether the "integrity and independence as a court are . . . compromised").

412. *Id*. at 592 (Gleeson, C.J.), 598 (McHugh, J.), 621 (Gummow, J.) (Hayne, J., agreeing), 658 (Callinan and Heydon, JJ.).

413. *Id*. at 592 (Gleeson, C.J.). *See also id*. at 596–97 (McHugh, J.), 657–58 (Callinan and Heydon, JJ.).

414. *Id.* at 619–21 (Gummow, J.) (Hayne, J., agreeing), 656–58 (Callinan and Heydon, JJ.).

415. Chief Justice Gleeson and Justice McHugh (writing separately) and Justices Callinan and Heydon (in a joint judgment) seem most intent on narrowing *Kable*. Justice Gummow's judgment suggests an inclination to allow a less narrow application of the principle, expressing the view that the *Fardon* legislation's outcome "could not be attained in the exercise of federal jurisdiction." *Id.* at 614 (Gummow, J.). Justice Hayne agreed with Justice Gummow generally but reserved his opinion on the federal jurisdiction question. *Id*. at 647–48.

416. *Austin* (2003) 215 C.L.R. 185. *See also* Anne Twomey, *Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another*, 31 FED. L. REV. 507 (2003).

417. *Engineers' Case* (1920) 28 C.L.R. at 155 (Knox, C.J., Isaacs, Rich and Starke, JJ.).

Parliament's power to legislate with respect to the States was partially truncated by the High Court's 1947 decision in *Melbourne Corporation v. Commonwealth*,[418] a case in which the Court recognized an implied limitation on the exercise of federal legislative powers. The limitation, drawn from the Constitution's federal structure, was understood[419] as having two parts: first, "the prohibition against discrimination which involves the placing on the States of special burdens or disabilities"; and second, "the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments."[420]

In *Austin*, the Gleeson Court reconsidered the *Melbourne Corporation* doctrine, reformulated the doctrine, and then applied it to invalidate federal taxation legislation that affected state judicial pension schemes.

The *Austin* legislation is complex. By two statutes, the Superannuation Contributions Tax Imposition Act, 1997 (Austl.) and the Superannuation Contributions Tax (Assessment and Collection Act), 1997 (Austl.), the federal government sought to alleviate perceived inequities in the superannuation system by imposing a new tax on high income earners.[421] Liability to pay the new tax, labeled a "surcharge," was imposed on the superannuation provider (rather than superannuation fund members) if that provider was the "holder" of the superannuation contributions.[422]

Subsequently, in 1997, the Federal Parliament enacted legislation to ensure that the superannuation contributions surcharge would apply to "members of constitutionally protected superannuation funds."[423] The legislation, the Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act, 1997 (Austl.) ("the Imposition Act") and the Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act, 1997 (Austl.) ("the Assessment Act"), came into force on December 7, 1997.[424] Pursuant to section 38 of the Assessment Act, "constitutionally protected superannuation fund" was given the same meaning as "constitutionally protected fund" in Part IX of

418. (1947) 74 C.L.R. 31.

419. *See* Twomey, *supra* note 416, at 509 n.20.

420. *Queensl. Elec. Comm'n* (1985) 159 C.L.R. 192, 217 (Mason, J.), *quoted with approval* in *Re* Austl. Educ. Union, *Ex parte* Vict. (1995) 184 C.L.R. 188, 231 (Mason, C.J., Brennan, Deane, Toohey, Gaudron and McHugh, JJ.).

421. *Austin* (2003) 215 C.L.R. at 231–32 (Gaudron, Gummow and Hayne, JJ.).

422. Section 10 of the Superannuation Contributions Tax (Assessment and Collection) Act, 1997 (Austl.).

423. *Austin* (2003) 215 C.L.R. at 233 (Gaudron, Gummow and Hayne, JJ.).

424. *Id.* at 235.

Washington University Open Scholarship

the Income Tax Assessment Act, 1936 (Austl.). At that time, the Income Tax Regulations, 1936 (Austl.) declared certain funds to be "constitutionally protected funds," including state statutory schemes which provided pensions and other benefits to state judges.[425]

High Court proceedings were initiated by two state judicial officers who claimed, *inter alia*, that the Imposition Act and the Assessment Act were invalid. One question was obvious: were these Acts invalid in their application to the first plaintiff (a Justice of the New South Wales Supreme Court) "on the ground that they so discriminate against the States . . . or so place a particular disability or burden upon the operation and activities of the States, as to be beyond the [Federal Parliament's] legislative power?"[426] As noted by Chief Justice Gleeson, the constitutional limitation raised was an implied limitation, "said to result from the federal nature of the Constitution as a matter of necessary implication."[427]

In a five-to-one decision (Justice Kirby dissented), the Court held both federal Acts invalid in their application to the first plaintiff because they imposed a particular disability or burden on the operations and activities of New South Wales.[428] Thus, the concept of "discrimination" in the context of intergovernmental immunities was critical to the majority's decision. First, the majority dealt with the content to be given to *Melbourne Corporation*'s concept of "discrimination." For example, was discrimination against a State merely "an illustration of a law impairing the capacity of a State to govern" or did it have "a standing of its own?"[429] In an uncharacteristic departure from precedent, the joint Justices and Justice Kirby rejected the "two-limb" *Melbourne Corporation* approach, preferring a single test.[430] Justices Gaudron, Gummow and Hayne explained:

> There is . . . but one limitation, though the apparent expression of it varies with the form of the legislation under consideration. The question presented by the doctrine in any given case requires assessment of the impact of particular [federal] laws by such criteria

425. *See* Income Tax Regulations, 1936, reg. 177 (Austl.).
426. Question 2(a) of the Case Stated, *Austin* (2003) 215 C.L.R. at 187–88.
427. *Id*. at 207 (Gleeson, C.J.).
428. *Id.* at 222 (Gleeson, C.J.), 267 (Gaudron, Gummow and Hayne, JJ.), 285 (McHugh, J.).
429. *Id.* at 246–47 (Gaudron, Gummow and Hayne, JJ.) (quoting *Re* State Pub. Serv. Fed'n, *Ex parte* Att'y Gen. (W. Austl.) (1993) 178 C.L.R. 249, 296 (Toohey, J.)).
430. *Id.* at 249 (Gaudron, Gummow and Hayne, JJ.), 301 (Kirby, J.). Justice McHugh disagreed. *Id.* at 281.

> as 'special burden' and 'curtailment' of 'capacity' of the [s]tates 'to function as governments.'[431]

Applying this test, why were the Imposition and Assessment Acts invalid in their application to the first plaintiff? For the joint Justices, determination of the terms and conditions upon which judges are appointed and remunerated were matters for the States.[432] Moreover, remuneration included the provision of retirement (and similar) benefits to state judges, their spouses and dependents.[433] It was entirely a matter for States to choose how to remunerate their judges.[434] Although the Imposition and Assessment Acts did not directly burden the State, the joint Justices placed significance upon the fact that by taxing individual judges the federal legislation might impact the States' ability to entice the best candidates into accepting judicial positions.[435] Of course, state legislatures are not constitutionally immune from federal laws of "general application." However, in the joint Justices' view, this federal legislation could not be considered a law of general application because it gave differential treatment to "high-income members of constitutionally protected superannuation funds."[436]

For Chief Justice Gleeson, the critical issue was interference.[437] Allowing the Federal Parliament to "dictate to the States" the terms upon which judges were to be engaged, or to "single out" state judges by imposing a special financial burden upon them would constitute interference with the "capacity of States to function as governments."[438] The differential treatment of state judges was constitutionally impermissible because the legislation interfered with the States' arrangements for judicial remuneration and not because of the financial burden it placed on the States.[439]

---

431. *Id.* at 249. This majority's approach may be contrasted with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985), which rejected as "unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" There is, however, a real question as to whether this stance was reconsidered in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), which deemed it relevant that a State's mandatory judicial retirement provision "is a decision of the most fundamental sort for a sovereign entity."

432. *Austin* (2003) 215 C.L.R. at 261 (Gaudron, Gummow and Hayne, JJ.).

433. *Id.*

434. *Id.* at 261–62.

435. *Id.* at 262–63.

436. *Id.* at 263.

437. *Id.* at 219–20 (Gleeson, C.J.).

438. *Id.* at 219.

439. *Id.*

Washington University Open Scholarship

Justice McHugh departed from the majority on the question of the two-stage approach.[440] However, his reasoning as to why the *Austin* legislation was invalid was similar to that of Chief Justice Gleeson and the joint Justices. Justice McHugh emphasized that this legislation discriminated against state judicial officers "in a way that interferes in a significant respect with the States' relationships with their judges."[441] In Justice McHugh's view, this legislation singled out state judges by placing a "financial burden on them that no one else in the community incurs."[442]

Justice Kirby, the only dissenter, expressed his agreement with much of the joint Justices' analysis of the *Melbourne Corporation* doctrine[443] and, in particular, agreed that the two limbs of the doctrine identified in previous cases were really "manifestations of the one constitutional implication."[444] Justice Kirby agreed that States must retain power over their selection and retention of judges, including power over judicial remuneration (which included judicial pension entitlements).[445] Where Justice Kirby disagreed with the joint Justices was whether imposing the federal surcharge tax had "a significant and detrimental effect on the power of a State to determine the terms and conditions affecting the remuneration of its judges."[446] In Justice Kirby's view, the answer was negative because appropriate candidates would continue to be willing to take up positions as state judges despite the financial disadvantages imposed by this federal legislation.[447]

Austin conferred constitutional immunity on state judges from this federal tax. It reaffirmed the importance both of federalism as a constitutional principle and of the *Melbourne Corporation* doctrine as a way of protecting States' independence from federal interference. From a comparative perspective, the High Court's reasoning resonates with that of *Gregory*, a U.S. case dealing with a constitutional challenge to a mandatory retirement provision for judges in the Missouri Constitution.[448] *Gregory* underlines the growing significance of a line of authority in American constitutional law recognizing "the authority of the people of the States to determine the qualifications of their most important

440. *Id*. at 281 (McHugh, J.).
441. *Id.* at 283.
442. *Id.*
443. *Id.* at 299 (Kirby, J.).
444. *Id.* at 301.
445. *Id.* at 303.
446. *Id.* at 304.
447. *Id*. at 305.
448. *Gregory*, 501 U.S. at 452.

government officials" which thereby imposes an essential, but not absolute, limit on congressional power.[449] Nevertheless, the significance of *Austin* and other Australian federalism cases will need to be reassessed in the light of the High Court's 2006 decision in *New South Wales v. Commonwealth (Work Choices Case)*.[450]

5. Constitution and the Common Law

One aspect of the Gleeson Court's jurisprudence that is particularly interesting from a judicial review standpoint is its development of the relationship between the Constitution and the common law. When the Australian Constitution went into effect on January 1, 1901, an established body of common law already existed.[451] The Australian colonies that formed the new federal nation of Australia were part of the British Empire and had been governed by the English legal system, including the English common law.[452] Thus, the Constitution's context was that of "an imperial context."[453] It was understood that the Constitution would be interpreted against the background of existing common law doctrines,[454] even though the common law was an increasingly complicated concept, variously described as English, State, Commonwealth, and Australian common law.[455] A more difficult issue, which only began to receive sustained judicial and academic interest in the 1990s, is how the Constitution might influence the ongoing development of the common law. The High Court first directly considered this question in *Lange*[456] against the background of the Court's prior recognition of the implied constitutional freedom of political communication.[457] Specifically, the *Lange* Court considered how the recognition of this constitutional freedom would affect the

449. *Id*. at 463 (O'Connor, J.).

450. After this Article was accepted for publication, the Gleeson Court handed down its decision in *N.S.W. v. Commonwealth* (2006) 231 A.L.R. 1, a Gleeson Court decision of tremendous legal and political significance in which the Court dismissed a challenge by five states and two trade unions to the constitutionality of the Workplace Relations Amendment (Work Choices) Act, 2005 (Austl.).

451. Leslie Zines, *The Common Law in Australia: Its Nature and Constitutional Significance*, 32 FED. L. REV. 337, 339–43 (2004) [hereinafter Zines IV].

452. *See id.* at 339–40.

453. B. M. Selway, *Methodologies of Constitutional Interpretation in the High Court of Australia*, 14 PUB. L. REV. 234, 234 (2003).

454. Sir Owen Dixon, *The Common Law as an Ultimate Constitutional Foundation*, *in* JESTING PILATE, *supra* note 94, at 203.

455. Zines IV, *supra* note 451, at 342–43.

456. *Lange* (1997) 189 C.L.R. 520.

457. *Theophanous* (1994) 182 C.L.R. 104, *Stephens* (1994) 182 C.L.R. 211, *Nationwide News* (1992) 177 C.L.R. 1, *A.C.T.V.* (1992) 177 C.L.R. 106.

Washington University Open Scholarship

development of the common law of defamation. On this question, the *Lange* Court stated: "Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the Constitution cannot be at odds."[458]

Applying this principle, the *Lange* Court developed the common law of defamation in a manner consistent with the implied freedom of political communication. Subsequently, in *John Pfeiffer Proprietary Ltd. v. Rogerson*,[459] the Gleeson Court held that the common law of choice of law in tort "should be developed to take into account various matters arising from the Australian constitutional text and structure."[460] Thus, it is now well established that Australian common law cannot be inconsistent with constitutional "imperatives." Beyond the scope of constitutional imperatives, *John Pfeiffer* suggests an increased influence of the Constitution on common law development. But, it remains unclear precisely how that influence might work.[461]

6. Conclusion

The Gleeson Court has significantly retreated from the Mason Court's activist approach to the exercise of judicial review and, in doing so, has sought to reaffirm the Court's commitment to constitutional legalism.[462] This is particularly evident in the Gleeson Court's reluctance to recognize new constitutionally implied rights or freedoms, and its treatment of the implied freedom of political communication and the *Kable* doctrines. However, the range of approaches among the Gleeson Court Justices—particularly with respect to drawing constitutional implications—may lead to different (and perhaps surprising) results in future cases. Moreover, the Gleeson Court's legalism does not mean the Court is unwilling to deliver decisions that are protective of vulnerable persons, as *Crampton*[463]

458. *Lange* (1997) 189 C.L.R. at 566 (footnote omitted).
459. (2000) 203 C.L.R. 503.
460. *Id.* at 534 (Gleeson, C.J., Gaudron, McHugh, Gummow and Hayne, JJ.).
461. *See generally* Adrienne Stone, *Freedom of Political Communication, the Constitution and the Common Law*, 26 FED. L. REV. 219 (1998); Greg Taylor, *The Effect of the Constitution on the Common Law as Revealed by* John Pfeiffer v. Rogerson, 30 FED. L. REV. 69 (2002); Greg Taylor, *Why the Common Law Should Be Only Indirectly Affected by Constitutional Guarantees: A Comment on Stone*, 26 MELB. U. L. REV. 623 (2002); Adrienne Stone, *The Common Law and the Constitution: A Reply*, 26 MELB. U. L. REV. 646 (2002); Kathleen Foley, *The Australian Constitution's Influence on the Common Law*, 31 FED. L. REV. 131 (2003).
462. *See, e.g.*, Selway, *supra* note 453, at 250.
463. (2000) 206 C.L.R. 161.

demonstrates, or unwilling to make politically controversial decisions, as evidenced by *Re Wakim*.[464]

CONCLUSION

Two key points emerge. First, despite the lack of express authorization in the Constitution, judicial review has been an accepted part of Australia's constitutional system since Federation. Second, the High Court's exercise of its judicial review power has been marked by an enduring commitment to constitutional legalism, a commitment only briefly interrupted by the Mason Court.

In the High Court's formative years, although there were some early signs of a more creative approach to constitutional interpretation, the *Engineers' Case*[465] established a constitutional methodology of strict legalism that has since dominated the Court's constitutional decision-making. When applied to the interpretation of section 117 of the Constitution, the legalistic approach narrowed that provision in a way that was not only contrary to its purpose but dramatically reduced section 117's rights-protective potential. As demonstrated by the *Communist Party Case*,[466] however, the High Court was not afraid to exercise its judicial review power to strike down legislation it considered to involve an unconstitutional exercise of legislative power—despite the political pressures surrounding the case.

The second phase considered by this Article—that of the Mason Court—was a period of great change for the High Court. In line with the Court's new position at the apex of Australia's judicial system and Australia's growing sense of national and international identity, the Mason Court broke with the past and adopted a more robust approach to its judicial review power. The early High Court's focus on text was broadened to also give effect to purpose. The traditional view of the Constitution as primarily concerned with federalism was replaced with a conception that included an overt concern for the protection of individual rights. There was an increased willingness to overturn precedent, to take into account developments in international and foreign law, and frankness about its policy-driven approach to judicial decision-making. The Mason Court's activism was, however, the source of a good deal of controversy.

464. *Re Wakim*, (1999) 198 C.L.R. 511.
465. *Engineers' Case* (1920) 28 C.L.R. 129.
466. *Communist Party Case* (1951) 83 C.L.R. 1.

Washington University Open Scholarship

Such sustained public scrutiny of the High Court's work was unprecedented in Australia and certainly has not been repeated.

The third phase considered by this Article, the Glesson Court, evidences a return to the constitutional legalism of the pre-Mason Court era. With the exception of Justice Kirby, the Gleeson Court's decision-making demonstrates a renewed commitment to Dixonian principles. Moreover, there has been a shift of focus away from rights-based jurisprudence to the development of doctrines arising from Chapter III of the Constitution.

Questions remain, of course. In particular, how should the Court's approach to judicial review be evaluated? Is the lack of anxiety in Australia about judicial review to be attributed to the way in which the Court has exercised its power, or are there other factors at play? For example, is the secure position of judicial review within Australia's legal system due to the fact that the focus of Australia's Constitution is federalism, not constitutional protection of individual rights?[467] Does the Court's adoption of a legalistic approach to judicial review reduce the potential for the protection of rights under Australia's Constitution in a way that should concern Australians? Or, is the Court right to be reluctant to imply rights and freedoms into the Constitution given the counter-majoritarian concerns arguably inherent in such a constitutional decision-making process?[468] At least one conclusion is obvious: Australian judicial review requires more sustained scholarly attention to provide a deeper, more complex account of how Australia's Constitution is understood.

---

467. Leighton McDonald, *Rights, 'Dialogue,' and Democratic Objections to Judicial Review*, 32 FED. L. REV. 1, 6 (2004); Seitz, *supra* note 36, at 4.

468. *Id*. at 7.