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Essay Question 3

78/100

Australian Constitutional history has demonstrated the significant changes that have taken place in interpretive approaches to the Constitution. The changes have not been linear – more progressive views of the role and purposes of the constitution have gained ascendancy at times and have been highly criticised at others. It is through the lens of dissenting judgments that this tension can be analysed. Thus, rather than necessarily providing an appeal to a future day, the important dissents in Australian constitutional history clearly illustrate the central and continuing tension between strict adherence to the text and structure of the constitution, and a view of the constitution as a document that should reflect the values and context of modern society.

The jurisprudence surrounding the implied freedom of political communication clearly demonstrates the tensions between textual and evolutionary approaches. In his dissenting judgment in *Miller v TCN Murphy* J was the first judge to recognise the implied freedom. Murphy drew his implications from principles of representative government and democracy that he thought informed the constitution. Murphy's approach was criticised by Mason J as attempting to imply a new section into the constitution. The implication reflecting democratic principles of freedom of political communication was seen as illegitimate in this case because it was not supported by the text of the constitution.

This implication was later fully realised by Mason J in *ACTV*. Mason J took a different approach to Murphy J, linking the doctrine of representative government directly to the text of the constitution – looking to ss7, 24, 64 and 128. However, Mason J also looked to sources extrinsic to the constitution, such as the Australia Act, to find a free standing doctrine of representative government that made an implied freedom of political communication 'necessary and logical'. However, for McHugh J in dissent such an implication could not be a free standing principle – it would exist only to the extent it could be found in ss7, 24, 64 and 128. This was the approach the Court ultimately affirmed in *Lange* [✓].

It is significant that in the space of less than twenty years a constitutional implication reflecting democratic principles and a modern rights based approach went from an approach made in dissent, to a modified version in the majority. The dissents of Murphy J in *Miller* and McHugh in *ACTV* not only demonstrate the dynamic nature of constitutional interpretation, but also the court's tendency to embrace or reject textual approaches at different stages. It is arguable the unanimous decision in *Lange* – recognising an implied freedom, but linking it to the text – signifies a compromise between the two approaches [✓✓].

The tension between textual and more evolutionary approaches is also demonstrated by Kirby's dissent in the *Hindmarsh Island Bridge Case*. While the Court could somewhat agree on the nature of special laws ad necessity needed under s.51(xxvi), Kirby J took a significantly different approach to the majority in addressing whether a law made under the races power can confer a detriment to a particular race [√]. The majority view, reflected by Gaudron [?] Gummow and Hayne looked closely at the words of s.51(xxvi) and amendments made in 1967. Although acknowledging the intentions of the Australian people in voting to amend s.51(xxvi), they argued that omitting only the words 'other than the aboriginal race in any state' could not possibly be understood as altering the meaning of the provision such that it could only have beneficial effect [√].

Kirby J, however, placed far more weight on the opinions of the Australian people and Parliament in proposing and affirming the alteration. He felt that allowing laws under the races power to confer disadvantage 'would amount to a refusal to acknowledge the unprecedented support for change evident in the vote of the Australian people' (*Hindmarsh Island*). Further, Kirby also argued that s.51(xxvi) should be read in light of contemporary human rights norms that would condemn a legislative head of power providing for racial discrimination [√].

Gaudron J felt practically it would be almost impossible to pass detrimental laws against aboriginals due to their position of social disadvantage and thus espoused many similar sentiments to Kirby J. Thus, the reason for Kirby's dissent was one of approach. Looking to the will of the Australian people and contemporary values he took an evolutionary approach to the constitution in conflict with Gaudron, Gummow and Hayne's textual analysis. Thus, the dissent was again a forum for exposing this interpretative tension in constitutional jurisprudence [√]. This tension is further highlighted by the fact that views similar to Kirby's, although without reference to human rights, had found their way into the majority [?] in the *Tasmanian Dam Case* (Brennan and Deane JJ).

A further example of dissent providing a window to constitutional interpretive tension is again offered by Kirby J in *Thomas v Mowbray*. Kirby J agreed with the majority view most clearly espoused by Gleeson CJ that the defence power is not limited to external threats or conventional war and the circumstances enlivening it s.51(vi) are constantly changing and evolving. However, again Kirby drew on external human rights norms, this time to argue the control order regime was not proportionate. Kirby J was the only judge to focus specifically on the constraints on civil liberties the regime imposed and by taking this broader view moved away from the text of the Constitution.

The three important dissents discussed examined disparate areas of Cth powers and their limitations. However, all were drawn back to a similar difference of opinion – the majority and dissent had different views on the interpretive approach that should be applied to the constitution. It is significant that at times the textual approach was in the dissent and other times the majority. This jumping around demonstrates the non-linear and dynamic history of constitutional interpretation [✓✓ interesting point].

These dissents are crucial, not for simply illustrating the existing tension but demonstrating the possibilities of each approach. An approach that seeks to interpret the constitution in light of modern values and context is more susceptible to protecting civil liberties and limiting government power. A textual approach will often expand Cth power. Thus, a strong dissent illustrates the tension and debate in the courtroom and demonstrates clearly the benefits and disadvantages of the differing interpretive principles.

[An original and thoughtful essay. Perhaps a bit narrow in focus, but the originality compensates for that.]