CRACKS IN THE FAÇADE OF LITERALISM: IS THERE AN ENGINEER IN THE HOUSE?

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[*For seventy years, the High Court has followed a literalist approach in the interpretation of the Australian Constitution. In recent years, however, that approach has come under increasing pressure, and is showing signs of strain. This article examines the nature of Australian constitutional literalism, its rise to orthodoxy, and the reasons for its adoption and continued application. It goes on to outline the reasons why the dominance of literalism is presently under challenge. In a companion piece to this article, to appear in the next issue of the Review, the precise nature of the threats to literalism will be considered and their implications assessed.*]

Introduction

Since its great decision in the *Engineers* case[1] in 1920, literalism has been the Australian High Court's enunciated methodology of constitutional interpretation. While the adherence of the Court to this interpretive method has not always been entirely faithful, it has undeniably operated within a predominantly literalist rhetoric, and has faced and resolved the great constitutional issues of Australia under its banner. Applying a literalist approach, the High Court has had probably its most profound effect upon Australian society in presiding over the gradual but inexorable expansion of the powers of the Commonwealth at the expense of those of the States. In short, literalism has been the received orthodoxy of Australian constitutional interpretation for seventy years, and hitherto, it has been an essentially popular orthodoxy. Notwithstanding certain widely acknowledged theoretical difficulties, and the necessity for occasional modification around the edges of the doctrine, literalism has in general been accepted and defended by judges and academic lawyers alike.

Today, however, the constitutional literalism of the High Court is an orthodoxy under challenge, and one which shows increasing signs of buckling under both external and internal pressures. Externally, literalism has become the subject of pointed criticism from a variety of sources, charging everything from simple intellectual invalidity to elaborate political fraud. Perhaps even more importantly, the Court itself is beginning to show distinct signs of weariness with the literalism of *Engineers*, and to look — if not with longing, then at least with interest — towards other principles of constitutional interpretation. This is not to say that the chapter opened by *Engineers* is now closed: literalism remains the cornerstone of constitutional interpretation in Australia. But as we approach the centenary of Federation, literalism undeniably looks more vulnerable than at any other stage in its long history. The most plausible diagnosis is probably one of a

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[1] *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

long, lingering illness, with occasional rallies and reprieves, but ultimately fatal nonetheless.

This article is the first of two pieces which between them seek to trace the rise and decline of literalism, and to consider the directions which might be taken by Australian constitutional interpretation after its fall. The present article will, first, outline the nature of literalism and its course in the interpretation of the Australian Constitution, showing both its path to hegemony and its continued potency despite a variety of incidental qualifications and modifications. Secondly, it will endeavour to isolate the reasons, both 'legal' and 'political', which have prompted the High Court for so long to attach itself to an interpretative methodology of literalism. Finally, the wide variety of contemporary factors and influences which are operating upon the High Court so as to weaken its once strong allegiance to literalism will be identified and examined.

In the article to follow,[2] an examination will be made of the emergence of the two most obvious current challenges to literalism, for convenience referred to as 'progressivism' and 'intentionalism'. The implications held by the High Court's substantial desertion of literalism in favour of either of these other approaches to constitutional interpretation will be isolated and considered. A modest attempt will also be made to outline what the author believes to be an appropriate alternative interpretative methodology for use within a post-literalist constitutional construct.

The Course of Literalism

To talk of 'literalism' gives rise to the regrettable necessity of defining that phenomenon. In this context, there is room for much subtle debate over such matters as whether this or that feature is a necessary component of literalism, the relationship of literalism to 'legalism', and the difference (if any) between these two concepts.[3] However, it is not the purpose of this article to become more embroiled in this debate than is absolutely necessary. For present purposes, 'literalism' may be understood as comprising the view that the Constitution is to be interpreted by reading its words according to their natural sense and in documentary context, and then giving to them their full effect.[4] Of course, such a bald formulation does not at first glance reveal much about the wider nature of literalism. Upon reflection, however, at least four key features readily may be discerned.

First, literalism clearly assumes that the words of the Constitution, considered in the textual context in which they appear, will (at least as a general rule) have a determinate meaning which may be ascertained with reasonable readiness.[5]

2 To be published as 'After Literalism, What?' in the forthcoming issue of M.U.L.R.

3 See *e.g.* the debate comprised in: Galligan, B., *Politics of the High Court* (1987); Goldsworthy, J., 'Realism about the High Court' (1989) 18 *Federal Law Review* 27; Galligan, B., 'Realistic "Realism" and the High Court's Political Role' (1989) 18 *Federal Law Review* 40; Goldsworthy, J., 'Reply to Galligan' (1989) 18 *Federal Law Review* 50. See also Hanks, P., *Constitutional Law in Australia* (1991) 21-6.

4 *Engineers*, *supra* n. 1, 142, 148-9; Lane, P., *The Australian Federal System* (2nd ed., 1979) 1177-9; Galligan, B., *Politics of the High Court* (1987) 258; Sawer, G., *Australian Federalism in the Courts* (1967) 96.

5 Sawer, *op. cit.* n. 4, 95.

Secondly, and following from this, there can (again as a general rule) be no occasion to search for meaning outside the text by reference to notions of grand constitutional theme or design, and only a very limited occasion to do so by reference to such humbler considerations as the wider history of the provision concerned.[6] Thirdly, the policy results of a particular interpretation are, as such, irrelevant: the only question is what the words as read and understood mean. Finally, it is worth noting that, despite its intrinsic textualism, literalism itself does depend ultimately upon one wider canon of constitutional construction, namely, the necessity of finding the author's intent. This flows from the fact that the implicit basis of literalism's exclusive reliance upon the text is that it is the text which is the best and most reliable means of discerning the intent.[7] In practice, however, it is basically fair to say that literalism is about the text, the whole text, and nothing but the text.

This is literalism in its purest form. Of course, only the most naive would expect a literalist court never to stray from its declared path. It is inevitable that over the course of judicial decision making an absolute commitment to strict literalism will be modified by an advertence to policy here, by reference to some non-textual consideration there. As will be seen, the High Court has quite unsurprisingly had the edges rubbed off its commitment to literalism in a number of contexts.[8] But this sort of incidental modification of a court's stance does not go to deny its basic adherence to literalism. The crucial question is always going to be whether at the heart of a court's constitutional jurisprudence there lies a commitment to literalism, and here one must talk in relative rather than absolute terms. Thus, a court which habitually (though not invariably) purports to eschew the policy implications of its constitutional decisions on the basis that the text is conclusive, and which consistently (though not without fail) emphasizes the bare text over all other non-textual considerations, is on any reasonable application of the term a 'literalist court'.

It is important for the purposes of this article to understand that there is indeed a difference between 'literalism' as it is defined above, and 'legalism'. Legalism is the broader concept, and it is perfectly possible to be a legalist without being a literalist, although all literalists will also be legalists. According to Sir Owen Dixon's famous formulation, 'legalism' in a constitutional context means simply that a court will 'interpret' a provision with 'close adherence to legal reasoning'.[9] While it is clear enough that this is in general terms intended to exclude advertence to the policy outcome of a particular interpretation, it says nothing as to the intrinsic necessity of understanding a constitution in light of its text alone. On the contrary, it would be perfectly conceivable that the strict legal reasoning

6 *E.g. Engineers*, *supra* n. 1, 142, 148-9.

7 Dawson, Sir Daryl, 'Intention and the Constitution — Whose Intent?' (1990) 6 *Australian Bar Review* 93, 94, 100. One might also seek to defend textual supremacy on the grounds of certainty, and the necessity that the law be readily ascertainable, rather than hidden in obscure sources of subjective intent. However, in the final analysis, such arguments must be subordinate to that turning on intention: unless textualism is ultimately traceable to authors' intent, it becomes an arbitrary and essentially accidental interpretative process, and as such logically indefensible.

8 *Infra*.

9 Dixon, Sir Owen, *Jesting Pilate* (1965) 247.

according to which a provision is to be 'interpreted' might acknowledge the relevance of a whole variety of non-textual considerations.[10] Thus, if a court is to be branded as 'literalist', more will have to be shown than an adherence to 'legal', as opposed to policy-based reasoning. As suggested above, it will be necessary to demonstrate that the constitutional jurisprudence of that court is substantially centred on the proposition that the unelaborated text is dispositive of a constitutional question.

It follows from what has been said before that the writer does indeed believe that the High Court has, in this sense, adopted an essentially literalist approach to constitutional interpretation. Here it should be noted that the High Court did not invent literalism. When Sir Isaac Isaacs in the *Engineers* case set the Court on its literalist course, he was able to support his position by reference to well-established themes of British statutory interpretation. Indeed, notwithstanding the enunciation of certain important concerns relating to the political and juridical acceptability of a non-literalist approach to constitutional interpretation,[11] the central justification for constitutional literalism running throughout *Engineers* is that the Constitution is a British statute, and as such is to be interpreted like other British statutes, that is, literally.[12]

The British courts of the nineteenth century had in fact repeatedly held that the only safe guide to the intention of the legislature was the words of the enactment,[13] and that 'if the text is explicit the text is conclusive'.[14] It is worth making two immediate points concerning this adoption of British statutory literalism in *Engineers*. First, some of the considerations upon which it is based — and most notably those relating to the interpretation of 'British statutes' — now sound an increasingly quaint note in the context of the interpretation of the written constitution of an independent nation in a post-imperial age. Secondly, even *Engineers*, and the English cases upon which it draws, contains the implicit recognition that literalism is not an end in itself, but merely instrumental: reliance upon the text is required simply because the words are the best means of arriving at that Holy Grail, the intent.

Probably one of the most striking features of the High Court's adherence to literalism is that it emerged only after a long period of decidedly non-literalist interpretation by the original Justices, Griffith, Barton and O'Connor. The non-textual character of the first High Court's constitutional approach has been overstated on occasions, notably by that architect of literalism Sir Isaac Isaacs,[15] but

[10] See also Lane, *op. cit.* n. 4, 1177-80; Galligan, B., *Politics of the High Court* (1987) 258-9; Goldsworthy, B., *Realism about the High Court, supra* n. 3, 28; Zines, L., *The High Court and the Constitution* (3rd ed. 1992) 341-8.

[11] Notably, that the States-protective implication-based interpretative method of the first High Court was not necessary, in the sense that abuses of power could be dealt with at the ballot box; and not proper, on the basis that it was uncertain and subjective. Nevertheless, anachronistic attempts to reconstruct *Engineers* purely as some elaborate theory of constitutional legitimacy tend to ignore its genesis in traditional canons of statutory interpretation: see *e.g.* Gageler, S., 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162.

[12] *Engineers*, *supra* n. 1, 148-50.

[13] *E.g. Sussex Peerage Claim* (1884) 11 Cl. & Fin. 85, 143; [1843-60] All E.R. 55: cited in *Engineers*, *supra* n. 1, 148.

[14] *Attorney-General for Ontario v. Attorney-General for Canada* [1912] A.C. 571, 583: cited in *Engineers*, *supra* n. 1, 150.

[15] Galligan, B., *Politics of the High Court* (1987) 142.

there can be no doubt that the Court did not accept the proposition that constitutional issues were to be resolved simply through an application of the relevant text. On the contrary, it took the view that constitutional provisions could be understood and applied only within the context of wider considerations, which together went to comprise what might reasonably be referred to as 'the spirit of the Constitution'.[16] The basic effect of this approach was that the written Constitution was interpreted as being subject to — or perhaps more correctly, supplemented by — a number of fundamental but unexpressed constitutional principles.[17] These principles were generally drawn from the nature (rather than the text) of the Constitution as an embodiment of federalism,[18] and moreover, as an embodiment of a federalism of a co-ordinate and strongly decentralized type.

The most important of the principles was the so-called doctrine of 'reserved powers'. This doctrine, which remained somewhat imprecise throughout the period of its application, is probably best rendered as requiring that the legislative powers of the Commonwealth be interpreted with extreme caution, so as to avoid any corresponding reduction in the powers of the States which would be inconsistent with the Constitution's broad vision of strongly regional federalism.[19] Clearly enough, therefore, reserved powers favoured the States at the expense of the Commonwealth. A related doctrine, that of the implied immunity of instrumentalities, was reciprocal, and precluded both Commonwealth and States from enacting laws binding each other's authorities.[20] Although it did not specifically favour the States, this doctrine was likewise founded not in any provision of the Constitution, but in basic principles which the Court saw as following necessarily from the type of federalism envisaged by the Constitution. Whichever way the constitutional doctrines of the first High Court are expressed, two things are clear: first, that these doctrines were in no sense centred on a literalist interpretation of the Constitution; and second, that as a package, they worked in favour of the States by limiting the powers of the emergent Commonwealth. Although there is now no more rejected theory in Australian constitutional law than that of reserved powers, it cannot be denied that — for good or ill — it was based upon a conception of the Constitution as an institutional vision, rather than as a mere formula of words.

To a significant extent, in fact, the first High Court's constitutional jurisprudence centred on a notion of giving direct and immediate effect to the perceived broad intentions of the Founders, without the absolute necessity of deducing those intentions via the medium of specific constitutional language. In this sense, it was intrinsically antagonistic to most of the precepts of the Court's later literalism. However, in accordance with comments made earlier concerning the expressed underpinnings of literalism in *Engineers*,[21] it may be noted that even a

[16] See the joint judgment of Knox C.J., Isaacs, Rich & Starke JJ. in *Engineers*, *supra* n. 1, 150-2.

[17] For the standard descriptions of the constitutional style of the first High Court see *e.g.* Zines, *op. cit.* n. 10, 1-15, 341-8. Sawer, *op. cit.* n. 14, 124-9; Coper, M., *Encounters with the Australian Constitution* (1987) 177-81.

[18] Coper, *loc. cit.* n. 17.

[19] *E.g. R. v. Barger* (1908) 6 C.L.R. 41; *Huddart Parker and Co. Pty Ltd v. Moorehead* (1909) 8 C.L.R. 330.

[20] See *e.g. D'Emden v. Pedder* (1904) 1 C.L.R. 91; *Deakin v. Webb* (1904) 1 C.L.R. 585.

[21] See text accompanying n. 11 and the following text.

strict literalism and the approach of judges like Griffith and Barton do share one basic assumption: in the final analysis, each acknowledges that at the heart of constitutional interpretation lies a search for the relevant intent. Differences arise (at least theoretically), not over the question of whether the intention is to be sought, but rather as to the means by which it is to be ascertained.[22]

History of course records that in the *Engineers* case, the forces of literalism gained a decisive victory over their less textual opponents, and the precise details of that victory are too well known to bear much repetition. Suffice to say that the jurisprudence of the first High Court was quite overturned, and the Court announced its future adherence to the principle that the Constitution would be interpreted in accordance with 'the natural meaning of the text' and not by reference to '[an] implication drawn from what is called the principle of "necessity", that being itself referable to no more definite standard than the personal opinion of the judge who declares it'.[23] It is this ringing endorsement of literalism — 'Back to the Constitution', as it has been called[24] — that has ever since been at the heart of the Court's declared approach to constitutional interpretation. Notwithstanding widespread criticism of both the style and the content of the joint judgment in *Engineers*,[25] the literalist banner proudly raised by Isaacs is ritually unfurled by the Court on most occasions that a federal division of powers case is decided in favour of the Commonwealth,[26] and is ordinarily discreetly aired even when the States secure one of their comparatively rare victories.[27] Those who would defend the Court against charges of excessive devotion to literalism — often on the ingenuous basis that the whole process is in any event an elaborate front[28] — tend to gloss over with some disdain the not insignificant fact, profoundly apparent to any non-specialist reader of its constitutional judgments, that the Court still solemnly professes literalism in a great number of its leading decisions, and purports to practice it.[29]

The immediate practical effect of this conversion to literalism by the High Court is, of course, clear enough. The old, States-protective doctrines developed by the Griffith Court having been swept away, the Commonwealth was placed in a far more favourable position to encroach upon areas of legislative activity

22 For further discussion of the question of the extent to which constitutional literalism is premised on a search for intention, see *infra*, under the heading, 'Why Literalism?'

23 *Engineers*, *supra* n. 1, 142.

24 By Sir Robert Garran, in *Prosper the Commonwealth* (1958) 181.

25 See *e.g.* Zines, *op. cit.* n. 10, 9-12; Dawson, Sir Daryl, 'The Constitution — Major Overhaul or Simple Tune-Up?' (1984) 14 M.U.L.R. 353; Sawer, *op. cit.* n. 4, 198-200. For an example of extremely severe criticism see Cooray, M. and Ratnapala, S., 'The High Court and the Constitution — Literalism and Beyond' in Craven G., (ed.), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) 203.

26 See *e.g. Commonwealth v. Tasmania* (1983) 158 C.L.R. 1, 127-8 *per* Mason J.; 220-1 *per* Brennan J.; *Koowarta v. Bjelke-Peterson* (1982) 153 C.L.R. 168, 225-9 *per* Mason J.

27 *E.g. Bourke v. State Bank of New South Wales* (1990) 93 A.L.R. 460, 463.

28 See *e.g.* Zines, *op. cit.* n. 10, 342 (concerning Isaccs J.); and on the issue of legalism as a political front see Galligan B., *Politics of the High Court* (1987) 38-41.

29 *Supra* n. 25; and see also *Attorney-General (Cth); (ex rel McKinlay) v. Commonwealth* (1975) 135 C.L.R. 1, 17 *per* Barwick C.J. Of course, this is not to suggest that the Court's literalism has been uniform in application among the different areas of the Constitution. While the key subject of the federal distribution of powers (with which this article is primarily concerned) has been consistently approached in a literalist manner, there are other areas (such as the separation of judicial power, see *e.g. R. v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254) which have been exposed to a far more implication-oriented approach.

which had hitherto been regarded as the exclusive preserve of the States. The difficulty for the States in this connection was that, possessing only an undelineated residue of power, as opposed to the Commonwealth's specific grants, they were particularly vulnerable to any constitutional approach that emphasized textual over all other considerations. The general course of the Court's decisions in the years after *Engineers* revealed the importance of the old reserved powers doctrine to the preservation of the powers of the States, and demonstrated the harshness of the new constitutional environment in which they would have to operate.[30] Moreover, the Court's enunciation in *Cowburn*[31] of the broad 'covering the field' test as the measure for inconsistency under s. 109 gave a new cutting-edge to the Commonwealth powers liberated by *Engineers*.

In reality, however, it was the genesis of *Engineers* of something rather more than a 'straightforward' literalism which so seriously weakened the constitutional positions of the States, and which gave to Australian constitutional literalism much of its distinctive flavour. The point here is that the mere fact that the Commonwealth enjoys specific powers, as opposed to the general residue of power confided to the States, and that the High Court has determined to interpret the Constitution literally, does not automatically have the consequence that the competence of the Commonwealth will be open-endedly expanded at the expense of that of the States. At least in theory, much will depend upon the manner in which the powers of the Commonwealth are expressed: powers which are formulated in comparatively narrow terms, even if interpreted literally and without recourse to any protective limitations in favour of the States, could not be expected to wreak undue havoc in the States' collective legislative domain. Indeed, some of the Founding Fathers placed considerable faith in what they saw as the narrowness of the Commonwealth's power as a potent means of safeguarding State interests.[32]

This is where it is imperative to understand that the literalism which has emerged out of *Engineers* and been applied in the subsequent cases has developed over time into something which is not a pure literalism, but a literalism with a very significant (and somewhat confusing) twist. It is to a significant extent this twist which gives to *Engineers*-style literalism its real sting in the crucial context of the federal division of powers. For the primary rule to be derived from *Engineers* in this context is for most practical purposes not merely that the powers of the Commonwealth are to be interpreted literally, but that they are to be interpreted literally, *and* as expansively (*i.e.* as favourably to a finding of Commonwealth legislative competence) as possible. In other words, a 'literal' interpretation of a provision conferring power upon the Commonwealth tends (far from self-evidently) to be equated with one which chooses from among the competing possible constructions of a piece of constitutional language that which is most sympathetic to the expansion of Commonwealth power. It should

30 See *e.g. Pirrie v. McFarlane* (1925) 36 C.L.R. 170; *South Australia v. Commonwealth* (First Uniform Tax case) (1942) 65 C.L.R. 373; *Fairfax v. Federal Commissioner of Taxation* (1965) 114 C.L.R. 1.

31 *Clyde Engineering Co. Ltd v. Cowburn* (1926) 37 C.L.R. 466.

32 See Craven, G., 'The States — Decline, Fall or What?' in Craven G., (ed.) *Australian Federation: Towards the Second Century* (1992) 49.

be noted that while it might be possible in theory to separate this twist from the literalism to which it attaches — and thus to posit the existence of two distinct rules of constitutional interpretation, that the Constitution be interpreted literally, and that the legislative powers of the Commonwealth be interpreted expansively — they are in practice so heavily intertwined as to comprise a single interpretative approach.[33]

As it happens, the 'expansive' interpretation component of the equation has a longer history in Australia's constitutional jurisprudence than its purely literalist companion. It derives ultimately from such dicta as that of O'Connor J. in *Jumbunna Coal Mine No Liability v. Victoria Coal Miners' Association*,[34] to the effect that the terms of a written Constitution should be interpreted broadly, rather than narrowly. But at the time of its formulation, this general principle of constitutional interpretation was not, as it largely has become in the wake of *Engineers*, one which operated overwhelmingly to the benefit of a quite narrow range of provisions, namely those conferring legislative power on the Commonwealth. Indeed, this could hardly have been the case in view of the operation of such overarching doctrines of constitutional interpretation as reserved powers. The effect of *Engineers* and its successor cases has been basically to absorb the rule in *Jumbunna* within the fabric of literalism, so that the rule has for most purposes become not 'Interpret the Constitution broadly and non-technically', but something much closer to 'Take a Commonwealth legislative power, formulate the widest literal interpretation possible, and then apply it, regardless of context or any other factors which might suggest that the result was not the one intended'.[35] In short, it may well be suggested that the *Engineers* line of reasoning has transformed *Jumbunna* (at least in the context of the federal division of power) from a laudable caution against judicial pedantry in the process of constitutional interpretation, into a justification for precisely such behaviour, so long as it is directed towards the end of expanding Commonwealth power.

This whole approach will shortly be examined further,[36] but it is worth noting at this stage that it is not particularly apt to describe it merely as 'literalism': it is more properly characterized as a particular form of 'ultra-literalism'. By 'ultra-literalism' is meant an interpretative methodology which not merely asserts the conclusiveness of the text over other considerations, but does so with a single-minded disregard of surrounding context and circumstance in considering what the text itself is to mean. The difference is in some ways one of degree, but it is real enough, nonetheless. As is equally obvious, this is a literalism which, in tending closely to equate an expansive with a literal interpretation, largely anticipates its own conclusion. If the *reductio ad absurdum* of the reserved powers doctrine is Isaacs' scenario of a person attempting to apply a residuary

[33] See *e.g. Commonwealth v. Tasmania* (1983) 158 C.L.R. 1, 127-9 *per* Mason J. Although a comparatively limited form of expansive interpretation, restrained by the operation of such doctrines as reserved powers, did exist under the first High Court.

[34] (1908) 6 C.L.R. 309, 367-8.

[35] See *e.g.* Dawson, Sir Daryl, 'The Constitution — Major Overhaul or Simple Tune-Up?' (1984) M.U.L.R. 353, 356.

[36] See also Evans, G., 'The High Court and the Constitution' in Hambly, D. and Goldring, J., *Australian Lawyers and Social Change* (1976) 13, 37-41.

clause in a will before having discharged the specific bequests, then the corresponding reduction of *Engineers* ultra-literalism would be comprised in the antics of the precocious child who asks his or her parent for some of the cake, and when subsequently reproved for having eaten it all retorts, 'Well, you said I could have some cake, and all of it is clearly some of it'.

This is not to say that the joint judgment in *Engineers* itself explicitly adopts this ultra-literalist stance: it nowhere advances the bald proposition that under literalism the powers of the Commonwealth Parliament are to be given the most expansive interpretation that the relevant constitutional language can conceivably bear.[37] But the whole tone of the joint judgment is sympathetic to the adoption of such an approach. Thus, as one considers the majority's prominent endorsement of such dicta as that of Lord Selbourne in *R. v. Burah*,[38] to the effect that 'if what is done is within the general scope of the affirmative words which give power, and if it violates no express condition or restriction ... it is not for any court to inquire further', it is far from difficult to understand how *Engineers* has provided the central impetus for the subsequent ultra-literalist utterances of the Court.

Such utterances have, since *Engineers*, enjoyed a prominent place in Australian constitutional interpretation, and have for most purposes continued (at least until comparatively recently) to be as fashionable as ever. The majority of important division of powers cases will at some point contain an important reference to this 'expansive' (*i.e.* ultra-literalist) canon of construction. Thus, in the *Dams* case, Mason J. stated that:

> In the ultimate analysis the comprehensive legal answer to the general considerations which Tasmania invokes to sustain its approach to the interpretation of the constitutional power is that a grant of power in s. 51 is to be construed with all the generality that the words used admit.[39]

Similar examples of such an approach may be seen in the judgments of those justices favouring a wide interpretation of the external affairs power in *Koowarta v. Bjelke-Petersen*,[40] and of the corporations power in *Actors and Announcers Equity Association of Australia v. Fontana Films Pty Ltd*.[41] In *Richardson v. Forestry Commission*,[42] Deane J. displayed an abiding affection for the underlying 'logic' of ultra-literalism enunciated by Isaacs J. in *Barger*.[43] Thus, the ultra-literalism which stems ultimately from the joint judgment in *Engineers* has not been merely alive and well, but positively flourishing on the High Court during recent years. It is precisely this approach to constitutional interpretation that has inspired the lament of Sir Daryl Dawson that:

> There is a notion to be found in the cases, for which the *Engineers* case is called in aid, that Commonwealth legislative powers are to given the widest interpretation which the language bestowing them will bear, uninhibited by the context of the document in which they appear and the nature of the compact which it contains.[44]

37 Although the use to which the *dictum* of O'Connor in *Jumbunna* would be put by a literalist court was probably predictable, at least in part.
38 (1878) 3 A.C. 889, 904-5.
39 *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1, 127.
40 (1982) 153 C.L.R. 168.
41 (1982) 150 C.L.R. 169, and see especially the judgment of Mason J. at 206-8.
42 (1988) 164 C.L.R. 261.
43 *Ibid.* 307.
44 Dawson, 'The Constitution — Major Overhaul or Simple Tune Up?', *supra* n. 35, 354, 356.

It is, of course, readily apparent that there are real difficulties even in regarding such an approach as a 'true', if modified literalism. The point here is not the usual one made by those who would, whether in praise or criticism, deny the substance of the High Court's literalism on the ground that it in fact practices some quite different method of constitutional interpretation.[45] Rather, it may be suggested with some force that the Court's professed version of literalism is on its own terms a somewhat debased and distorted variant even of that comparatively undemanding art. For there is no necessary correlation between a 'literal' interpretation and one sympathetic to the expansion of Commonwealth power. It does not follow that the 'natural meaning' of the words of a provision conferring power on the Commonwealth Parliament is inevitably the broadest which those words can conceivably bear. Nor is it clear, without in any sense resorting to extreme theories as to the total inutility of language, that the typically broad terms of such provisions as those conferring legislative power upon the Commonwealth Parliament can bear any 'natural'[46] meaning in the absence of an examination of all pertinent surrounding contextual factors, including the entire constitutional scheme and any relevant historical material, which is essentially the point made by Sir Daryl Dawson.

It is, in fact, one of the more prominent ironies of Australian constitutional history that this undeniably blinkered interpretative approach is on occasions both praised and justified as comprising the sort of 'liberal', non-technical attitude to constitutional interpretation which conforms to the old *Jumbunna* notions that the Constitution in general is to be interpreted broadly.[47] One is tempted here, perhaps inspired by some mischievous ghost of the first High Court, to make the following retort: it may well be that were a solicitor to apply the reserved powers doctrine developed by that Court to the execution of a will, he or she would find themselves in a fearful muddle. It is equally clear that were a child to act upon the ultra-literalism of many of Griffith's successors in interpreting the instructions of his or her parents concerning the consumption of a cake, they would receive a well-deserved clip over the ear.

Suggested deficiencies aside, it is apparent that the most prominent consequence of the adoption of literalism in *Engineers*, and its development and application in subsequent cases, has been a movement by the High Court away from any pursuit of the wider supposed intention of the Framers of the Constitution, as exemplified in the formulation of such doctrines as reserved powers and immunity from instrumentalities, towards the gleaning of an intent merely from an examination of the words of that document. Equally clear is that this fundamental change in interpretative method, accentuated as it has been by such factors as the ultra-literalist tendencies of the Court and its approach to

[45] For example, by arguing that literalism is merely a cover used by the Court to allow it to make decisions which are appropriate in policy terms: *cf. e.g.* Zines, *op. cit.* n. 10, 13-15; and on the issue of legalism as a political front see Galligan B., *Politics of the High Court* (1987) 38; Sawer, *op. cit.* n. 4, 97-9.

[46] The injunction respecting the Constitution in *Engineers* (at 152) is 'to read it naturally', although even here, it is conceded that it is necessary to have regard to the circumstances in which the Constitution was made.

[47] See *infra*, under the heading 'Why Literalism?'

s. 109 inconsistency, has presided over a corresponding shift in the constitutional balance between the Commonwealth and the States.

In fact, however, and quite unsurprisingly, the High Court has not in the years since *Engineers* walked unswervingly down a literalist path. Putting aside the distortion involved in the practice of what has here been termed ultra-literalism, the Court has been forced to accept certain modifications to the strict literalism apparently envisaged by Isaacs. The simple reason for this backsliding is, as Sir Owen Dixon put it, that no document can be interpreted absolutely literally and without regard to implications, and this is particularly true of a written constitution, necessarily framed in broad terms and providing for an entire system of government.[48] Thus, within twenty years of *Engineers*, States-protective implications were again being made into the Constitution on the basis of the nature of Australian federalism. They were, however, but a dim reflection of the past glories of the doctrine of reserved powers. Under the *Melbourne Corporation* doctrine, the States are merely protected against laws of the Commonwealth which discriminate against them, or impair their essential functions.[49] Outside this narrow compass of protection, Commonwealth legislative power construed in accordance with the principles enunciated in *Engineers* and elaborated in the subsequent cases is free to operate without restriction, and time and again the States have found that the Dixonian concept of federal implications gives them little protection.[50] Nevertheless, literalism has been compromised to the extent that this admittedly narrow role for implications from federalism is conceded. Another concession in favour of the use of implications, this time operating to the benefit of the Commonwealth, has come to be comprised in the emerging concept of the implied power from nationhood.[51]

However, it would be wrong to see these comparatively minor inroads as compromising the Court's essential commitment to a literalist interpretative technique, particularly in the context of the division of powers. On the contrary, the Court has constantly re-affirmed its basic support for the literalism of *Engineers*, and this is clearly evident in the series of cases decided in the late seventies and early eighties expanding Commonwealth legislative power in the fields of corporations and external affairs.[52] The majorities in these important division of powers cases rely to a significant extent upon literalist reasoning of the type described already in this article,[53] and are generally intensely hostile to

[48] *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31, 81-2. Dixon J. argued that *Engineers* had not been intended to end all implications, but only some. See also *Street v. Queensland Bar Association* (1989) 168 C.L.R. 461.

[49] *E.g. South Australia v. Commonwealth* (1942) 65 C.L.R. 373; *Commonwealth v. Tasmania* (1983) 158 C.L.R 1. See also *Street v. Queensland Bar Association* (1989) 168 C.L.R. 461.

[50] See *e.g.* Mason, Sir Anthony, 'The Role of a Constitutional Court in a Federation' (1986) 16 *Federal Law Review* 1, 18.

[51] See *e.g. Commonwealth v. Tasmania* (1983) 158 C.L.R. 1; see also Saunders, C., 'The National Implied Power and Implied Restraints on Commonwealth Power' (1984) 14 *Federal Law Review* 267; Zines, *op. cit.* n. 10, 256-61; see also *supra* n. 29.

[52] *E.g. Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168; *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1.

[53] Although, as will be observed in the companion article to this piece, *supra* n. 2 it is also (paradoxically) true that signs of the newer approaches which threaten *Engineers* literalism are also prominent in these decisions.

any attempt to limit the application of such reasoning by reference to broader implications to be drawn from the nature of federalism.[54] It is worth noting that only last year, the seventieth anniversary of the decision in *Engineers* saw lawyers specially gathered together to eulogize it as the foundation of modern Australian constitutional interpretation.[55] Accordingly, notwithstanding some significant modifications at the periphery, and accepting that the ultra-literalist tendencies of the Court described above do themselves constitute something of a departure from a 'pure' literalism, it is fair to say that the general literalist hegemony established in *Engineers* has continued up to the present day.

Of course, it is one of the main points of this article to suggest that the grasp of *Engineers* upon Australian constitutional methodology is slipping, and to explain why this might be so. The exact nature of the major threats which literalism faces in terms of alternative interpretative approaches, together with the details of their emergence on the Court, will be fully outlined in a subsequent article,[56] but it is appropriate at this point to note in broad terms the identity of these challenges.

The first of these may be labelled 'progressivism'. Briefly, progressivism begins by stressing the ambiguity of constitutional language, and denying its self-sufficiency as a means of resolving constitutional disputes. It goes on to posit that the deciding factor in constitutional interpretation will be whether a particular construction answers the needs and advances the aspirations of modern Australian society. While the text is not discarded, it is dethroned: to one committed to progressivism, a simple and unelaborated literalism is grotesque.

The other threat to literalism is what may loosely be referred to as 'intentionalism'. Intentionalism essentially posits that the absolute and overriding duty of a constitutional court is to give effect to the intentions of those who framed the constitution. It follows from this that the text cannot, at least in a literalist sense, be supreme: the crucial thing is the intent, and if it can be gleaned from other sources, then the intent may be elucidated. Once again, the text is not rejected, but it is not dispositive. As is obvious, these two approaches will generally be in conflict with one another, but one further point is pellucidly clear: neither is in any sense sympathetic to the literalism of *Engineers*.

Why Literalism?

The essential question in this context is why the High Court adopted literalism in the first place, and why it has continued to adhere to it — notwithstanding occasional lapses — for so long. The picture here is a somewhat confused one. Clearly enough, some judges (and other authorities), would defend literalism on purely 'legal' grounds, arguing that it is an approach to constitutional interpretation mandated by law. Others might frankly admit that whatever literalism lacks in legal logic, it more than makes up through its facility as a means of transferring power from the States to the Commonwealth, something which is (in

[54] *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168, 226-8 *per* Mason J.; *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1, 126-9 *per* Mason J.; 168-70 *per* Murphy J., 220-1 *per* Brennan J.; *Richardson v. Forestry Commission* (1988) 164 C.L.R. 261, 307 *per* Deane J.

[55] See 'The Seventieth Anniversary of the Engineers Case Commemorated' (1990) 64 *Australian Law Journal* 755.

[56] *Supra* n. 2.

their view) a highly desirable end. The true attractions of literalism to the High Court have tended to lie somewhere in between these two views. The Court has embraced and persevered with literalism through a complex interaction between constitutional politics, and legal-judicial culture. Moreover, as among different judges, these factors have operated in widely varying degrees of strength.[57]

Nevertheless, on an institutional level, it would be profoundly naive not to recognize that a major motive in the Court's continued adherence to literalism has been its positive desire to ensure that the federal balance of power is tilted firmly in favour of the Commonwealth. So much has been recognized, tacitly or explicity, by virtually every knowledgeable commentator.[58] The manner in which literalism works to the advantage of the Commonwealth has already been explained,[59] and need not be enlarged upon. But it may be observed that it passes all belief that such judges as Isaacs could have been blind to the direction in which literalism would take the Constitution, or that the present judges of the Court are not fully sensible of its continuing potency in this respect. In short, literalism has been an instrument of Commonwealth power ever since *Engineers*, and its usefulness in this regard underlies both its adoption and its continuance.

In one sense, this does not take anyone much further in trying to understand the attraction of literalism for the Court. Certainly, it reveals that at least part of that attraction is 'political' (in the sense that it is based on an opinion as to the political desirability of particular constitutional institutions, or at least as to the desirability of a particular power-balance between such institutions), but it necessarily begs the question of why the Court has been so enamoured of the extension of central power. This is a difficult question, perhaps better answered by an historian (or even a sociologist or psychologist) than a lawyer, but a few brief points may be made.

To judges like Isaacs, any movement towards the centralization of power (and thereby, incrementally, towards unification) seems to have been identified with some concept of national progress. There is an historic, and even a personal dimension here. The greatest political problems faced by Australians before Federation had been general disunity and numerous specific petty colonial squabbles. It was the great work of Federation (and people like Isaacs) to remedy this situation: Australia was to be a great new nation, with a similarly great destiny.[60] It is only a short step from this sort of nationalism, a nationalism that not unreasonably sees division and difference in all their forms as its natural enemies, to the conclusion that anything which stresses a single, central, united power over the disparate powers of the States is an objective constitutional good.[61]

57 Galligan, 'Realistic "Realism" and the High Court's Political Role', *supra* n. 3, 44-7; Goldsworthy, 'Realism About the High Court', *supra* n. 3, 35-6.

58 See *e.g.* Sawer, *op. cit.* n. 4, 129-32, 196-208; Zines, *op. cit.* n. 10, 341; Coper, *op. cit.* n. 17, 193-8.

59 See *supra* text following footnote 32.

60 This nationalist vision runs through the joint judgment in the *Engineers* case *supra* n. 1, (see especially at 151-2), and see also Isaacs' speech to the Convention in Adelaide: *Convention Debates*, Adelaide, 1897, 168-82. See also Sawer, *op. cit.* n. 4, 177-8.

61 See generally Finnis, J., 'Reforming the Expanded External Affairs Power', Appendix C to the Report of the External Affairs Subcommittee, *Proceedings of the Australian Constitutional Convention, Brisbane, 1985*, II, 43.

The first twenty years following federation can only have served to strengthen this conviction in minds already favourable to the expansion of central power. The infant Commonwealth's formative experience was its early exposure to the necessities of waging total war during the years 1914-1918.[62] Nothing could have been more suggestive of the need for strong and united government. Coincidentally, no event could have been more calculated to rouse a potent Australian nationalism, a nationalism which would naturally attach itself to the Commonwealth, rather than to the States. Nor was there any reason for a strong commitment to the expansion of central power to dissipate in the years after the war. Not so long after the decision in *Engineers*, the advent of the Great Depression, with its urgent demands for national measures of economic recovery, would have provided (or could have been seen as providing) potent confirmation of the wisdom of its authors. Similar points can be made, over a longer span of time, in relation to such nationally traumatic events as the Second World War, Post-War Reconstruction, the oil crisis of the seventies and the recession of the nineties.

So nationalism and a desire to cope effectively with crisis have been, to a significant extent, the continuing foundations of a widespread commitment by Australians generally to centralism. But one should not ignore the fact that nothing succeeds like success. At least from the beginning of the First World War, the Commonwealth was (in politico-constitutional terms) in the ascendant, and the States in decline. From that point on, the collective prospects and dignity of the States — their institutional aura, if one likes — had begun to take on the slightly seedy character which attends entities in decline. In short, the States were exhibiting the sort of unappealing pathos that is so apparent when they are in the process of being outgunned at Premier's Conferences. The evident decline could only give added weight to the idea that the States were creatures of the past, whose remaining shreds of influence were to be minimized as quickly and expeditiously as possible.

It is, of course, a commonplace of history that at least from the nineteen-twenties on, Western Society as a whole became increasingly convinced both of the necessity for governments to manage such intractable beasts as the economy, and of their ability (if guided by the right principles) to do so. Such, to a large extent, was the message of influential thinkers like Keynes. The postulation of so unprecedentedly great a role for government naturally suggested the need for that government to be as cohesively organized as possible, and once again, in Australia, the Commonwealth was the beneficiary of these notions readily at hand. In an age where national economies were to be guided, if not planned, the States were liable to be dismissed as mere impedimenta.[63]

All these factors have combined over the years to produce a climate of thought in Australia broadly receptive to arguments in favour of the expansion of Commonwealth power, and hostile to the interests of the States. Put bluntly, it

62 As to which see generally Clark, C. M. H., *A Short History of Australia* (1981), V, Chs 10-11.

63 Echoes of these types of view continue to sound in the ears of High Court judges: see *e.g.* the views of Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation', *supra.* n. 50, 23. They may also be heard in some of the Court's more recent decisions concerning the imposition of duties of excise: see generally, *e.g.*, *Hematite Petroleum Pty Ltd v. Victoria* (1983) 151 C.L.R. 599.

has been intellectually unfashionable for many years in Australia to be a serious protagonist of the State. For example, the term 'States Rights' has a dull, faintly hickish ring to it, not entirely traceable to its ritual incantation by constitutionally unsophisticated Premiers of the smaller and remoter States. In this sense, the High Court's centralism (and its allied constitutional literalism) is as much a predictable product of its intellectual milieu as any unusual inclination of its own. If politicians, academics, entrepreneurs, generals and trades unionists generally cry for increased Commonwealth power, it is far from startling that the judiciary have done their best to give it to them.

It is hardly suggested that this analysis is comprehensive, but it does give some idea of the foundations of the Court's attachment to centralism, and thus to literalism. Ironically, of course, to the extent that literalism is underpinned by centralism, one is faced with the spectacle of a constitutional methodology whose avowed essence is an inadvertence to political issues, but whose intellectual genesis lies in precisely such considerations. Yet the fact that literalism is thus open to the charge that it is what might charitably be called (at least in part) a constitutional fiction, does not seem to have unduly troubled either the Court or the commentators. Judges are apparently able to juggle the true basis of literalism alongside its curial camouflage with no particular disquiet. Accordingly, whether or not Galligan's recent thesis that the Court's literalism is motivated 'politics' is correct,[64] it is abundantly clear that its chosen constitutional methodology is significantly actuated by the institutional politics of federalism.

However, as suggested above, this is not to say that the High Court's attachment to literalism is entirely political in character. Also important here are a number of aspects of Australia's legal-judicial culture. However consciously a judge like Isaacs may have acted upon political motives, to other judges, the deciding factors would have been derived from this other source. Even to Isaacs, the appeal of such purely legal considerations was presumably not irrelevant. However much political scientists may discern pure politics in the operations of the High Court, lawyers know only too well how difficult it is to separate politics from legal principle, not merely in the actions of others, but within one's own mind.

The first of these factors is that the majority of judges in *Engineers* were on firm ground when they said that it was established law that British statutes were to be interpreted literally[65] — so much is revealed by the most cursory examination of the leading case-law of the time.[66] In historical terms, the general approach of both British and Australian courts to statutory interpretation has tended to be a literal one, though in line with what has been said previously, the Australian Constitution has certainly been singled out for the application of a particularly virulent strain of literalism, despite the fact that there are clear grounds for moderating such an approach in the case of a constituent document.[67] Nevertheless, a proponent of literalism could point to a wealth of supporting authority. It is only in comparatively recent times that the criticism of a

64 Galligan, B., *Politics of the High Court* (1987).
65 See *supra* text accompanying n. 11, and following *supra* n. 13.
66 See *e.g. The Sussex Peerage Claim, supra* n. 13.
67 As was originally intended in *Jumbunna*: see *supra* n. 34 and accompanying text.

literalistic approach to the broad task of statutory interpretation has become more or less general.

This preponderance of authority would have weighed heavily on the mind of any 'traditional' lawyer, constituting as it did a clarion call to established precedent. Indeed, to many of the 'black-letter' positivist lawyers of the 1920s (and later), there can be no doubt that the words of Isaacs in *Engineers*, in an exclusively legal sense, had and continue to have the ring of pellucid truth. Just as they would minutely construe a wills statute or a taxation Act according to the exact tenor of the words, no more and no less, so they would interpret the Constitution. To such lawyers, the argument that the interpretation of any Act, including a Constitution Act, is to be an exercise in literalism, is a legal truism. Thus, when *Engineers* made its call for literalism, it was playing upon a strong conservative, and above all literalistic legal tradition. It was an intensely positivist position in an intensely positivist legal world. In this sense, while *Engineers* may in its practical effects have had some flavour of political radicalism, it was in legal terms reactionary. It was Griffith and his brethren who would have been more in tune with less technical modern trends of statutory interpretation.[68]

Aside from its appeal to authority, literalism has had other advantages for traditional lawyers. One of its chief virtues has been its surface plausibility as a comprehensive denial that the work of the Court is political. It has already been noted that the extent to which such a claim would have been accepted by the judges themselves would have varied from individual to individual.[69] But the point is that a literalist judge can say with some force (and, if necessary, injured innocence): 'I am only interpreting the words as they stand — what else would you have me do?' To many judges, this was undoubtedly as much a camouflage as anything else, but to others it has been a genuinely reassuring constitutional mantra to be chanted softly in moments of interpretative doubt. Even today, one can find judges of the stature of Kirby P. solemnly praising the *Engineers* decision on the grounds that it prevented the Court from becoming involved in the political disputes of federalism,[70] as if one of the essential effects (and objects) of that decision were not practically to pre-determine a wide range of such disputes in a specified direction. Yet to a limited extent, Kirby is right: for the literalism of *Engineers* does provide not only a cover for the judicial politician, but also (somewhat ironically) a dogmatic ivory tower for the legalistic judge who is forlornly determined not to engage in politics.

Literalism also makes a facile promise of certainty. Instead of having to grapple with such airy and elastic concepts as 'federalism' or 'the nature of the compact', a judge can retreat to the apparent safety of the explicit text. Here, he or she can summon up a battery of semantic and grammatical rules, and canons of statutory interpretation, which will 'automatically' dispose of interpretative issues. Of course, we all know that an unelaborated text — and especially the

68 As to which see *infra*, text accompanying n. 79, and following text.

69 See *supra* n. 57, and accompanying text.

70 'The Seventieth Anniversary of the Engineers Case Commemorated' (1990) 64 *Australian Law Journal* 755, 757.

typically broad text of a written constitution — cannot be certain in this dispositive sense. Ambiguity and shades of ambiguity abound. But, being human, those who purport to interpret a constitution 'literally' are all too ready to assume that the construction of the words which they have arrived at is the only one possible. Indeed, one is tempted here to suspect that a 'certain' interpretation is simply a construction that has been thought up by oneself, and to conjugate a series of irregular propositions: 'I am certain'; 'You are unclear'; 'They have been misled'. It is this tendency which at least partly underlies the phenomenon, doubtless productive of enormous confusion in the layperson, of the High Court splitting into two camps over the meaning of a particular piece of constitutional language, each utterly certain of its own correctness and the other's error. Nevertheless, 'the security of the text' has undoubtedly been a major factor in judicial acceptance of *Engineers*.

There is an allied point here which should not be overlooked. Not only is literalism 'certain', it is also comparatively easy: one might even be tempted to say that it is lazy. Under such an approach there is no need to try and tease out a scheme from the Constitution. There is no requirement that it be interpreted within a potentially confusing historical context. Above all, there is no necessity to develop a sophisticated theory of constitutional interpretation. All that is required is to read the words, apply a few rules of construction, and the answer will emerge (at least in principle) as if from some gigantic constitutional computer. Literalism is thus attractive not only because it produces desired institutional results, shields the judiciary from charges of political bias, is founded in authority and is (supposedly) productive of certainty, but because it is in no sense an intellectually or theoretically challenging interpretative approach to apply. *Engineers* literalism has, in short, relieved the High Court of the trying necessity to develop a serious theory of constitutional interpretation. Instead of developing such a theory, the Court has simply asserted the utility of a particular interpretative methodology.

A final factor may be noted, one that draws upon much of what has been said above. This is that the literalism of *Engineers* has been subjected to remarkably little intellectual criticism, a most appealing characteristic in an interpretative method from the point of view of the court which subscribes to it. Whereas the United States Supreme Court has had to face the fact that whatever approach it adopts to constitutional interpretation — liberal or conservative, textual or non-textual — it will face vehement opposition from one section or other of the American constitutional intelligentsia, the High Court has not been so constrained. On the contrary, the mainstream position of both Australian political scientists and academic constitutional lawyers has been a highly centralist one, very much in sympathy with the results achieved by *Engineers*.[71] Consequently, the thrust of the Court's constitutional methodology has been free to operate

[71] For example, the writings of Professor Sawer are from a professedly pro-central standpoint: see Sawer, *op. cit.* n. 4, 197. Professor Howard's work (especially his monograph, *Australian Federal Constitutional Law*, first published in 1968, with further editions in 1972 and 1985) is also generally sympathetic to the High Court's extension of Commonwealth power. Similar comments could be made of the work of Professor Zines, as exemplified in *The High Court and the Constitution* (1st ed. 1981; 2nd ed. 1987; 3rd ed. 1992).

substantially without the need to cope with sustained hostile criticism. It is true that most commentators have occasionally felt themselves compelled to tut-tut over the more evident logical deficiencies of the *Engineers* approach,[72] and there have been relatively isolated pockets of more intense intellectual criticism.[73] But considering the extent of literalism's deficiencies as a constitutional methodology, it is remarkable just how benign academic lawyers in particular have been. The simple truth is that to a person strongly committed to an increased centralization of power in Australian society, *Engineers* has been a worthy servant, and one not lightly to be discharged for other imperfections.

The Fall from Grace of Literalism

This article has already outlined the emergence and progress of literalism, and has attempted to identify its attraction for the High Court. It has also suggested that literalism is increasingly under threat as Australia's dominant methodology of constitutional interpretation. The exact nature and implications of this threat (or threats) will be fully considered in the article to follow.[74] What is attempted now is an explanation as to why the hold of literalism has begun to weaken at this particular juncture in our constitutional history, and of the factors which underlie the diminishing enthusiasm of the High Court for its appointed interpretative method. It may be noted at the outset that there is no single explanation for the decline of literalism. Rather, a wide variety of considerations have interacted to lessen its attractiveness to the Court. It should also be appreciated that not all of these factors pull in the same direction in terms of the two challenges to literalism identified earlier in this article: some would promote an approach based on intentionalism, while others would suggest the adoption of a 'progressive' slant to constitutional interpretation.

The starting point here must be to return momentarily to ground already covered: literalism has never been an intellectually satisfying constitutional methodology. While it has been noted that a large proportion of constitutionalists have been prepared to accept the intellectual implausibilities of literalism as the price to be paid for the judicial expansion of central power, they have not been entirely unabashed in so doing: as was suggested,[75] even those commentators generally sympathetic to the results of *Engineers* have found it expedient to demonstrate from time to time that they are well aware of its logical difficulties as an interpretative method, even if disinclined to press them. Thus, in examining the declining popularity of literalism, one has to keep in mind that it has always possessed the vulnerability of an intrinsically flawed doctrine, and is thus necessarily more exposed to disintegration than one which is basically sound.

Nevertheless, this does not explain why *Engineers* literalism has started to come under sustained challenge now, rather than at some earlier juncture in its career. The point worth making in this context is that, to a very large extent,

[72] See *e.g.* Zines, *op. cit.* n. 10, 9-11; Sawer, *op. cit.* n. 4, 197-200; Coper, *op. cit.* n. 17, 194-8.
[73] *E.g.* Dawson, 'The Constitution — Major Overhaul or Simple Tune-Up?' *supra* n. 35; Finnis, *op. cit.* n. 61; Cooray and Ratnapala, *op. cit.* n. 25.
[74] See *supra* n. 2.
[75] See *supra* n. 71.

Australian constitutional literalism is as much a victim of time as of anything else. The sheer burden of solemnly adhering to interpretative propositions which are far from satisfactory has produced a strain which has become harder to bear with each passing year, and each threadbare articulation. In this very basic sense, *Engineers* is afflicted with plain old age.

Quite apart from the effluxion of time, however, there are a number of reasons why the present is a particularly testing time for *Engineers* literalism. One of the most important of these is the general decline of confidence on the part of lawyers in the certainty and determinacy of statutory language, evident across the whole spectrum of the law, but nowhere more pronounced than in the context of the interpretation of written constitutions. Literalism as an interpretative methodology was born at a time when most lawyers were confidently prepared to assert that, with the aid of a good dictionary and the usual canons of statutory interpretation, they could make objective sense of virtually any piece of legislation. Those days are largely gone.

This is not to assert that the critical legal studies movement and its deconstructionist allies, for example, have won the hearts and minds of lawyers generally.[76] Nor is it to adopt the position of the more extreme of such theorists that language is largely without meaning.[77] It is simply the case that over forty years of assaults upon the concept of textual certainty have now produced the result that most thinking lawyers would view with some amusement the proposition that complex statutory language, especially the broad language of a constitutional document, can be understood in the splendid literal isolation enshrined in cases like *Engineers*. By and large, we have embraced (or at least accepted) a notion of prevalent textual ambiguity quite hostile to the spirit of such an approach, and readily admit that a vast quantity of both constitutional and statutory language is susceptible of competing meanings which simply cannot be convincingly resolved by resort to the text alone. In such circumstances, literalism becomes an increasingly untenable canon of constitutional construction, and the injunction to read the text is likely to be met with the terse response, 'Yes, but what do we do next?' It may be noted in passing that this ready acceptance of constitutional ambiguity is more or less a given in our law schools, and that younger lawyers are correspondingly unlikely to embrace a literalist interpretative methodology with enthusiasm.

These influences could hardly have been expected to by-pass the High Court, which now seems to be showing a significantly increased willingness to admit of the possibility that constitutional language might be profoundly ambiguous.[78] In line with what has been said above, it is clear that such a tendency will only increase with time. However, it may be observed that even at present, there are a

[76] For an outline of a 'critical' approach to interpretation see *e.g.* Kelman, M., *A Guide to Critical Legal Studies* (1987), especially at 213-33.

[77] See *ibid.* 45-6; and see Tushnet, M., 'Critical Legal Studies and Constitutional Law: An Essay in Deconstruction' (1984) 36 *Stanford Law Review* 623.

[78] *E.g. Bourke v. State Bank of New South Wales* (1990) 93 A.L.R. 460, 463-5; *Phillip Morris Ltd v. Commissioner of Business Franchises* (1989) 167 C.L.R. 399, 201 *per* Mason C.J. and Deane J.; 239-41 *per* Toohey and Gaudron JJ.

number of factors which facilitate the infiltration of such notions into the Court's jurisprudence. One of these is the increasing interest shown by a number of members of the Court in North American constitutional theory and jurisprudence.[79] The point here is that if Australian lawyers are beginning to feel that a faith in the utter determinacy of constitutional language is a little dated, to American and Canadian scholars — and courts — the literalism of *Engineers* must seem positively antediluvian. Such North American constitutional thinkers as even care any longer about the concept of a constitutional text[80] have long ago accepted the tyranny of ambiguity as simple reality, and concentrate their best efforts upon the development of techniques to resolve such uncertainty.[81] As the Australian High Court becomes increasingly cosmopolitan in its constitutional jurisprudence, it is inevitably exposed to the fact that however much literalism has been an accepted constitutional methodology in Australia, its intellectual poverty is readily apparent to those reared in a less rigid constitutional climate. Whether they are there physically or merely intellectually, to the Australian constitutionalist overseas, *Engineers* is a plain embarrassment.

A further relevant factor is the Court's increasing interest in legal theory, including constitutional theory, which can only lead to an acute appreciation of the fact that constitutional literalism makes no real attempt to present (or even to relate to) a coherent theoretical vision of the Australian Constitution and its interpretation. Following upon its traditional common law-inspired distaste for the impractical and speculative, the Court's burgeoning interest in legal theory generally is both pronounced and well documented.[82] The concern of a number of the judges to delve more deeply into the specific field of constitutional theory, and to at least begin the task of articulating a vision, as opposed to conducting a dissection of the Australian Constitution, is also evident.[83] In one sense, such an enterprise is merely a further evidence of the increasing maturity and sophistication of Australia as an independent legal and constitutional system, a maturity strikingly illustrated in the Court's current concern to develop an independent Australian common law.[84] To the extent that the Court's emergent vision of a self-sustaining Australian law and legal system requires as an essential component a serious constitutional theory, together with a derivative methodology of constitutional interpretation, the literalism of *Engineers* as such has virtually nothing to offer.

[79] See *e.g.* Mason, 'The Role of a Constitutional Court in a Federation', *supra* n. 50, originally delivered at the University of Virginia Law School; Mason, Sir Anthony, 'Future Directions in Australian Law (1987-8) 13 *Monash University Law Review* 149, 160-1; McHugh, M., 'The Law Making Function of the Judicial Process' (1988) 62 *Australian Law Journal* 15, 16-7, 26-31.

[80] For a discussion of the extent to which 'progressive' American constitutional thought is textually based see Bork, R., *The Tempting of America: The Political Seduction of the Law* (1990) Ch. 8, 'The Theorists of Constitutional Revisionism'.

[81] See *e.g.* Monaghan, H., 'Our Perfect Constitution' (1981) 56 *New York University Law Review* 353.

[82] See for example the references cited *supra* n. 79; and see the judgment of Deane J. in *University of Wollongong v. Metwally* (1984) 158 C.L.R. 447, 476-8; and of Brennan J. *Kioa v. West* (1985) 159 C.L.R. 550.

[83] See *supra* n. 79.

[84] See especially Mason, 'Future Directions in Australian Law', *supra* n. 79, 149-55.

It is worth noting here the potential symbolic importance of the enactment of the Australia Acts in 1986.[85] As much as anything else, these Acts exemplify the attainment by Australia of full constitutional and legal independence. However convenient it may have been for Australians to muddle along on the prosaic instrumentalism of *Engineers* while their nation was umbilically linked to the placenta of Britain's own fundamental constitutional self-vision, the sundering impact of the Australia Acts is a potent force for the articulation of a new, comprehensive conception of what the Australian Constitution is, and what a Court is doing when it interprets it. A legally independent nation may reasonably be expected to stand on its own legal feet, and in order to do so, it will need its own sustaining constitutional vision. Nor should one entirely overlook the fact that the historically critical passages of *Engineers* drawing upon accepted practices for the interpretation of British statutes must ring less and less true in an age when British statutes, and even Britain herself, are of no great moment to Australians, emotionally, legally or constitutionally.

The general decline of faith in the determinacy of constitutional language has already been mentioned,[86] but a further matter may also be noted. Quite apart from the growing acceptance that language is an inexact legal tool, there has been a pronounced trend in recent years, both within and without Australia, towards the purposive, non-literal construction of statutory provisions. In Australia, this was very largely fuelled by wide-spread community feeling against the High Court's application of literalist techniques very similar to those endorsed in the *Engineers* case for the purpose of narrowly confining the scope of taxation legislation.[87] The primary outcome of this feeling has been the enactment of statutes in both the State and Federal spheres directing courts to prefer a purposive over a technical construction.[88] Such statutes also tend to liberalise the rules concerning the use of extrinsic non-textual materials in order that the purpose in question may be more readily ascertained.[89] Indeed, quite apart from these legislative intiatives, there appears to have been something of a change of heart in this context on the part of the courts themselves.[90] The net result of all this is that in the field of statutory interpretation, we have seen a marked general swing towards intent-based, non-literalist, purposive construction.

It can come as no particular surprise that such a movement cannot be quarantined from the closely allied field of constitutional interpretation. It is true that the relevant reforming Commonwealth legislation, s. 15AA of the Acts Interpretation Act 1901, specifically does not apply to the interpretation of the Constitution. But this does not secure the Constitution from the less formal

85 See generally Lindell, G., 'Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29.

86 See *supra* n. 76 and following text.

87 See *e.g.* Pearce, D. and Geddes, R., *Statutory Interpretation in Australia* (3rd ed. 1988) 29-30; Macrossan, J., 'Judicial Interpretation' (1984) 58 *Australian Law Journal* 547.

88 *E.g.* Acts Interpretation Act 1901 (Cth) s. 15AA; Interpretation of Legislation Act 1984 (Vic.) s. 35.

89 See *e.g.* Acts Interpretation Act 1901 (Cth) s. 15AB; Interpretation of Legislation Act 1984 (Vic.) s. 35.

90 See *e.g. Cooper Brookes (Wollongong) Pty Ltd v. Federal Commissioner of Taxation* (1981) 147 C.L.R. 297; *Wacando v. Commonwealth* (1981) 148 C.L.R. 1.

movement in favour of purposive construction and against technical literalism that has had such a powerful influence upon the whole field of statutory interpretation. It would place the Court in an untenable position were it to adopt a strongly purposive approach to the construction of statutes generally, but to reserve a widely discredited literalism for exclusive application to the Constitution. It is no coincidence that the Court's new willingness to refer to the Convention Debates of the 1890s in the interpretation of the Constitution[91] has come about in an atmosphere far more sympathetic to the use of extrinsic aids generally than has previously been the case. Nor is it difficult to see the connection between a wider concept of purposive construction and the intensified interest of the Court in the object behind such constitutional provisions as ss. 90 and 92.[92] It may be noted for present purposes that influences such as these clearly enough propel the Court away from literalism in the specific direction of what has been referred to above as 'intentionalism'.

Others have a profoundly different effect. One increasingly important aspect of the functioning of the Court has been its growing acceptance and confession that it is routinely in the business of making the Constitution as it interprets it. The Court is far more comfortable with its role as moulder of constitutional policy than at any point in its history. What the judges of *Engineers* had to cloak with the language of precedent and imperative interpretative practice, today's justices are inclined to at least half admit.[93] Under the influence of realist and post-realist thought, many members of the Court now accept that, if they are not unconstrained by the text, they are to a significant extent free to channel that text. As Goldsworthy says, we are all realists now.[94]

Of course, the willingness of judges to make overt constitutional policy choices, and to assert their right to do so, varies from individual to individual. Some are much more reticent than others. But an increasing number of High Court judges would regard the proposition that they are, and even that they could conceivably present themselves as being, mere media for the transmission of a determinative constitutional text, as little short of bizarre. To such judges, there is a powerful temptation to abandon the encumbering trappings of literalism, and to engage in what is probably the more risky but infinitely more intellectually defensible (and honest) exercise of interpreting the Constitution in accordance with the perceived needs of contemporary Australian society, or whatever other formulation of the same concept that they may choose to adopt. Adoption of this approach would amount to the 'progressivism' described above. Of course, it is not suggested that such judges would entirely abandon the text: rather, they would be inclined to embrace the concept of pervasive ambiguity which has

[91] See *Cole v. Whitfield* (1988) 165 C.L.R. 360. This question is more fully considered in the companion piece to this article, see *supra* n. 2.

[92] *E.g. Hematite Petroleum Pty Ltd v. Victoria* (1983) 151 C.L.R. 599; *Phillip Morris Ltd v. Commissioner for Business Franchises* (1989) 167 C.L.R. 399; *Cole v. Whitfield* (1988) 165 C.L.R. 360.

[93] See *e.g.* Mason, 'The Role of a Constitutional Court in a Federation' *supra* n. 50, 22-3; Mason, 'Future Directions in Australian Law', *supra.* n. 79, 160-2; *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168, 225.

[94] Goldsworthy, J., 'Reply to Galligan', *supra* n. 3.

already been considered, and utilize their conception of an ideal Australian society to fill in the resulting gaps.

A matter operating in the same direction is the pervasive belief in Australia that the constitutional amendment process has 'failed', a belief apparently held by some members of the Court.[95] The idea here is that the electorate has proved perversely stubborn in resisting constitutional reform, and has tended to vote 'No' at referenda more out of an unreasoning innate conservativism than upon any considered view as to the demerits of particular proposals.[96] This is not the place to consider the objective accuracy of such a perception, but its potential to influence the constitutional approach of the High Court is clear. Any judge firmly of the view that the Constitution is in need of significant reform, and that such reform will never be achieved under s. 128, will at least be tempted to try to secure that reform through a process of judicial interpretation. Indeed, some would seek to justify a variety of the Court's past decisions (at least in part) on precisely this utilitarian ground.[97] Obviously, literalism is not an interpretative technique that is openly sympathetic to such a process, however much it may be pressed into service as an intellectually unsatisfying cover for a 'reformist' agenda. The methodology of progressivism, by way of contrast, would provide a principled base from which a right-minded judge could pursue the reform of the Constitution, openly and more or less comprehensively. Again, suggested ambiguity would provide the interpretative 'window of opportunity'.

A more subtle influence is the growing awareness of lawyers that their discipline is not an isolated and self-contained domain of knowledge. The relevance of such other disciplines as history, economics, political science and sociology has been accepted in the law schools, and is in the process of forcing itself upon the courts. The High Court, for example, is now painfully aware that it cannot simply rely on 'pure law' and eschew all knowledge of economics when it comes to apply ss 90 and 92.[98] The increasing importance of history in the process of constitutional interpretation has also become apparent in a number of contexts.[99] Influences of these sort all work in a pervasive way in favour of an opening-up of the Court's task of constitutional construction, and against an exclusive reliance upon a literal reading of the text according to 'lawyers rules'.

To an extent, it may also be argued that literalism is in decline because it has substantially achieved the purpose for which it was designed. As has been suggested, [100] the primary purpose in question was the provision of a vehicle for the judicial expansion of Commonwealth power. Seventy years after *Engineers*, this goal has largely been attained. It is true that the States retain a significant

95 See Mason, 'The Role of a Constitutional Court in a Federation', *supra* n. 50.

96 See *e.g.* Sawer, *op. cit.* n. 4, 207-8; Coper, *op. cit.* n. 17, 374-80.

97 See *e.g.* Mason, 'The Role of a Constitutional Court in a Federation' *supra* n. 50, 22-3.

98 See for example the decision of the Court in *Bath v. Alston Holdings Pty Ltd* (1988) 165 C.L.R. 411 77; and the criticisms of that decision in the case note by Howard, C., in (1988) 16 M.U.L.R. 852; and Coper, M., 'The Economic Framework of the Australian Federation: A Question of Balance', in Craven, G. (ed.), *Australian Federation: Towards the Second Century* 131; and see *Phillip Morris Ltd v. Commissioner of Business Franchises* (1989) 167 C.L.R. 399.

99 *E.g.* s. 92 (see *Cole v. Whitfield* (1988) 165 C.L.R. 360), and the corporations power (see *New South Wales v. Commonwealth* (1990) 169 C.L.R. 482).

100 *Supra*, text following n. 32.

residue of power, but a great proportion of this is comprised of matters towards which the Commonwealth entertains no particular ambitions, while the federal balance of power has in practical terms come to be essentially political, in the sense that the Commonwealth be only sufficiently determined, there is little that it cannot achieve.[101] To this extent, the necessity that went much of the way towards prompting the Court's original adherence to literalism — that of achieving a transfer of power from the States to the Commonwealth — has substantially disappeared, and the process of centralization thus achieved would, in political and social terms, be almost impossible to reverse. Arguably, therefore, the Court is free to discard a literalism that has outlived much of its usefulness.

Paradoxically, a further potential incentive for the Court to abandon literalism is that it may in fact have been a little too successful in achieving a centralization of power in Australia. While the present High Court is hardly known for its attachment to federalist values, it has clearly had occasion to look somewhat askance at the Commonwealth juggernaut that it has helped to create, especially in terms of the enormous power wielded by a Commonwealth executive firmly in control of the House of Representatives.[102] It may be that the Court could be tempted to relax its literalism in the cause of securing for the States a little more breathing room, if only to provide some sort of balance to the pervasive political power of the Commonwealth[103] — a balance the achievement of which is, after all, one of the chief theoretical advantages claimed for federalism.[104] Supportive of any such move would be the emergent school of Australian 'federalists', writing in the fields of both political science and constitutional law, who seriously question the value of ever-increasing central power.[105]

Finally, to the extent that the federal balance of power is largely a dead (or comatose) issue in Australian constitutional law, it is natural enough for the Court to look for new areas of constitutional endeavour. Indeed, without federal

101 See Galligan, B., 'Federal Theory and Australian Federalism: A Political Science Perspective' in Galligan, B. (ed.), *Australian Federalism* (1989) 45; Craven, G. 'The States — Decline, Fall or What?' in Craven, G. (ed.), *Australian Federation: Towards the Second Century* (1992) 53-7.

102 See Craven, G., 'A Few Fragments of State Constitutional Law' (1990) 20 *University of Western Australia Law Review* 353, 368. Such influences might be discerned in decisions like *Brown v. West* (1990) 169 C.L.R. 195, and even *New South Wales v. Commonwealth* (1990) 169 C.L.R. 482.

103 After the high-water mark of the expansion of Commonwealth power achieved in *Commonwealth v. Tasmania* (the *Dams* case), there are some signs that the Court is looking more kindly upon the States. Not only did the States have a major victory in *New South Wales v. Commonwealth* (the *Corporations* case) (1990) 169 C.L.R. 482, but some of the Court's rhetoric seems rather less pro-centre in tone than has hitherto been the case: see *e.g. Street v. Queensland Bar Association* (1989) 168 C.L.R. 461.

104 See Dawson, 'The Constitution — Major Overhaul or Simple Tune Up?', *supra* n. 35, 364-5; Galligan, 'Federal Theory and Australian Federalism: A Political Science Perspective', *supra* n. 2, 54-60.

105 *E.g.* Galligan, 'Federal Theory and Australian Federalism: A Political Science Perspective', *supra* n. 2, 98; Saunders, C., 'Towards a Theory for Section 96: Part II' (1989) 16 M.U.L.R. 699; Saunders, C., 'Fixed Federalism — A General and Unholy Scramble', in Craven G. (ed.), *Australian Federation: Towards the Second Century* (1992) 101; Crommelin, M., 'The Federal Model', in Craven, G. (ed.), *Australian Federation: Towards the Second Century* 33; Craven, G., 'The States — Decline, Fall or What', in Craven, G., (ed.), *Australian Federation*; Craven, G., 'States Rights and the Australian Federation', forthcoming *University of New Brunswick Law Journal*.

division of power cases, and with nothing else substituted, the High Court of Australia becomes a fairly pedestrian court of appeal. The most obvious possibility would be for the Court to devote itself to the development of constitutional guarantees of democratic and individual rights, a currently fashionable field which it has so far neglected, but in which a number of its members show a lively interest.[106] The problem with literalism in this context is that however apt it may have been as a tool of centralism, it is quite useless as a means of propounding rights which simply do not appear on the face of the text. For this task, a far more free-wheeling constitutional approach, permitting in particular massive resort to implications, would be necessary. Thus, to the extent that the Court has any serious agenda concerning the formulation of guarantees of human rights, it may be strongly inclined to ditch the literalism of a former time and former problems.

Conclusion

This article has sought to explain the basic nature of Australian constitutional literalism; to trace its rise to orthodoxy; and to explore its attraction to the High Court. It has gone on to attempt to isolate those factors underlying literalism's present decline. By way of conclusion, it is worth stressing again that not all these factors work in the same direction: some are sympathetic to an intentionalist approach, others run more towards progressivism. What all have in common, however, is that they are essentially hostile to the Court's present literalism. Were one to emphasize anything that emerges from the diverse strands collected above, it would be that the existing constitutional climate is ripe for the demise of literalism, because the agenda which it originally served has ceased to be of overwhelming importance in Australian constitutional politics, or at least is achievable by other means; and because the complex legal culture which fostered the approach taken in *Engineers* has passed on in favour of newer and much less sympathetic positions and priorities. In the article to follow, the exact nature of the current challenges to literalism as Australia's established orthodoxy of constitutional interpretation will be more fully canvassed, and the implications posed by their possible success considered.

[106] See Mason, 'Future Directions in Australian Law', *supra* n. 79, 162-3; *University of Wollongong v. Metwally* (1984) 158 C.L.R. 447, 476-8, *per* Deane J; *Union Steamship Co. Pty Ltd v. King* (1988) 166 C.L.R. 1, 10.