DERIVING CONSTITUTIONAL IMPLICATIONS: THE ROLE OF 'EXTERNAL' SOURCES IN THE TEXT AND STRUCTURE APPROACH

The High Court applies the 'text and structure approach' when deriving constitutional implications. This requires implications to be drawn from the 'text' and 'structure' of the document. A particular line of criticism has been made by some scholars that frames this approach as a falsehood. According to these scholars, judges claim to be drawing implications solely from the 'text' and 'structure' but are, in fact, employing 'external' sources when carrying out this task. I argue that this criticism is misguided. Judges are using 'external' sources to help illuminate the ideas conveyed by, or contained within, the 'text' and 'structure'. This means that their use of 'external' sources is not necessarily a circumvention of the text and structure approach but an accompaniment to it. The relevant scholars' critique seems to be rooted in flawed conceptualisations of the Constitution's 'text' and 'structure' and their ideational content. This work examines the problems with the relevant scholars' critique and offers what I consider to be a more accurate explanation of the operation (and shortcomings) of the text and structure approach.

I INTRODUCTION

In the landmark case of *Lange v Australian Broadcasting Corporation* ('*Lange*'), the High Court clarified its approach to establishing new constitutional implications.[1] It held that implications may only be derived from the text and structure of the *Commonwealth Constitution* ('Constitution').[2] The Court outlined this 'text and structure approach' in the context of explaining how a particular implication, the freedom of political communication, is drawn from the document.[3] The unanimous, joint judgment states:

> Since *McGinty* [*v Western Australia* ('*McGinty*')] it has been clear, if it was not clear before, that the Constitution gives effect to the institution of "representative government" only to the extent that the text and structure of the Constitution establish it. In other words, to say that the Constitution gives effect to representative government is a shorthand way of saying that the Constitution provides for that form of representative government which is to be found in the relevant sections. Under the Constitution, the relevant question is not, "What is required by representative and responsible government?" It is, "What do the terms and structure of the Constitution prohibit, authorise or require?"[4]

Thus, a particular conceptualisation of 'representative government' manifests from relevant constitutional provisions.[5] This includes sections 7 and 24, which state that members of

[1] (1997) 189 CLR 520 ('*Lange*').
[2] Ibid 566-567.
[3] Before receiving unanimous support in *Lange*, the implied freedom had gained majority support in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*') and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*').
[4] *Lange* (n 1) 566-567; *McGinty v Western Australia* (1996) 186 CLR 140 ('*McGinty*').
[5] For discussion on the lack of clarity surrounding the specific provisions that this includes see: Jeremy Kirk, 'Constitutional Implications II: Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24, 49 ('Implications II'). While I use the term 'representative government' in this article, judges sometimes used the term 'representative democracy' when explaining the establishment of the implied freedom. These terms appear to be broadly interchangeable in this context: Jeremy Kirk, 'Administrative Justice and the

Commonwealth Parliament are to be 'directly chosen by the people'.[6] The Court held that an implied limit on Commonwealth and State legislative and executive action unduly burdening freedom of political communication was required to preserve this form of 'representative government'.[7] In this manner, the implied freedom was drawn from the text and structure of the Constitution.

Subsequent case law confirms that the text and structure approach is to be employed when deriving implications beyond the freedom of political communication.[8] In the 2020 case of *Gerner v Victoria*, for example, Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ state that the need for implications to be drawn from the text and structure of the Constitution 'is now well settled'.[9] The judges applied the text and structure approach in this matter to assess the viability of establishing an implied freedom of movement.[10] The plaintiffs proposed its establishment in response to Victorian government restrictions on movement during the COVID-19 pandemic.[11] More than two decades after *Lange*, the text and structure approach remains the interpretive framework within which the Court determines the viability of such proposed implications.

While the Court continues to employ it, the approach has attracted criticism in constitutional law scholarship.[12] This article centres on, and challenges, a particular line of criticism from

Australian Constitution' in Robin Creyke and John McMillan (eds), *Administrative Justice - The Core and the Fringe* (2000) 78, 99-101.
[6] *Lange* (n 1) 557-558.
[7] Ibid 560.
[8] Catherine Penhallurick, 'Commonwealth Immunity as a Constitutional Implication' (2001) 29 *Federal Law Review* 151, 162; Jeremy Kirk, 'Constitutional Implications I: Nature, Legitimacy, Classification, Examples' (2000) 24 *Melbourne University Law Review* 645, 647 ('Implications I').
[9] 385 ALR 394, 398.
[10] Ibid 398.
[11] Ibid 395-396. The Court ultimately held that this proposed implication is not to be established: 404.
[12] See in particular: Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668 ('Limits'); Adrienne Stone, 'Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law*

scholars who view the text and structure approach as a falsehood ('the relevant scholars').[13] According to these scholars, judges are claiming to derive implications from the Constitution's text and structure but are, in fact, regularly drawing them from 'external' sources.[14] James Stellios is one such scholar, stating that judges must be deriving implications from beyond the Constitution's text and structure when determining the precise content of the concept of 'responsible government' manifesting from the Constitution's wording and drawing implications from it.[15] He explains that nowhere in the Constitution 'do we find any statement as to the accountability of the executive to Parliament or the duty of a prime minister (who is not mentioned) to resign if there is a resolution of no confidence in, or a refusal of supply, by the House of Representatives.'[16] He concludes that '[i]t is impossible to believe that someone with no prior knowledge and understanding of the system [of responsible government] could discover it in the text and structure of the Constitution.'[17]

George Williams and Andrew Lynch similarly state that the judges of the High Court 'rarely acknowledge that the text and structure of the Constitution may just be a helpful starting point that can take a judge only so far. Beyond such assistance, value judgements and questions of policy and degree necessarily arise.'[18] Tom Campbell and Stephen Crilly equate 'determining what is necessarily implied by the text and structure of the Constitution' with not 'taking into

Journal 842 ('Revisited'); Kirk, 'Implications I' (n 8); Kirk, 'Implications II' (n 5); Nicholas Aroney, 'Towards the Best Explanation of the Constitution: Text, Structure, History and Principle in Roach v Electoral Commissioner' (2011) 30 *University of Queensland Law Journal* 145 ('Towards'); Jeffrey Goldsworthy, 'Constitutional Implications Revisited – The Implied Rights Cases: Twenty Years On' (2011) 30 *University of Queensland Law Journal* 9 ('Twenty').

[13] James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 562-563; Tom Campbell and Stephen Crilly, 'The Implied Freedom of Political Communication, Twenty Years On' (2011) 30 *University of Queensland Law Journal* 59, 59-60; George Williams and Andrew Lynch, 'The High Court on Constitutional Law: The 2010 Term' (2011) 34 *University of New South Wales Law Journal* 1006, 1026-1027. While these works are the focus of this article, other literature may be considered to endorse this line of criticism. This includes the prominent work on the text and structure approach by Adrienne Stone: see below nn 29.

[14] For a definition of 'external' sources see: Part II(D).

[15] (n 13) 562-563.

[16] Ibid 563.

[17] Ibid 563.

[18] (n 13) 1026-1027.

account material external to the Constitution'.[19] In the context of the freedom of political communication, this leads judges to rely on legal reasoning 'ill-suited' to determining the moral and political questions raised when determining which laws curbing free expression are permissible and which are not.[20]

This is an understandable reading of the Court's position in a sense. As seen above, the text and structure approach has been presented by the Court as a form of restraint on judges.[21] They must pay proper regard to the specific wording of the Constitution and, in the context of the freedom of political communication, resist drawing on outside conceptualisations of 'representative government' inappropriately. As Brennan CJ states in *McGinty*, judges must be '*confined* by the text and structure' when deriving implications.[22] These critics seem to be agreeing with the Court that the Constitution's text and structure are a form of restraint on judges. Their particular view, however, is that these two sources are so restraining, that judges must be drawing substantially on 'external' sources when deriving complex implications without sufficient acknowledgment of this reality and in breach of their stated approach.

In this article, I argue that the relevant scholars' critique is a misunderstanding of the text and structure approach. Judges are not necessarily deriving implications from *beyond* the Constitution's text and structure when they utilise 'external' sources in their interpretive process. They have stated relatively clearly that they are using such sources to determine the ideas conveyed *by* this text and structure.[23] This means that their use of 'external' sources is not necessarily a departure from the text and structure approach but an accompaniment to it.

[19] (n 13) 59-60.
[20] Ibid 60.
[21] See above n 4 and accompanying text.
[22] (n 4) 176 (emphasis added).
[23] See discussion in: Part III.

The relevant scholars' critique appears to be rooted in a flawed conceptualisation of the Constitution's 'text' and 'structure'.[24] The content of these two sources is not as fixed or restrictive as these scholars suggest. It is malleable given judges' ability to draw on diverse interpretive methods to determine their content. They may, for example, apply an intentionalist, progressivist or other interpretive perspective as they see fit when assessing the ideas conveyed by the 'text' and 'structure'. The important point for present purposes is that almost all such perspectives require 'external' sources to be utilised when interpreting the Constitution (they merely differ on which 'external' sources are preferable).[25] In this manner, judges' use of 'external' sources remains permissible under the approach, despite the relevant scholars' views to the contrary.

This is not to suggest that criticism of the text and structure approach is altogether unwarranted. A prominent example of valid criticism can be found in the work of Adrienne Stone.[28] She notes, among other insights, that the approach allows judges to hold vastly different views on the content of the Constitution's 'text' and 'structure' and, thus, on the implications that may be drawn from it.[29] This renders the approach unable to fulfil its fundamental role satisfactorily. That is, it is unable to provide sufficient guidance for determining the legitimacy of proposed (or established) implications. Judges can often claim to be adhering to the approach but each come to a range of different conclusions on the implication in question.[30] I agree with this criticism by Stone and draw similar conclusions on the approach's shortcomings in this work.[31]

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[24] See discussion in: Part V.
[25] See discussion in: Part IV(B).
[28] 'Limits' (n 12); 'Revisited' (n 12); 'Insult and Emotion, Calumny and Invective: Twenty Years of Freedom of Political Communication' (2011) 30 *University of Queensland Law Journal* 79 ('Insult').
[29] 'Revisited' (n 12) 850; 'Insult' (n 28) 90.
[30] 'Revisited' (n 12) 850; 'Insult' (n 28) 90.
[31] See discussion in: Part IV(B). Stone, however, seems to be making a criticism of the text and structure approach akin to that of the relevant scholars in certain junctures of her work. This presents an inconsistency in her scholarship. Stone argues that the Constitution's 'text and structure' is simply 'too bare to provide clear guidance in any given case': 'Revisited' (n 12) 844. This indicates that she views the 'text' and 'structure' as not conveying enough ideas to anchor (at least) the establishment of the freedom of political communication, which is the

While such valid criticisms of the approach exist, it remains important to challenge flawed ones. Judicial decisions to establish new implications have the capacity to substantially alter the workings of the Australian constitutional system.[32] Judges continue to apply the text and structure approach when making these decisions and lawyers are required to abide by this approach when presenting arguments in support of, or in opposition to, proposed implications.[33] Maintaining an accurate understanding of the approach for all parties concerned, therefore, is vital.

This article is similar to other works addressing purported misconceptions in scholarship regarding the Court's establishment of implications.[34] Such works focus on clarifying how the Court seemingly is deriving implications, rather than proposing how it should perform this

implication at the centre of her discussion. Other comments in her work compound this view, such as her statement that judges deciding to formulate the implied freedom with a proportionality test component requires 'reference to values or principles external to the Constitution': 'Limits' (n 12) 668. Stone concludes that this amounts to a 'depart[ure]' from the text and structure approach: 668.

In other segments of her work, however, Stone seems to be arguing something different. She argues that the judges in *Coleman v Power* (2004) 220 CLR 1 are 'adher[ing]' to the text and structure approach, despite coming to vastly different conclusions on the protection of insulting language under the implied freedom: 'Revisited', 850. Similarly, she concludes that '[i]n almost every case, there will be competing, and often vastly different, conceptions of political communication *any of which could satisfy* the text and structure method': 'Insult' (n 28) 90 (emphasis added).

Thus, in some segments of her work, she seems to align with the relevant scholars, arguing that judges are departing from the text and structure approach when drawing on seemingly 'external' sources because the 'text' and 'structure' are too 'bare'. In other segments of her work, she seems to be aligning with my view. Namely, she is arguing that judges are adhering to the approach when drawing on seemingly 'external' sources (she infers that this is what has led them to come to such vastly different conclusions). This argument appears to frame the 'text' and 'structure' not as 'bare', but broad and malleable enough to justify such differing views.

[32] For example see: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*') (and see discussion in: Stellios (n 13) 477-501); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*') (and see discussion in: Fiona Wheeler, 'The Boilermakers Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 160).

[33] See above nn 8-11 and accompanying text.

[34] For example see: Michael Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228; Jonathan Crowe, 'Constitutional Text, Authorial Intentions and Implied Rights: A Response to Allan and Arcioni' (2021) 49 *Federal Law Review* 149 ('Response'); Patrick Emerton, 'The Integrity of State Courts under the Australian Constitution' (2019) 47 *Federal Law Review* 521 ('Integrity').

task.[35] Patrick Emerton's 'The Integrity of State Courts under the Australian Constitution' is an example of the former.[36] He draws on the semantic theory of reference developed by Hilary Putnam and Saul Kripke to help explain the Court's reasoning for establishing the *Kable* doctrine.[37] He does so to rebuff criticisms of the implication by Jeffrey Goldsworthy and other commentators.[38] The misunderstanding I examine here is one yet to be discussed – the relevant scholars' particular views on the use of 'external' sources when applying the text and structure approach. By critiquing these scholars' position, I offer what I propose is a more accurate understanding of the approach.

While Emerton focuses on misconceptions surrounding a specific implication (the *Kable* doctrine), I focus on misconceptions surrounding the Court's framework for deriving implications generally (the text and structure approach). Unlike Emerton, I do not ground my analysis in a vision of how words convey implied meaning from a particular school of thought in linguistics or the philosophy of language. This is because, as noted above, my contention is that the text and structure approach is so broadly constructed that it permits judges to adopt a

[35] For examples of literature suggesting how the Court should approach the establishment of implications see: Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150 ('Language'); Aroney, 'Towards' (n 12); Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality (2013) 39 *Monash University Law Review* 66. Some works may be viewed as falling into both categories, exploring how the Court is, and proposing how it should, derive implications. Rosalind Dixon, for example, discusses how a 'functionalist' model of interpretation is evident in some judgments involving implications as well as how it deserves further attention from the Court (and her fellow scholars): 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43 *Federal Law Review* 455.

[36] (n 34). Emerton explains: 'one function of academic legal writing is to provide a supplement to, an underpinning for, and in some cases even a sympathetic reconstruction of, doctrine and doctrinal reasoning': at 523. He views his work as 'a rigorous grounding of the *Kable* doctrine which is recognisably true to the way that the High Court has articulated it': at 523.

[37] Emerton, 'Integrity' (n 34) 523; Hilary Putnam, 'Dreaming and "Depth Grammar"' in RJ Butler (ed), *Analytical Philosophy* (Basil Blackwell, 1962) 211; Hilary Putnam, 'The Meaning of "Meaning"' in Hilary Putnam (ed), *Mind, Language and Reality: Philosophical Papers, Volume 2* (Cambridge University Press, 1975) 215; Saul Kripke, *Naming and Necessity* (Basil Blackwell, 1980); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('*Kable*'). Emerton also draws on the sociological understanding of institutions put forward by Philip Selznick (and the treatment of his work by Martin Krygier in particular): Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford University Press, 2012).

[38] Emerton, 'Integrity' (n 34) 521-522.

range of understandings of how words convey such meaning.[39] That is, the approach allows judges to employ Emerton's understanding of how implications arise (grounded in the work of Putnam and Kripke), Goldsworthy's understanding of this phenomenon (grounded in the work of another philosopher of language, Paul Grice) or other understandings entirely when assessing the merits of a proposed constitutional implication.[40] This lack of anchorage in a particular vision of how words convey implied meaning is a feature of the text and structure approach that will be explored in this article.[41]

I structure my discussion as follows. In Part II, I define key concepts, such as 'constitutional implications' and ''external' sources', in line with how they appear to be understood in case law. I do so primarily to clarify how these terms will be used in this article. In Part III, I outline how the Court presents a different view to the relevant scholars regarding its use of 'external' sources when applying the text and structure approach. The Court's view is that 'external' sources help illuminate the ideas contained within the 'text' and 'structure'. In Part IV, I explain why this view is logically sound. This is because judges may employ a range of interpretive methods when determining the content of the 'text' and 'structure' and almost all methods permit such a use of 'external' sources. The relevant scholars' view is not merely unreflective of the Court's position. As discussed in Part V, it is inherently flawed due to their misguided conceptualisations of the 'text' and 'structure'. I conclude this work, in Part VI, by summarising the problems with the relevant scholars' critique, distinguishing it from valid

[39] See discussion in: Part II(B)-(C). Drawing on analysis from a particular school of thought in linguistics or the philosophy of language, therefore, has more utility for Emerton. He is examining the Court's reasoning for deriving a specific implication, the *Kable* doctrine, rather than its overarching framework for deriving implications, which permits such a diversity of views.

[40] Goldsworthy, 'Language' (n 35) 152-162. For discussion on Goldsworthy's interpretive method informed by Grice see: Part II(C).

[41] This lack of anchorage also partially explains why the Court appears to be operating with a broad definition of 'constitutional implications'. See discussion in: Part II(B).

critiques that may be made of the text and structure approach and providing what I propose is a more coherent explanation of the approach's operation.

II THE DEFINITION OF KEY CONCEPTS

In this Part, I define the following concepts in line with their meanings in case law – 'text', 'structure', 'constitutional implications', 'interpretive methods' and ''external' sources'. Despite possible appearances to the contrary, their meanings are not necessarily obvious or self-evident. Indeed, the relevant scholars' misunderstanding of some of these concepts helps explain the errors in their critique.[42] Unfortunately, the Court has not straightforwardly defined these concepts in its discussion of them. My definitions, therefore, are gleaned from the usage of these concepts in case law, supported by analysis of them in scholarship. A more detailed illustration of these terms is gained in the remainder of this article as I explore their application via the text and structure approach.

A *'Text' and 'Structure'*

In case law, 'text' ostensibly refers to the entirety of the Constitution's words in its multiple provisions and accompanying headings. For an example of an implication gleaned from the Constitution's 'text', consider the implication drawn from section 80 in *Cheatle v R*.[43] This provision stipulates that Commonwealth indictable offence trials shall be by jury. While it does not explicitly state whether their guilty verdicts must be unanimous, the Court held that this is implied by the words 'trial by jury' in the provision, based on how these words have been understood historically and in common law.[44] In this manner, the requirement of unanimity is an implication derived from the 'text' of section 80.

[42] These concepts are 'text' and 'structure', in particular, as discussed in: Part V.
[43] (1993) 177 CLR 541 ('*Cheatle*').
[44] The joint judgment in *Cheatle* refers to 'the requirement of unanimity' as 'implicit' in s 80: Ibid 560. For discussion on the potential for this requirement to be viewed as something other than an implication see: below n

'Structure' appears to encompass two distinct meanings.[45] First, it seems to refer to the ordering of the Constitution's chapters and provisions ('organisational structure').[46] An example of an implication drawn, at least in part, from the Constitution's organisational structure can be seen in *Newcrest Mining (WA) Ltd v Commonwealth*.[47] Several judges noted that the territories power (section 122) sits in a separate chapter (Chapter IV) from that which contains the bulk of the Commonwealth's other legislative powers (Chapter I).[48] This helped lead them to conclude that it is implicit in the Constitution that restraints on Commonwealth law-making power for the territories differ from those for the remainder of Australia.[49]

Second, 'structure' appears to refer to the collection of foundational principles underpinning the Constitution.[50] These include federalism, separation of powers and representative government.[51] In this article, I refer to this collection of principles as the Constitution's

88 and accompanying text. Further, this is not to suggest that the meaning of words historically or in common law are always determinative of the implications drawn from them. See discussion in: Parts II(C), IV(B); Constantine Avgoustinos, 'Climate Change and the Australian Constitution: The Case for the Ecological Limitation' (PhD Thesis, University of New South Wales, 2020) 55-61.

[45] Justice Susan Kenny, 'The High Court of Australia and Modes of Constitutional Interpretation' in *Statutory Interpretation: Principles and Pragmatism For a New Age* (Judicial Commission of New South Wales, 2007) 45, 62 ('Modes'); Kirk, 'Implications I' (n 8) 664.

[46] Kenny, 'Modes' (n 45) 62; Kirk, 'Implications I' (n 8) 664.

[47] (1997) 190 CLR 513.

[48] Ibid 535 (Brennan CJ); 550-551 (Dawson J); 577 (McHugh J).

[49] Ibid.

[50] Kenny, 'Modes' (n 45) 62; Kirk, 'Implications I' (n 8) 664. These foundational principles appear to be constitutional implications themselves. McHugh J, for example, refers to separation of powers as an 'implication' and 'implied principle' in *McGinty* (n 4): 233. See discussion in: Avgoustinos (n 44) 107-108.

[51] The High Court has never conclusively stated which principles are considered structural principles. The court seems to align with the view espoused by Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 that '[t]here are *at least* three main general doctrines of government which underlie the Constitution': federalism, separation of powers and representative government: 69-70 (emphasis added). Deane and Toohey JJ question whether 'responsible government' is its own structural principle or a subsidiary of 'representative government': 71. Other possible structural principles might include parliamentary supremacy or the rule of law. These are principles that (at least some) judges view as foundational to the Constitution's operation and have at least provided assistance in the process of assessing the merits of proposed implications: Kirk, 'Implications I' (n 8) 658, 663. For examples of parliamentary supremacy providing such assistance see: *Kable* (n 37) 74; *Williams v Commonwealth* (2012) 248 CLR 156, 370. For examples of the rule of law providing such assistance see: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193; *Thomas v Mowbray* (2007) 233 CLR 307, 342. For discussion on the unclear positions of the rule of law and parliamentary supremacy in Australian constitutional law see: David Kinley, 'Constitutional Brokerage in Australia: Constitutions and the Doctrines of

'principle-based structure'. I refer to each of the principles that form this collection as 'structural principles.' They are not identical to conceptualisations of these principles in other contexts. The Court in *Lange*, for instance, emphasises that the structural principle of 'representative government' only includes attributes or components that can be gleaned from the words of sections 7 and 24 as well as other provisions on the democratic process established by the Constitution.[52] As will be discussed, however, judges may still draw on conceptualisations of 'representative government' from 'external' sources to help shed light on the particular vision of 'representative government' that manifests from these words.[53]

The freedom of political communication is an example of an implication derived from the principle-based structure. As discussed in Part I, this implication restraining Commonwealth and State legislative and executive action from unduly burdening people's freedom of political communication was established to help maintain the structural principle of 'representative government'.[55] Such 'structural' implications may only be established where 'necessary'.[56] That is, according to Chief Justice Mason's frequently invoked statement in *Australian Capital Television Pty Ltd v Commonwealth* ('*ACTV*'), they may only be derived if 'logically or practically necessary for the preservation of the integrity of [the Constitution's] structure.'[57]

Parliamentary Supremacy and the Rule of Law' (1994) 22 *Federal Law Review* 194; Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017).

[52] See above nn 2-7 and accompanying text.

[53] See discussion in: Parts III, IV.

[55] *Lange* (n 1).

[56] Some precedent suggests that all constitutional implications, not just structural ones, must pass a necessity test: Kirk, 'Implications I' (n 8) 649; Goldsworthy, 'Twenty' (n 12) 18. For example see: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 155 ('*Engineers*').

[57] (n 3) 135; Goldsworthy, 'Twenty' (n 12) 19; Kirk, 'Implications I' (n 8) 664. For an example of its recent invocation by the High Court see: *Burns v Corbett* (2018) 265 CLR 304, 355, 383, 388-389. For discussion on the meaning of 'necessity' see: n 88. With regard to 'structural' implications limiting government power, the government action in question does not need to present a threat to the entirety of the Constitution's principle-based structure for an implication restraining such action to be deemed 'necessary'. It only needs to present a threat to one or more structural principles (although the operation of these principles cannot be neatly prised apart). The *Melbourne Corporation* doctrine, for example, centres on preserving the structural principle of federalism while the *Boilermakers* doctrine centres on preserving the structural principle of separation of powers.

The central premise of the approach that implications can only be derived from the 'text' and 'structure', therefore, means that they can only be derived from the Constitution's text, organisational structure and principle-based structure. While an implication can be derived from the Constitution's text without any reference to the Constitution's structure, the reverse is not true. Any implication drawn from the Constitution's organisational structure is a product of its words (that is, 'text') – specifically, the *arrangement* of its words. Any implication drawn from the Constitution's principle-based structure is also a product of its words (that is, 'text'). This is because structural principles are conceptualised as manifestations of the Constitution's text.[58] Recalling the example above, 'representative government' was held in *Lange* to manifest from a collective reading of the words of sections 7, 24 and related provisions.[59] The same can be said for other structural principles.

Thus, an implication derived from the Constitution's structure is effectively an implication derived from its text as well. The two sources cannot be neatly prised apart – and neither, therefore, can 'textual' and 'structural' implications. As Dawson J states in *McGinty*, '[w]hether or not an implication is categorised as structural or not, its existence must ultimately be drawn from the text. One is brought back to the text in the end'.[60]

B *'Constitutional Implications'*

The Court has not provided a conclusive definition of 'constitutional implications.' While scholars have discussed implications at length, none have provided a straightforward articulation of what the Court appears to mean when it uses the term 'constitutional

[58] For discussion see: Avgoustinos (n 44) 104-116.
[59] See above n 52 and accompanying text.
[60] (n 4) 184.

implications' (or derivatives of this term, such as reference to what is 'implied from the Constitution').[61] Goldsworthy, for example, does not provide such a definition, noting the inherent difficulty in doing so.[62] Instead, he offers a non-exhaustive categorisation of four discernible kinds of implications (or what he refers to as 'implied meanings').[63] Even here, however, these categories of implications do not necessarily capture the Court's conceptualisation of 'constitutional implications'. Rather, they capture Goldsworthy's view on how implications *should* be understood. This leads him, in 'Implications in Language, Law and the Constitution', to argue against the Court's establishment of the freedom of political communication because it does not sufficiently fall under one of these categories.[64]

The works closest to articulating a definition in line with the term's use in case law are those of Jeremy Kirk.[65] While he only defines an 'implication' rather than 'constitutional implication', Kirk uses his definition of the former to ground subsequent discussion on how constitutional implications are understood in case law.[66] To arrive at what appears to be the doctrinal understanding of 'constitutional implications', therefore, I draw on discussion of implications in case law and scholarship with particular attention paid to the analysis by Kirk.

Defining a 'constitutional implication' begins with an understanding of the relationship between words and ideas. Written words, at their most basic level, are 'black marks on a white

[61] For examples of the Court using this term (and its derivatives) see: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 146 ('*Theophanous*'); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 260; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 274.
[62] 'Language' (n 35) 152-154.
[63] Ibid 152-162. For more detailed discussion on these categories see: Part II(C).
[64] (n 35).
[65] 'Implications I' (n 8); 'Implications II' (n 5).
[66] 'Implications I' (n 8) 647-648.

background'.[69] These 'marks' convey ideas.[70] That is, reading them places certain concepts or thoughts in the reader's mind. Ideas conveyed directly are the words' express meaning.[71] Those conveyed indirectly are the words' implied meaning.[72] The words 'Socrates is mortal', for a simple example, directly convey the idea that this Greek philosopher is susceptible to death.[73] The words 'All men are mortal and Socrates is a man' conveys the same idea indirectly. The idea that this philosopher is susceptible to death, therefore, can be viewed as implied by these words. Thus, 'implications', as Kirk defines it, are ideas conveyed indirectly by words.[74] '*Constitutional* implications', following from this, can be defined as ideas conveyed indirectly by the *Constitution's* words.

In order to build on this definition, attention must be paid to the basic function served by the Constitution. Namely, this document outlines the essential infrastructure of the Australian constitutional system. It identifies participants and institutions that make up this system; their powers and limitations within this system; and the guiding principles that underpin this system, such as federalism and representative government, that I refer to as 'structural principles'.[76] Some of these features of the Australian constitutional system are explicitly named or directly referred to by the Constitution's words. Others are implicitly identified or indirectly referred to by the Constitution's words. The existence of these latter features can be understood, therefore, as being identified by constitutional implications.

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[69] Stanley Fish, 'Intention Is all There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law' (2008) 29 *Cardozo Law Review* 1109, 1112; James Allan, 'Constitutional Interpretation Wholly Unmoored from Constitutional Text: Can the High Court of Australia Fix Its Own Mess?' (2020) 48 *Federal Law Review* 30, 33.
[70] Fish (n 69) 1112; Kirk, 'Implications I' (n 8) 647.
[71] Kirk, 'Implications I' (n 8) 647; Aharon Barak, 'On Constitutional Implications and Constitutional Structure' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 53, 57-58 ('Structure'); Jeffrey Goldsworthy, 'Language' (n 35) 154.
[72] Kirk, 'Implications I' (n 8) 647; Barak, 'Structure' (n 71) 53, 57-58; Goldsworthy, 'Language' (n 51) 154.
[73] Goldsworthy, 'Language' (n 51) 152. See below n 105 and accompanying text.
[74] Kirk, 'Implications I' (n 8) 647. Kirk ostensibly considers implications to also include ideas conveyed indirectly by sources *other* than words (for instance, pictures). His discussion on implications and the examples he provides, however, centre on words.
[76] With regard to structural principles, see: Part II(A).

For example, the idea that States cannot raise armies without Commonwealth Parliament consent is an idea directly conveyed by the words in section 114.[77] In contrast, the idea that States and the Commonwealth cannot take legislative or executive action unduly burdening freedom of communication about political and government matters is an idea indirectly conveyed by a collective reading of the words in sections 7, 24 and other provisions related to democratic processes.[78] The indirectness with which the idea of this freedom is conveyed by the Constitution's words renders it a constitutional implication. Thus, my definition can be extended as follows: constitutional implications are ideas conveyed indirectly by the Constitution's words that identify features of the Australian constitutional system.

This definition aligns with the Court's discussion of implications in the context of the text and structure approach. As noted above, its formulation of the approach emphasises that such implications are not derived from outside of the Constitution's words nor should they be understood as judges effectively 'adding words' to the Constitution.[79] These implications emanate from the words themselves. The understanding of constitutional implications as 'ideas' is not to suggest that they do not carry legal force. As Jonathan Crowe succinctly states, '(t)he *Constitution* works: it does things in the world.'[80] The ideas conveyed by the Constitution's words indicate the various features of the Australian constitutional system that must be made a reality. Constitutional implications are as much a part of the Constitution, and carry as much legal force to invalidate legislation, empower government officers and so forth,

[77] Section 114 states: 'A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force'.
[78] See above nn 1-7 and accompanying text.
[79] Barak, 'Structure' (n 71) 61; *ACTV* (n 3) 135.
[80] 'The Narrative Model of Constitutional Implications: A Defence of Roach v. Electoral Commissioner' (2019) 42 *University of New South Wales Law Journal* 91, 117 ('Narrative'). Patrick Emerton captures this sentiment differently, stating that 'to know the meaning of the text is to know the content of the law': 'Political Freedoms and Entitlements in the Australian Constitution – An Example of Referential Intentions Yielding Unexpected Legal Consequences' (2010) 38 *Federal Law Review* 169, 170 ('Political').

as the ideas conveyed directly by its words. The fundamental difference is that the existence of these implications is often more difficult to detect due to the indirectness in which they are conveyed.

The above definition of 'constitutional implications' is unavoidably broad. This is, in part, because judges remain free to employ a range of interpretive methods when deriving implications.[81] As will be discussed below, different methods carry with them different conceptualisations of implications. They detail *how* words convey ideas and *how* they do so indirectly. It is these interpretive methods, therefore, that provide more conceptual precision regarding how implications are understood. My definition must remain broad, therefore, to capture this diversity of understandings of implications permitted.

Another reason for the breadth of my definition is that a wide number of ideas attract the label of 'constitutional implications' (and its derivatives) in case law. While discussion in Australian constitutional law on 'constitutional implications' often centres on implied governmental powers (such as the implied nationhood power) and implied limits on governmental power (such as the freedom of political communication) the term and its derivatives are used more broadly than this in case law. Such implications can be drawn from a small number of words, such as the implication gleaned from the words 'trial by jury' in section 80 regarding unanimous jury trials discussed above. They can also span the words of multiple provisions, such as the freedom of political communication.[83] Any doctrinal understanding of implications must also capture this diversity.

[81] See discussion in: Part II(C).
[83] Also see: Kirk, 'Implications I' (n 8) 662.

If this definition of implications is accepted, its imprecision must be acknowledged. That is, the difference between express and implied meaning is essentially one of degree – how directly or indirectly an idea is conveyed.[86] In Australian constitutional law, therefore, constitutional implications cannot always be neatly distinguished from ideas conveyed directly by the Constitution's words.[87] Again, consider the words 'trial by jury.' It is arguable that the requirement of unanimity drawn from these words should not be considered a constitutional implication but merely an explanation of their *express* meaning.[88] One cannot conclusively determine the correctness of this argument because of the gradational difference between express and implied meaning.

The unclear distinction between the two leads Kirk, among others, to question the need to treat constitutional implications as a 'special category' for the purposes of constitutional interpretation.[89] Kirk suggests that such categorisation is artificial and distracts from the important question at hand, 'what the Constitution means; whether the ideas are communicated directly or indirectly is incidental.'[90] While constitutional implications can only be defined in a broad fashion, a better grasp of their conceptualisation is gained through consideration of their relationship to interpretive methods.

C *'Interpretive Methods'*

[86] Kirk, 'Implications I' (n 8) 647; Barak, 'Structure' (n 71) 53, 57-58; Stephen Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133, 137.
[87] Kirk, 'Implications I' (n 8) 647; Goldsworthy, 'Language' (n 51) 153-154; Barak, 'Structure' (n 71) 53, 57-58; Donaghue (n 86) 137; *Levy v Victoria* (1997) 189 CLR 579, 607.
[88] Kirk, 'Implications I' (n 8) 648.
[89] Ibid 649. Also see: Geoffrey Sawer, 'Implication and the Constitution - Part 1' (1948) 4 *Res Judicatae* 15, 17; Barak, 'Structure' (n 71) 53; Emerton, 'Political' (n 80) 175-177.
[90] 'Implications I' (n 8) 648-649.

I use 'interpretive method' to describe a theory or framework, and its accompanying practices and techniques, employed to interpret the Constitution. Examples include those associated with the terms 'legalism', 'literalism', 'intentionalism' and 'progressivism'. While a range of methods exist, they are difficult to define and categorise with precision.[91] Justice Stephen Gageler states with regard to legalism, for example, that he has 'never been sure exactly what legalism means. … It seems to mean different things to different people.'[92] This confusion stems from the fact that interpretive methods are constructs – an artificial categorisation of the various styles of constitutional interpretation on display in the legal community. Observers are free to hold different views as to what defines and distinguishes these various styles.[93] While such difficulties exist, terms such as 'intentionalism' and 'progressivism' remain useful to discuss differences in judges' processes of interpretation. For the sake of convenience, I will focus on these two examples of interpretive methods to illustrate certain points throughout this article.[94]

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[91] For discussion on the difficulties associated with defining and categorising interpretive methods see: Avgoustinos (n 44) 47-49.

[92] 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138, 144.

[93] For taxonomies of different interpretive methods see: Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323 ('Evolutionary'); Sotirios Barber and James Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford University Press, 2007); Sir Dyson Heydon, 'Sir Maurice Byers Lecture: Theories of Constitutional Interpretation: A Taxonomy' [2007] (Winter) *Bar News* 12; Larry Alexander, 'Constitutional Theories: A Taxonomy and (Implicit) Critique' (2014) 51 *San Diego Law Review* 623.

[94] 'Intentionalism' can broadly be defined as a method emphasising the importance of interpreting the Constitution in accordance with the intentions of the Constitution's framers: Aharon Barak, *Purposive Interpretation in the Law* (Princeton University Press, 2011) 260 ('Purposive'); Natalie Stoljar, 'Counterfactuals in Interpretation: The Case against Intentionalism' (1998) 20 *Adelaide Law Review* 29, 29; Greg Craven, 'After Literalism, What?' (1992) 18 *Melbourne University Law Review* 874, 882 ('After'). The rationale for adopting this method rests on the premise that the ideas conveyed by a particular arrangement of words primarily, if not solely, emanates from the person(s) who wrote them: Fish (n 69) 1112; Greg Craven, 'Original Intent and the Australian Constitution — Coming Soon to a Court Near You?' (1990) 1 *Public Law Review* 166, 177 ('Original'); Goldsworthy, 'Language' (n 51) 167.

'Progressivism' can broadly be defined as an interpretive method emphasising two premises: Kirk, 'Evolutionary' (n 93) 331. The first premise is that much of the Constitution's language is ambiguous: Craven, 'After', 874; Kirk, 'Evolutionary', 331; Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 23. The second premise is that, where different plausible interpretations of the Constitution arise given this ambiguity, judges should prioritise interpretations that serve the contemporary needs of the Australian community: Kirk, 'Evolutionary', 331; Craven, 'After', 874-875; Michael Detmold, 'Australian Law: Federal Movement', (1991) 13 *Sydney Law*

In general, judges are free to use the method of their choice. They may not only select an interpretive method distinct from their peers, but change their method from case to case.[95] This position seems to be partially due to the practical reality that it would be difficult for judges to reach agreement on a single method to adopt in all cases.[96] It also seems to be based on the view that the judiciary limiting itself to a single method is too restrictive when engaged in the complex work of constitutional interpretation.[97] Judges must 'start with the question, not the answer', as the Hon Murray Gleeson explains, and be flexible when confronted with specific interpretive challenges.[98] This ostensibly requires judges to draw on the practices or techniques associated with differing methods depending on the 'question' that they seek to address.[99] As French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ state in *Commonwealth v Australian Capital Territory*, '[t]he utility of adopting or applying a single all-embracing theory of constitutional interpretation has been denied.'[100]

Review 31, 31; Mason 23. For further discussion on defining these interpretive methods see: Avgoustinos (n 44) 52-55.

[95] Justice Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 250; Justice Susan Kenny, 'The High Court on Constitutional Law: The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210 ('2002 Term'); Nicholas Aroney, 'The High Court on Constitutional Law: The 2012 Term - Explanatory Power and the Modalities of Constitutional Reasoning' (2013) 36 *University of New South Wales Law Journal* 863, 864-865 ('2012 Term'); Chief Justice Robert French, 'Theories of Everything and Constitutional Interpretation' (Speech delivered at the University of New South Wales, 19 February 2010). This is not to suggest that judges are not constrained to some extent by precedent (including accepted notions on when such precedent may be overturned). See discussion in: Part IV(A).

[96] Kenny, 'Modes' (n 45) 46.

[97] For discussion on the benefits of the judiciary remaining free to employ a range of interpretive methods see: French (n 95); Murray Gleeson, 'Foreword' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (Supreme Court of Queensland Library, 2003) vii, viii-ix; Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001) 50-51; Daniel Farber, 'The Originalism Debate: A Guide for the Perplexed' (1989) 49 *Ohio State Law Journal* 1085, 1103.

[98] Gleeson (n 97) viii-ix.

[99] This could be considered an interpretive method of its own. Goldsworthy refers to such a method as 'pluralism': 'Twenty' (n 12) 12. It also has similarities to the method put forward by Philip Bobbitt in the United States constitutional law context regarding different modes of interpretation: *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982).

[100] (2013) 250 CLR 441, 455 ('*Same Sex Marriage Case*').

As stated above, an interpretive method does the work of providing an explanatory theory for how the Constitution's words convey ideas and do so indirectly.[101] This means that it provides the vital details to explain what implications are and how they can be derived (from the standpoint of the proponent of that interpretive method at least). Consider, for example, Jeffrey Goldsworthy's intentionalist perspective.[102] He asserts that written words essentially convey ideas that reflect the intentions of the person who wrote them (subject to certain constraints regarding the context and evidence available on those intentions).[103] In the case of the Constitution, therefore, the ideas conveyed by the Constitution's words can generally be determined with reference to the framers' intentions.[104]

With regard to how words can be understood as conveying ideas indirectly, he lists four ways in which this might occur (as noted above): 'logical implications' (the ideas conveyed are clear through logical reasoning. Recall the example provided above – 'all men are mortal and Socrates is a man' logically implies that Socrates is mortal); 'deficient expression' (the framers failed to use words that convey their ideas clearly but it remains evident what they 'really meant to say'); 'deliberate implications' (the framers deliberately chose to convey certain ideas through implication); and 'implicit assumptions' (the framers may not have actually consciously considered a particular idea to be conveyed but simply took this idea for granted).[105]

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[101] See above n 81 and accompanying text.

[102] For example see: 'Language' (n 35); 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 23 *Monash University Law Review* 362 ('Reply'); 'Twenty' (n 12).

[103] Goldsworthy, 'Reply' (n 102) 362-363; Goldsworthy, 'Language' (n 35). His understanding of how words convey ideas is based on the work of philosopher of language, Paul Grice: 'Language' (n 35) 154-155; Paul Grice, *Studies in the Way of Words* (Harvard University Press, 1989).

[104] For discussion on Goldsworthy's view on why the framers' intentions are his focus (as opposed to those of other plausible candidates: namely, the Australian people of the 1890s who approved the Constitution at referenda or the Imperial Parliament who enacted the Constitution) see: Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 26.

[105] Goldsworthy, 'Language' (n 35) 152-162; See above nn 62-64 and accompanying text. Goldsworthy suggests that this list is non-exhaustive but, as Kirk notes, 'a clear aim of this project of classification is to limit the legitimate scope for inferring implications from the Constitution': 'Language' (n 35) 154; Kirk, 'Implications I'

Of course, proponents of other interpretive methods hold different views than Goldsworthy on how the Constitution's words may convey ideas indirectly.[106] A progressivist, for example, would not view the ideas gleaned from these words as being so strictly tethered to the framers' intentions.[107] They generally recognise other avenues for determining the ideas conveyed by the Constitution's words, directly or otherwise.[108] Jonathan Crowe offers such an alternative vision to that provided by Goldsworthy.[109] He asserts that the Constitution's words (for instance, 'directly chosen by the people' in ss 7 and 24) are not restricted to reflecting the framers' intentions.[110] They can be understood as conveying ideas reflecting the broader factual and normative universe within which they are situated and from which they cannot be divorced.[111] This is a universe in which the constantly evolving social practices of freedom of political speech, universal suffrage and representative democracy exist.[112] This forms the basis for implications, such as the freedom of political communication and implication on voting access in *Roach v Electoral Commissioner* ('*Roach*'), to be established.[113] In this manner, interpretive methods provide differing visions of how implications are to be conceptualised and which proposed implications may be legitimately derived.

(n 8) 657. Goldsworthy suggests another possible category of implications is some form of 'spurious implication': 'Twenty' (n 12) 20. This is where judges are 'in effect inserting some provision into' the Constitution: 'Twenty' (n 12) 20. He notes that 'calling them implications is misleading' given that they are seemingly additions to the Constitution, rather than derived from (or 'already implicit in') the Constitution: 'Twenty' (n 12) 20-21. While Goldsworthy generally views 'spurious implications' as illegitimate, he asserts that they may be valid in exceptional circumstances where the framers failed to provide a solution to unanticipated problems: 'Twenty' (n 12) 20.

[106] For examples of works critiquing Goldsworthy's views on implications see: Donaghue (n 86); Crowe, 'Narrative' (n 80); Emerton, 'Political' (n 80); Emerton, 'Integrity' (n 34); Kirk, 'Implications I' (n 8) 657-661.

[107] Kirk, 'Evolutionary' (n 93) 331.

[108] See above n 94.

[109] Crowe's 'wide contextualism' seems to fit into the broad category of 'progressivist' interpretive methods (although, again, such labels cannot be used with precision: See above nn 91-93 and accompanying text). For discussion on 'wide contextualism' (and the associated 'narrative model' for understanding constitutional implications) see: 'Narrative' (n 80) 93; 'The Role of Contextual Meaning in Judicial Interpretation' (2013) 41 *Federal Law Review* 417; 'Functions, Context and Constitutional Values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 61.

[110] 'Narrative' (n 80) 116.

[111] Ibid 116.

[112] Ibid 116.

[113] Ibid 116; (2007) 233 CLR 162 ('*Roach*').

D *''External' Sources'*

I use the term ''external' sources' in this article to refer to sources outside of the Constitution's 'text' and 'structure'. The text and structure approach stipulates that implications cannot be derived from such sources. The particular kinds of items that this might include are unclear. Judges have made various statements opposing the use of 'external' sources in vague terms. These include statements opposing the use of 'extrinsic sources' and dissuading judges from drawing on 'extrinsic circumstances.'[114] Such sources include 'external' theories, such as free-standing conceptualisations of 'representative government' that exist beyond Australian constitutional law, as the judgment in *Lange* suggests.[115] It presumably also includes materials distinct from the document of the Constitution, such as books and journal articles.

As will be explored in the next Part, the extent to which such sources can be considered 'external' to the Constitution is complicated by the Court's view that judges are drawing on ideas encapsulated by these sources to aid them in determining the ideas 'internal' to the Constitution. It is also complicated by the reality that the 'external' sources considered suitable to be used as such interpretive aids differ depending on the particular interpretive method employed by judges.[116] A judge interested in drawing on the framers' intentions, for instance, might be willing to employ 'external' sources that other judges are not when interpreting the

[114] *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 231 (Brennan J) ('extrinsic sources'); *ACTV* (n 3) 181 (Dawson J) ('extrinsic circumstances'). For discussion on the ambiguity of these statements see: Kirk, 'Implications I' (n 8) 666-667.
[115] See discussion in: Part I.
[116] See discussion in: Part IV(B).

Constitution.[117] These factors make it more difficult to precisely define the sources that might be considered 'external' to the Constitution's 'text' and 'structure'.

Thus, the Constitution's 'text' refers to its words. 'Structure' refers to the organisation of its provisions and chapters as well is its underlying foundational principles. 'Constitutional implications' are ideas drawn from the Constitution's 'text' and 'structure' that identify features of the Australian constitutional system. While some ideas are conveyed directly from the words that make up the 'text' and 'structure', constitutional implications are those ideas conveyed indirectly by these words. 'Interpretive methods' are theories or frameworks, and related practices and techniques, that provide details on how words convey ideas and, in the case of implications, do so indirectly. 'External' sources, lastly, are those sources outside of the 'text' and 'structure' from which implications cannot be derived. The discussion thus far only provides a basic exploration of these concepts. In the next Part, I examine these concepts in more detail as I outline the Court's view of the relationship between 'external' sources and the text and structure approach.

[117] See discussion in: Part IV(B).

III THE HIGH COURT'S VIEW OF 'EXTERNAL' SOURCES

My disagreement with the relevant scholars centres on the observation that judges appear to be using 'external' sources when applying the approach in a substantially different way than these scholars suggest. Namely, they appear to be using 'external' sources to help determine the content of the Constitution's 'text' and 'structure' when deriving implications. This is different from using them in addition to, or in disregard of, this 'text' and 'structure' as the relevant scholars posit.

This position by the Court is evident in a series of cases. Prior to *Lange*, Brennan CJ explains that the 'text of the Constitution can be illuminated by reference to ['external' versions of] representative democracy but the concept neither alters nor adds to the text.'[118] McHugh J similarly asserts that '[u]nderlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the Constitution but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution.'[119] 'External' sources, therefore, are used to 'illuminate' the ideas represented by the 'text' and 'structure'. They are helpful tools (or torches) in the interpretive process.

In *Lange*, the Court seems to accept this framing of 'external' sources. To begin, this explains why the Court employs 'external' sources in this manner in the case itself. The Court draws on Anthony Harold Birch's book, *Representative and Responsible Government*, and the 1890s Convention Debates in order to tease out the vision of 'representative government' entrenched

[118] *McGinty* (n 4) 169.
[119] Ibid 231-232. Also see: *Nationwide News* (n 3) 70.

in the Constitution and the role of the freedom of political communication with regard to it.[120] Further, as discussed above, McHugh J views 'external' sources as interpretive aids when determining the content of the Constitution's 'text' and 'structure'. This suggests that such a view aligns with the text and structure approach espoused in *Lange* given the fact that its establishment in this case is generally viewed as an endorsement of Justice McHugh's approach to deriving implications in pre-*Lange* freedom of political communication matters.[121]

The Court's use of 'external' sources as interpretive aids is also on display in post-*Lange* cases where the text and structure approach has been applied. In *Roach v Electoral Commissioner*, for example, Gummow, Kirby and Crennan JJ state that

> an understanding of [the Constitution's] text and structure may be assisted by reference to the systems of representative government with which the framers were most familiar as colonial politicians. They do not necessarily limit or control the evolution of the constitutional requirements to which reference has been made.[122]

In this 2007 case, judges are asserting their ability to use the framers' 'external' conceptualisation of 'representative government' in order to shed light on the content of the structural principle of 'representative government'.

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[120] *Lange* (n 1) 559-560; Anthony Harold Birch, *Representative and Responsible Government* (Allen and Unwin, 1964); *Official Report of the National Australasian Convention Debates*, Adelaide, 24 March 1897.
[121] Stone, 'Limits' (n 12) 674-675. The Court in *Lange* seemed to be strongly influenced by Justice McHugh's concerns that 'representative government' not be treated as an 'external political theory' untethered to the particular wording of the document: Stone 674-675; *McGinty* (n 4) 235. In *McGinty*, McHugh J likened it to treating the 128-section-long Constitution as containing a 's 129' establishing 'representative government' and all that flows from it: at 234.
[122] (2007) 233 CLR 162, 188-189.

Thus, when developing the text and structure approach prior to *Lange* and applying the approach in and after *Lange*, the Court's position generally seems to be that 'external' sources may be used to help determine the content of the Constitution's 'text' and 'structure' when deriving implications. This, therefore, seems to be the more accurate understanding of how the text and structure approach operates, as opposed to the view put forward by the relevant scholars. Their critique might still hold weight if the Court's position was lacking in internal logic or not a fair reflection of how it, in fact, applies the approach. This, however, is not the case. To explain why this is so, a deeper look at the Court's position on 'external' sources is needed. This involves consideration of the role of interpretive methods in its understanding of the 'text' and 'structure'.

IV THE HIGH COURT'S VIEW OF THE 'TEXT' AND 'STRUCTURE'

A *Interpretive Methods and the 'Text' and 'Structure'*

As discussed in Part II, judges generally remain free to employ the interpretive method of their choice. The text and structure approach does little to change this position. Judges generally remain free to choose the interpretive method that they see fit when determining the meaning of the Constitution's words – and, thus, the 'text' and 'structure' formed from them.[133] The approach emphasises that implications are to be drawn from the Constitution's words and not from outside of them.[134] This restrains judges from employing extreme methods that allow for an utter disregard of the document's words.[135] The approach also establishes that implications may be derived from a particular construct, the Constitution's 'structure'. This does little to restrict judges' choice of method other than require them to accept this construct's existence. Indeed, it seems to expand the interpretive tools that judges may employ, rather than limit them. It permits them to draw meaning from the ordering of the Constitution's provisions (via the organisational structure) and the principles that appear to be embedded in the document (via

[133] For discussion on the relationship between the 'text' and 'structure' and Constitution's words see: Part II(A).
[134] Ibid.
[135] The approach, therefore, still allows judges to employ various versions of progressivism. Progressivists in the Australian context generally abide by the view that implications are drawn from the Constitution's words and the particular wording of the document cannot be disregarded: Greg Craven, 'Cracks in the Facade of Literalism: Is there an Engineer in the House?' (1992) 18 *Melbourne University Law Review* 540, 561-562 ('Cracks'). Their position, however, is that the meaning carried by these words is often ambiguous and can be plausibly interpreted in a range of ways: 561-562; n 78.

the principle-based structure).[136] Thus, as long as a judge's chosen method respects these minimal conditions, it seems to be permitted by the text and structure approach.[137]

Judges, therefore, can draw on different interpretive methods while operating within the framework of this approach. Their choice of method can lead to diverse interpretations of the 'text' and 'structure'. While this may seem a rudimentary observation, it poses challenges for the relevant scholars' position, as will be seen in Part V. With regard to the Constitution's 'text', consider the example of the word 'race' in section 51(xxvi). This provision holds that the Commonwealth can pass laws regarding '[t]he people of any race for whom it is deemed necessary to make special laws'. An intentionalist judge might interpret this word as signifying a pseudo-scientific category of people anchored in a belief in the existence of a racial hierarchy based on the likely meaning given to this word by the framers.[138] A progressivist judge, in contrast, might interpret the word 'race' as signifying a socially constructed category of people anchored, at least in part, in the concept of community identity based on the likely meaning

[136] The further, more specific, requirement that implications only be drawn from the principle-based structure where 'necessary' is not as restrictive as it might seem. Such an implication is deemed 'necessary' if required for the *efficient* operation of (some aspect) of the Australian constitutional system: *Lange* (n 1) 561; Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1994) 18 *University of Queensland Law Journal* 249, 264-267. Judges maintain a substantial amount of discretion when determining what an 'efficient' constitutional system entails and this does not inhibit their choice of interpretive method. Jeffrey Goldsworthy makes a similar point, stating that the necessity test does not restrain judges' interpretive method and require them to consider the 'necessity' of a proposed implication with regard to what the framers' intended (as he would prefer): 'Twenty' (n 12) 18-31.

[137] This is also evident from Justice McHugh's comments in *McGinty*: 'The Constitution contains no injunction as to how it is to be interpreted. Any theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself': (n 4) 230. Further, this lack of restriction on judges' interpretive method makes it difficult to sustain any suggestion that the text and structure approach requires judges to interpret the Constitution in a specifically legalist manner. See discussion in: Avgoustinos (n 44) 86-87.

[138] Justin Malbon, 'The Race Power under the Australian Constitution: Altered Meanings' (1999) 21 *Sydney Law Review* 80, 87-98, 106; George Williams, 'Race and the Australian Constitution' (2013) 28 *Australasian Parliamentary Review* 4, 6-7. One of the framers and subsequently Australia's first Prime Minister, Edmund Barton, for example, states at the 1898 Convention Debate that the Commonwealth 'should have the power to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth': *Official Report of the National Australasian Convention Debates*, Melbourne, 27 January 1898, 228-229.

given to the word by a modern reader.[139] In this way, the content of the Constitution's 'text' is relatively malleable. It changes depending on the interpretive lens placed on it.

As this content changes, so too do the opportunities to determine that a specific constitutional implication may be derived from the 'text'. In *Kartinyeri v Commonwealth*, for instance, Gaudron J argues for the derivation of an implication from section 51(xxvi) stipulating that the Commonwealth cannot pass laws under this head of power depriving people of a specified race their fundamental human rights.[140] This is rooted in her progressivist (or at least modern) interpretation of the word 'race'. According to Gaudron J, a law on a race of people is only 'necessary' if based on what distinguishes them as a race of people.[141] Since people of all races are inherently equal (as opposed to inferior or superior based on a premise of racial hierarchy) and so all possess fundamental human rights, it would never be 'necessary' to strip people of these rights due to their membership of any particular race.[142] Deriving this implication would not be possible if the word 'race' was held to convey a different collection of ideas – namely, the collection of ideas stipulated by the intentionalist judge discussed above.[143]

A similar result can be seen in the context of the Constitution's 'structure'. With regard to its principle-based structure, judges may disagree considerably on the content of structural principles based on their chosen interpretive method. In *ACTV*, for example, Dawson J takes on an intentionalist bent when conceptualising the structural principle of 'representative government': 'those responsible for the drafting of the Constitution saw constitutional

[139] Sarah Pritchard, 'The 'Race' Power in Section 51(xxvi) of the Constitution' (2011) 15 *Australian Indigenous Law Review* 44, 50-51; Malbon (n 138) 109.
[140] (1998) 195 CLR 337, 366 ('*Kartinyeri*'). An argument can be made that this is not a constitutional implication but an idea directly conveyed by the Constitution's words. The directness with which this idea flows from the Constitution's words, however, cannot be conclusively determined: See above nn 86-88 and accompanying text.
[141] *Kartinyeri* (n 140) 365.
[142] Ibid 366.
[143] Malbon (n 138) 109.

guarantees of freedoms as exhibiting a distrust of the democratic process. They preferred to place their trust in Parliament'.[144] This helps lead Dawson J to his conclusion that the vision of 'representative government' embedded within the Constitution does not include a (judicially-enforced) freedom of political communication.[145] Other judges who conceptualised the content of 'representative government' differently either did not take on such an intentionalist bent, or their intentionalism was of a kind that did not lead them to the same conclusions.[146]

Judges may also come to different conclusions on the ideas conveyed by the organisational structure of the Constitution depending on their interpretive method. The Court views the separation of powers, for example, as an entrenched feature of the Australian constitutional system. This is partly based on the organisation of the Constitution's chapters in a manner to distinctly represent the executive, legislative and judicial branches of power.[147] A stronger adherence to an intentionalist perspective might have led the Court to a different conclusion. This is because, according to Sir Robert Garran, this formatting of the Constitution was merely a 'draftman's neat arrangement, without any hint of further significance'.[148] As can be seen, even the ordering of the Constitution's chapters and provisions carries meaning (or lacks meaning) based on judges' choice of method.

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[144] (n 3) 186.
[145] Ibid 184.
[146] The most explicit statement of disagreement on the significance of the framers' intentions regarding the freedom of political communication in *ACTV* was made by Mason CJ: (n 3) 135-136. He stresses that the framers' 'unexpressed assumptions' do not equate to an 'implication' in the Constitution: at 135. Gummow, Kirby and Crennan JJ in *Roach* offer an example of judges drawing on the framers' intentions in a different manner than Dawson J to explain their vision of 'representative government': (n 113). They do not view the framers' intentions as being such decisive factors when determining whether an implication to protect the structural principle of 'representative government' may be established (in this instance, an implication securing voting access for certain prisoners): at 188-189. Instead, they draw on the framers' intentions 'merely' to better understand disjunctions between s 44(ii) (on the qualifications of Parliament members) and ss 8 and 30 (on the qualifications of voters): see in particular at 192-195.
[147] *Boilermakers* (n 30) 275.
[148] *Prosper the Commonwealth* (Angus and Robertson, 1958) 194. Within the framework of intentionalism, however, one might question Garran's assessment of the framers' views on this topic and the extent to which they were shared. See discussion in: Fiona Wheeler, 'Original intent and the Doctrine of the Separation of Powers in Australia' (1996) 7 *Public Law Review* 96.

None of this is to suggest that the Constitution's words – whether making up its 'text' or organisational or principle-based 'structure' – are completely devoid of meaning and hence able to convey whatever an interpreter chooses. As Jeffrey Goldsworthy notes, such an extreme position is incoherent.[149] It proposes that the Constitution's words convey *no* ideas and *some* ideas (that is, whatever ideas the interpreter selects) simultaneously.[150] Judges can regularly reach agreement to at least a certain point in the interpretive process before judicial choice presents itself and judges' particular interpretive methods start to lead them to different conclusions.[151] Further, precedent has been established in large tracts of Australian constitutional case law. While it can always be overturned, many questions on the meaning given to particular segments of the Constitution's 'text' and 'structure' are effectively settled. Nevertheless, the content of the 'text' and 'sources' cannot be understood as fixed. It is subject to change depending on the interpretive method adopted.

B *Interpretive Methods and 'External' Sources*

The crucial point to note for present purposes is that almost all interpretive methods require 'external' sources to be employed when determining the ideas conveyed by the 'text' and 'structure'. An intentionalist seeking to better understand the framers' intentions, for example, would often require the aid of 'external' sources such as the Convention Debates or framers' speeches.[152] These sources shed light on what ideas the words 'truly' convey, according to this

[149] Goldsworthy, 'Language' (n 51) 162.
[150] Ibid 162.
[151] Kirk, 'Implications I' (n 8) 650; Dixon (n 35) 458.
[152] For discussion on the 'external' sources an intentionalist might be willing to consider see: Goldsworthy, 'Language' (n 51) 181; Jeffrey Goldsworthy, 'Moderate versus Strong Intentionalism: Knapp and Michaels Revisited' (2005) 42 *San Diego Law Review* 669, 671-672 ('Moderate'); Kirk, 'Evolutionary' (n 93) 328-330.

judge. In the alternative, if a progressivist judge believes that the ideas conveyed by the 'text' and 'structure' are to be understood with regard to modern sensibilities, then the judge presumably can determine these sensibilities with the aid of 'external' sources such as social scientific books or journal articles.[153] Again, these sources shed light on what ideas the words 'truly' convey, according to this judge. In this way, judges are not deriving implications from outside of the 'text' and 'structure'. They are not circumventing or ignoring the 'text' and 'structure'. They are using these 'external' sources to determine the ideas they consider to be conveyed by, or held within, the 'text' and 'structure'.[154] While these methods differ with which 'external' sources they view as valid to illuminate the ideas carried by the 'text' and 'structure', they all sanction the use of 'external' sources as such interpretive aids.

The method that serves as an exception to this would be some extreme form of literalism. This method stipulates that the Constitution should be interpreted by engaging purely in a plain reading of the document without reference to 'external' sources.[155] Any suggestion, from the relevant scholars or otherwise, that this is what the text and structure approach requires faces significant problems. First, it contradicts the Court's general stance that judges are free to choose the interpretive method that they deem appropriate. They may opt for this extreme form of literalism or not. Second, the Court has never indicated, at least with any sort of consensus,

[153] For examples of works on the ongoing debate with regard to the use of social scientific materials being used in legal adjudication see: Alexander Tanford, 'The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology' (1990) 66 *Indiana Law Journal* 137; Michael Heise, 'Brown Undone?: The Future of Integration in Seattle After Pics v Seattle School District No 1' (2008) 31 *Seattle University Law Review* 863; Matthew Matusiak, Michael Vaughn and Rolando del Carmen, 'The Progression of "Evolving Standards of Decency" in US Supreme Court Decisions' (2014) 39 *Criminal Justice Review* 253.

[154] This ties in with Kirk's discussion of judges' use of 'external doctrine' to determine the ideas conveyed by the 'text' and 'structure':

> If an external doctrine is invoked in order to resolve ambiguity, or to fill out the text, or to influence interpretation in some way, then that doctrine is given some effect to the extent that it makes a difference. The Court in *Cheatle* [(n 43)] did not merely take account of the historical requirement of unanimity in jury verdicts; it gave this aspect of the concept hard effect. The particular construction would not have been adopted but for the influence of the external doctrine': 'Implications I' (n 8) 667 (citations omitted).

[155] For discussion on defining 'literalism' see: Craven, 'Cracks' (n 135); Kirk, 'Evolutionary' (n 93) 324-326; Heydon (n 93) 26.

that that is what it means by deriving implications only from the 'text' and 'structure'. The Court's use of 'external' sources when interpreting the 'text' and 'structure', such as its use of Birch's work and the Convention Debates in *Lange*, suggests that this is not its position.[156]

Third, such an extreme form of literalism is unpopular in the Court. As Sir Dyson Heydon states extra-judicially in the context of determining the definition of 'literalism':

> If by "literalism" is meant examining the words in isolation, no-one advocates it. If by "literalism" is meant examining the words in the context of the Constitution as a whole, and nothing more, no-one advocates it.[157]

It is difficult to see how such an unpopular interpretive method in the Court could be viewed as unanimously mandated by it in *Lange* when deriving implications.

Finally, this interpretive method makes little sense. The ideas contained in one's mind come from *somewhere*, be it books that they have read, discussions that they have had, observations that they have made of the world around them or otherwise. In this way, judges are drawing on (what appear to be) 'external' sources when interpreting the Constitution even when engaged in a plain reading of the Constitution's words. Consider the word 'race', discussed above.[158] It is not self-evident that a judge is aligning more strictly with the 'text' and 'structure' if they define this word based on a book that they have read on the topic in their leisure time five years ago (or a more dubious source like a conversation with friends on the topic), than a book that they have read and openly referenced in their judgment in the present. Both, in theory, can be

[156] See discussion in: Part III.
[157] (n 93) 26.
[158] See discussion in: Part IV(A).

viewed as a valid means of determining the ideas conveyed by the 'text' and 'structure' depending on their method. There is no reason to conclude that the former is truer to the text and structure approach (or otherwise more legitimate) than the latter.

Thus, the Court provides a logical explanation of how 'external' sources may be used alongside the text and structure approach. The approach generally allows judges to employ the interpretive method that they deem appropriate. Almost all methods require judges to draw on 'external' sources to determine the implications and other ideas encapsulated by the 'text' and 'structure'. The only exception to this is an extreme form of literalism that the Court has not indicated is required by the approach nor is popular among the judiciary. Thus, by permitting this array of methods, the text and structure approach permits this use of 'external' sources when deriving implications.

Criticism of the approach can be made on these grounds. That is, it fails to provide sufficient guidance for determining which proposed implications may be deemed acceptable and unacceptable by the Court. This is because judges may determine the content of the 'text' and 'structure' in vastly different ways depending on the interpretive method that they adopt.[159] This criticism, however, differs from that put forward by the relevant scholars. The latter frame the 'text' and 'structure' as substantially restrictive sources from which to derive implications.[160] This leads them to conclude that judges are deriving implications from outside

[159] This is not to negate the good reasons that exists for permitting judges to employ the interpretive method of their choice: see above nn 96-100 and accompanying text. I am merely noting the specific drawback that comes with this position regarding the ability of the text and structure approach to circumscribe how implications are derived.
[160] See discussion in: Part V.

of these sources in contradiction with their stated approach. My criticism is akin to that made by Stone.[161] In contrast with the relevant scholars, it frames the 'text' and 'structure' as substantially unrestrictive. Judges are adhering to the approach but, given the malleability of the 'text' and 'structure', this does little to reign in judicial discretion when determining the viability of proposed implications. In the next Part, I delve deeper into how the Court's and relevant scholars' views of the 'text' and 'structure' compare.

[161] See discussion in: Part I.

V THE RELEVANT SCHOLARS' VIEW OF THE 'TEXT' AND 'STRUCTURE'

In order to make this comparison, it is helpful to first deconstruct the 'text' and 'structure' to its base elements. As discussed in Part II, the Court envisions the 'text' and 'structure' as being formed by the Constitution's words. These words are 'black marks on a white background' conveying ideas.[162] They convey ideas both directly and indirectly – those conveyed indirectly being constitutional implications. The 'text' and 'structure', therefore, can be understood as representing respective sets of ideas. The 'text' represents all of the ideas conveyed in a direct and indirect fashion by the Constitution's words. The 'structure' represents all of the ideas conveyed by the arrangement of these words and foundational principles underpinning these words. I will refer to the collection of these ideas encapsulated by both the 'text' and 'structure' as the 'grand-set of ideas'.[163]

The relevant scholars each put forward their own vision of the grand-set of ideas. They do so to purportedly demonstrate that judges are deriving implications from outside of this set. As discussed in Part I, Stellios suggests that the 'text' and 'structure' only conveys the ideas that can be gleaned from a hypothetical reader of the Constitution who has no prior knowledge of responsible government or (presumably) similar legal concepts. Williams and Lynch suggest that the 'text' and 'structure' only conveys the ideas that can be gleaned without judges making

[162] Fish (n 69) 1112.

[163] The collection of ideas conveyed by the Constitution's 'structure' can be understood as a sub-set of the collection of ideas conveyed by its 'text'. As discussed in Part II(A), this is because the ideas conveyed by the document's organisational structure is a product of its 'text'. They are the ideas conveyed by the arrangement of these words. The ideas conveyed by the principle-based structure are also products of this 'text' given the framing of structural principles as manifestations from the Constitution's words. For further discussion see: Avgoustinos (n 44) 80.

value judgments and policy considerations. Campbell and Crilly suggest that the 'text' and 'structure' only conveys the ideas that do not involve judges 'taking into account material external to the Constitution'.[164]

Each of these visions of the 'text' and 'structure' differ from each other. None of these visions, however, align with that of the Court. To start with, the Court has never indicated, at least with any sort of consensus, that any of these specific visions is how they perceive the content of the 'text' and 'structure'. The Court, for example, has never indicated that the 'text' and 'structure' only covers the concepts that an uninformed hypothetical person reading the Constitution could detect, as Stellios submits. This seems to be suggesting that the Court requires the 'text' and 'structure' to be interpreted via something similar to the unpopular and extreme version of literalism that I discussed in Part IV.

More fundamentally, any assertion that the 'text' and 'structure' convey a specific set of ideas, or that the Court has a settled explanatory theory to determine these ideas, conflicts with the Court's position that judges may employ the interpretive method that they deem appropriate.[165] A judge *could* envision the 'text' and 'structure' as conveying a set of ideas gleaned by Stellios' uninformed hypothetical reader, devoid of value judgments and policy considerations, as Williams and Lynch suggest, or with no material external to the Constitution taken into account, as Campbell and Crilly claim, if that is what their chosen interpretive method indicates. They are also free, however, to view the ideas conveyed by the 'text' and 'structure' differently. Judges are entitled to view the content of these two sources, for example, as reflections of the framers' intentions (unknown to Stellios' uninformed hypothetical reader) or

[164] (n 13) 60.
[165] See discussion in: Part II(C).

gleaned from centuries' worth of British common law principles (requiring materials external to the Constitution to be taken into account, despite Campbell's and Crilly's position). These scholars cannot presume that the 'text' and 'structure' convey the set of ideas that they stipulate above. Nor can they presume that the Court has a uniform or settled vision of the set of ideas that the 'text' and 'structure' convey altogether.

Another problem exists with the relevant scholars' portrayal of the 'text' and 'structure'. They view the grand-set of ideas represented by these two sources as small or narrow. This is understandable because, as discussed in Part I, the Court itself has suggested that deriving implications solely from these two sources serves as a substantial restraint on the implications that can be drawn. Nevertheless, this position seems untenable. Judges' ability to employ the interpretive method that they see fit means that the approach does not restrict how narrowly or broadly the set of ideas represented by the 'text' and 'structure' is understood.[166] They may view the range of ideas flowing from the Constitution's words, and thus its 'text' and 'structure', as substantially constraining or generous as they wish.

A legalist, for instance, emphasises the need for judges to interpret the Constitution as objectively as possible.[167] A particularly strict adherent to this method, therefore, might frame the Constitution's words as only conveying ideas that can be logically and neutrally ascertained.[168] This limits the set of ideas that they might be willing to view as flowing from the 'text' and 'structure' considerably. A progressivist, however, would not abide by such a limit. They would be generally willing to view the 'text' and 'structure' as including ideas ascertained by judges drawing on their own subjective value judgments and political

[166] See discussion in: Part IV(A).
[167] Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14 *International Journal of Constitutional Law* 60, 76; Kirk, 'Evolutionary' (n 93) 327.
[168] See discussion in: Avgoustinos (n 44) 50-51.

perspectives given the progressivist position that such subjectivity is not as avoidable as legalists typically assert.[169] In this manner, judges may conceptualise the overall breadth of the set of ideas conveyed by the Constitution's 'text' and 'structure' in different ways.

Further, while the 'smallness' or 'vastness' of a set of ideas is relative (and changeable, to some extent, given this choice of method), it is difficult to see how the 'text' and 'structure' could convey anything other than a set generally described as vast. These two sources are not conveying ideas that describe a simple object. They convey the ideas required to explain the workings of a myriad of diverse features of Australia's constitutional system throughout its extensive lifespan.[170] The fact that the Constitution is written in a skeletal fashion means that a large amount of ideas is expected to flow from a meagre number of words. As Sir Owen Dixon explains, the Constitution is a document 'expressed in general propositions wide enough to be capable of flexible application to changing circumstances.'[171]

The breadth of ideas that the Constitution's 'text' and 'structure' are expected to convey make it difficult to view these two sources as substantial restraints on judges' interpretive choices when deriving implications. This does not only serve as a challenge to the position of the relevant scholars. It is also grounds for another valid criticism of the Court and its portrayal of the text and structure approach.[172] The Court infers that the 'text' and 'structure' captures a relatively small amount of ideas by suggesting that these two sources considerably limit the implications that may be derived from them. This position appears unsustainable – regardless of whether it is put forward in scholarship or the judiciary. While the Court's position on 'external' sources being used to shed light on the ideas conveyed by the 'text' and 'structure'

[169] See above n 94 and accompanying text.
[170] See discussion in: Avgoustinos (n 44) 43-44.
[171] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81.
[172] For the earlier criticism, see above nn 159-161 and accompanying text.

is justifiable, its position that the 'text' and 'structure' are substantially constraining of judges' ability to derive implications is not.

Overall, the relevant scholars' understanding of the 'text' and 'structure' is fundamentally flawed. They each put forward their own visions of the set of ideas represented by the 'text' and 'structure'. The Court has never indicated it shares any of these visions. Further, each of these visions conflict with the Court's established position that judges generally may use the interpretive method of their choice. This means that judges may opt for a method that aligns or does not align with the relevant scholars' views of the 'text' and 'structure' as they deem appropriate. It also means that suggestions by these scholars that the 'text' and 'structure' only conveys a relatively narrow set of ideas are ill-founded. Judges' ability to choose their own method essentially enables them to envision this set as narrowly or broadly as they wish. Compounding this, this suggestion sits uncomfortably with the reality that the small number of words in the Constitution must convey a wide breadth of ideas, both directly and indirectly, to explain the complex operation of various aspects of the Australian constitutional system. This latter criticism of the relevant scholars may also be made of the Court to the extent that it has expressed a similar view.

VI CONCLUSION

In this article, I have analysed the relevant scholars' critique that the High Court is not deriving implications from the Constitution's 'text' and 'structure' as it claims. Two interrelated problems exist with this critique. The first of these problems is that the scholars appear to discount the Court's use of 'external' sources as interpretive aids to illuminate the ideas conveyed by the 'text' and 'structure' when deriving implications. This use of 'external' sources aligns with the Court's position that judges may draw on the interpretive method of their choice given that almost all such methods sanction the use of 'external' sources in this regard (the exception being an extreme form of literalism that essentially has no support in the Court). The second of these problems is their framing of the 'text' and 'structure' itself. The scholars base their critique of the text and structure approach on a conceptualisation of these two sources that the Court does not hold nor is internally coherent. This leaves their critique resting on a faulty premise.

By examining these flaws with the relevant scholars' critique, what I propose to be a more accurate depiction of the text and structure approach emerges. The Constitution's 'text' and 'structure' refer to the Constitution's words. 'Text' refers to these words straightforwardly, while 'structure' refers to the arrangement of these words ('organisational structure') and foundational principles drawn from these words ('principle-based structure'). The Constitution's words convey ideas directly and indirectly. Those conveyed indirectly are constitutional implications. Judges glean the ideas conveyed by these words, both directly and indirectly, via the interpretive method that they deem appropriate (and the use of 'external' sources that correlate with that method). As discussed in Part V, this leaves judges with a substantial amount of discretion to come to differing views on the set of ideas that make up the

'text' and 'structure', the breadth of this set, and the constitutional implications included in this set.

This exploration of the text and structure approach draws attention to some legitimate criticisms of it. The fact that judges may view the content of the 'text' and 'structure' in vastly different ways (in line with their chosen interpretive method) means that the approach does not provide the guidance that the Court has itself indicated when one is considering the viability of proposed implications. It also means that the Court's suggestions that the 'text' and 'structure' should be understood as narrow or restrictive sources from which implications can be drawn are not borne out. These criticisms align with the findings of Stone on the shortcomings of the approach discussed in Part I. They differ, however, from those put forward by the relevant scholars. This work has been an attempt to critique the relevant scholars' understanding of the text and structure approach and provide what I consider to be a more accurate explanation of its operation and flaws.