JUSTICE MCHUGH: A MODERATELY CONSERVATIVE APPROACH TO PRECEDENT IN CONSTITUTIONAL LAW

JOHN CARROLL*

Abstract

This paper analyses McHugh J's approach to precedent in constitutional law in order to provide an insight into his Honour's view of the role of the judge in upholding the Constitution. In his time on the High Court McHugh J produced judgments that fiercely advocated both for and against accepting a prior precedent of the Court. However, such judgments should not be seen as at odds with each other, but rather, once contextual factors surrounding the cases are taken into account, if can be seen that his Honour sought to promote similar values in both approaches. In particular, McHugh J's approach to precedent sought to promote certainty in the law, particularly where governmental reliance was involved, his Honour believed such certainty promoted the values of legitimacy and confidence in the Court.

I INTRODUCTION

It has been contended by Guilfoyle that the jurisprudence of Justice McHugh is permeated by the balance of two distinct themes – the respect for individual rights, and an adherence to principle, which is motivated by a desire for 'certainty … in the law'.[1] This paper seeks to examine

* BSc (Psych) ANU, JD (Hons) (ANU). This paper is based upon Honours thesis research undertaken at the Australian National University, supervised by Professor Fiona Wheeler.

1 Kate Guilfoyle, 'McHugh, Michael Hudson' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 464, 465.

McHugh J's view as to the role of the judge in upholding the *Constitution* by examining his Honour's approach to precedent in constitutional cases. Of particular interest is to test how McHugh J balanced the two themes of his Honour's jurisprudence in the constitutional arena.

Precedent has been described as the 'hallmark of the common law'.[2] However, the High Court, as a final court of appeal, and also as a constitutional court, has never been strictly bound by its decisions.[3] There are a number of competing values involved when considering precedent, including stability, consistency and predictability from following precedent, versus the need for justice, flexibility and rationality that departing from precedent may bring.[4] Precedent also has a special significance in constitutional law, where a tension can be set up between adhering to the law as articulated by precedent, and adhering to the law of the *Constitution* itself.[5] Accordingly, in considering precedent in constitutional law, a judge must weigh up the importance of a significant range of values in light of their own view of the role of the judge in upholding the *Constitution*.[6] It is this balancing process that will be used to identify the values that were most significant for McHugh J when interpreting the *Constitution*.

The particular interest in McHugh J is that first, his Honour was a member of the High Court from 1989 until 2005 – a significant period for

---

2 Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 93.

3 Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 246.

4 Mason, 'The Use and Abuse of Precedent', above n 2, 93–5.

5 Tony Blackshield, 'Precedent' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 550, 553.

6 See Michael Gerhardt, 'The Role of Precedent in Constitutional Decisionmaking and Theory' (1991–1992) 60 *George Washington Law Review* 68, 74.

constitutional jurisprudence. This was a time of flux in the Court, when the High Court moved from taking an 'expansive approach to express and implied constitutional rights' to applying a more confined approach to such rights.[7] Second, Justice McHugh has written extensively about the judicial process, which can be utilised to enrich the understanding of the values that influenced his Honour.

This paper is divided into three parts. Chapter One analyses approaches to precedent, particularly in constitutional law, and discusses the competing values underlying such approaches. Chapter Two discusses constitutional cases where McHugh J deferred to precedent, and analyses the values that influenced his Honour to take this approach. Three cases are of particular interest here. First, *Re Tyler; Ex parte Foley* ('*Tyler*')[8] and *Commonwealth v Mewett* ('*Mewett*')[9] demonstrate instances where McHugh J followed the precedent of an earlier decision, despite his Honour holding a different opinion on the constitutional issue. The third case, *Austin v Commonwealth* ('*Austin*'),[10] is of interest for McHugh J's criticism of the majority for refusing to follow precedent. One further case is discussed in Chapter Two, *Street v Queensland Bar Association* ('*Street*').[11] In *Street*, McHugh J rejected precedent; this approach will be rationalised with his Honour's deferral to precedent in *Tyler*.

Chapter Three turns to McHugh J's rejection of precedent in *Theophanous v Herald & Weekly Times Ltd* ('*Theophanous*')[12] and

---

7 Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205, 206.

8 (1994) 181 CLR 18.

9 (1997) 191 CLR 471.

10 (2003) 215 CLR 185.

11 (1989) 168 CLR 461.

12 (1994) 182 CLR 104.

McGinty v Western Australia ('*McGinty*').[13] This chapter discusses the values that influenced McHugh J's approach to reject precedent, and analyses whether this was inconsistent to his Honour's approach when deferring to precedent.

As will be seen, both the themes of respecting individual rights, and adhering to principle,[14] are evident in McHugh J's approach to constitutional precedent. However, when the two values conflicted, McHugh J preferred the certainty provided by adherence to principle. Also, rather than McHugh J's approach to constitutional precedent being viewed as inconsistent, his Honour's rejection, and deferral, to precedent can *both* be understood as instances of adhering to principle.

II CHAPTER ONE: THE DOCTRINE OF PRECEDENT

Former Chief Justice Mason has provided an influential account of the doctrine of precedent, noting that the term 'precedent' can be used in a number of different senses.[15] Precedent may refer to the obligation of lower courts to apply decisions of courts higher in the hierarchy; or, more broadly, precedent may also encompass the doctrine of *stare decisis*.[16] *Stare decisis* refers to the idea that 'a superior court is bound by its own decision or *ought not* to depart from it.'[17] In the sense of *stare decisis*, precedent has been referred to as a process involving a 'value judgment'.[18] *Stare decisis* may be labelled a 'product of human experience',[19] where the effects that flow from past decisions are simply

13 (1996) 186 CLR 140.
14 Guilfoyle, above n 1, 465.
15 Mason, 'The Use and Abuse of Precedent', above n 2, 95–6.
16 Ibid 95, 98.
17 Ibid 98 (emphasis added).
18 John Lockhart, 'The Doctrine of Precedent – Today and Tomorrow' (1987) 3 *Australian Bar Review* 1, 6.
19 Ibid.

considerations to take into account in the judging process, rather than mechanically applying previous decisions. It is this 'value judgment' that is of particular interest in examining McHugh J's approach, and accordingly, precedent will be referred to in the sense of *stare decisis* in this paper.

The doctrine of precedent does not require that the whole of a previous decision be applied; rather, only the ratio decidendi (ratio) of the decision must be followed.[20] The ratio comprises that part of the judicial reasoning that is essential for deciding the case,[21] and not any additional remarks that were not essential to the decision.[22]

This chapter first considers the approach that the High Court has taken to constitutional precedent, followed by an examination of the values at stake when considering approaches to precedent. Finally, there is a brief discussion as to how approaches to precedent in constitutional law have a complex relationship with the approach to constitutional interpretation that a judge prefers.

A *The Approach of the High Court*

It has long been established that the High Court can overrule its own decisions,[23] and, particularly in constitutional law, the Court has adopted

---

20 Kirby, 'Precedent Law, Practice and Trends in Australia', above n 3, 245.

21 Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 3rd ed, 2004) 363.

22 Kirby, 'Precedent Law, Practice and Trends in Australia', above n 3, 245.

23 See, eg, *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 278–9 (Isaacs J); David Bennett, 'Overruling' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 516, 516.

a flexible approach to precedent.[24] However, no settled principles as to when it may be appropriate to overrule have been developed, particularly in constitutional cases.[25] The case law does, however, provide a framework to the approach taken by the Court when overruling previous constitutional decisions.

1 *Framework for Overruling*

First, a cautionary approach is taken when considering overruling. Gibbs J summed up this position; that '[i]t is only after the most careful and respectful consideration of the earlier decision ... that a Justice may give effect to his own opinions in preference to an earlier decision'.[26] Next, a judge considers whether the previous decision is 'wrong'.[27] Phrases such as 'manifestly wrong'[28] or 'fundamentally wrong'[29] have been used to demonstrate that it is appropriate to overrule.[30] Horrigan suggests, however, that such terms merely give 'emphatic force' to a judge's opinion, and are simply a conclusion that the judge has already made in regards to overruling.[31]

If the previous decision is thought to be 'wrong' then the judge considers whether it is appropriate to overrule. In determining this, consideration is

---

24 Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 433. The fourth edition is being utilised here as Zines omitted the section on precedent in constitutional law in the fifth edition.

25 Bryan Horrigan, 'Towards a Jurisprudence of High Court Overruling' (1992) 66 *Australian Law Journal* 199, 199.

26 *Queensland v Commonwealth* (1977) 139 CLR 585, 599 ('*Second Territories Senators Case*').

27 See, eg, Horrigan, above n 25, 205.

28 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 554 ('*Lange*').

29 See, eg, *McGinty* (1996) 186 CLR 140, 235 (McHugh J).

30 Kirby, 'Precedent Law, Practice and Trends in Australia', above n 3, 245.

31 Horrigan, above n 25, 205.

given to a range of factors, identified in the case law, to provide an *indication* as to whether the circumstances are appropriate to overrule.

2 *Factors Involved in Considering Precedent*[32]

Four matters that may justify a *departure* from an earlier decision were affirmed in *John v Federal Commissioner of Taxation* ('*John v FCT*'),[33] and were applied in the constitutional context in *Street*.[34] These matters include, if the 'earlier decision [does] not rest on a principle carefully worked out in a significant succession of cases'; if there are differences in the reasoning of the majority in the previous case; if the prior decision has 'achieved no useful result' or 'led to considerable inconvenience'; and if the previous decision has 'not been independently acted upon in a manner which [militates] against reconsideration'.[35] These factors demonstrate that more is involved than simply the 'correctness' of a past decision – with reference being made to the practical consequences of a decision, the level of reliance that has been placed on it, and also the degree to which a decision has been accepted by members of the Court.

Another argument favouring overruling is, if the constitutional issue is of 'fundamental' importance,[36] or relates to individual rights,[37] then a judge should uphold the 'correct' interpretation, even if it is contrary to precedent. Judges are likely to differ considerably in their interpretation

---

32 For a comprehensive discussion see Zines, *The High Court and the Constitution*, above n 24, 433–44.

33 (1989) 166 CLR 409.

34 Ibid 489 (Mason CJ), 549 (Dawson J), 560 (Toohey J), 569 (Gaudron J), 586 (McHugh J).

35 Ibid 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

36 See, eg, *Second Territories Senators Case* (1977) 139 CLR 585, 630 (Aickin J).

37 *Street* (1989) 168 CLR 461, 489 (Mason CJ), 518–9 (Brennan J), 588 (McHugh J). *Street* considered the *Constitution* s 117, an 'individual right' preventing a state from discriminating against residents of other states by reason of their inter-state residence.

as to what is of 'fundamental' importance in relation to the *Constitution*. Identifying those issues that are so 'fundamental' that a judge prefers to reject precedent can provide an insight into the values that are significant for that judge, and also as to the judge's perceived limits of their authority in interpreting the *Constitution*.

A final factor favouring overruling precedent is if the previous decision has become inconsistent with contemporary developments in other areas of the *Constitution*. For example, Deane J in *Street* argued that the word 'discrimination' in *Constitution* s 117 must extend past formal discrimination to also include substantive discrimination, since the Court 'rejected the preference of form for substance in the construction of ... s 92'[38] in *Cole v Whitfield*.[39] This factor draws together the need for consistency of interpretation, predictability, and flexibility in order to account for changing circumstances.

In relation to *adhering* to precedent in constitutional cases, it necessarily follows that the converse of the factors enunciated in *John v FCT* weigh in favour of following precedent. Zines notes that precedent may also be followed if the decision in question brought about agreement following previous uncertainty.[40]

It is also clear that a mere change in composition of the bench is *not* a reason, of itself, to overturn precedent.[41] Also, whilst the relative age of a decision has been used to support both overruling and affirming a

---

38 Ibid 524.

39 (1988) 165 CLR 360.

40 Zines, *The High Court and the Constitution*, above n 24, 442.

41 See *Second Territories Senators Case* (1977) 139 CLR 585, 594 (Barwick CJ).

precedent, Horrigan notes that in no case has the age of a decision been a decisive factor in overruling.[42]

3 *Alternatives to Overruling*

If a judge comes to the conclusion that a previous case is 'incorrect', it may be possible to apply his or her own interpretation without overruling the previous decision, since only the ratio of the previous decision is binding. The ratio of a previous decision may be narrowly defined in order to allow what may appear to be a differing interpretation to be able to sit alongside the previous decision without overruling it.[43] This approach may be a useful tool as a compromise, to both promote consistency, by not overruling, and allow the judge to apply his or her own 'correct' interpretation of the *Constitution*.

B *Values Underlying Approaches to Precedent*

The factors involved in considering precedent have been developed from deeper values that inform the judicial process. Considering the range of factors that are involved there is much scope for a judge's judicial method to come to the fore in their approach to precedent. Zines suggests that consideration of precedent eventually comes down to a judge weighing up the 'conflicting interests and policies' involved in

---

42 See Horrigan, above n 25, 211.

43 See, eg, Hayne J's dissent in *Smith v ANL Ltd* (2000) 204 CLR 493 ('*Smith*'). The earlier case of *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 ('*Georgiadis*') decided that the statutory extinguishment of a right to sue for common law damages was an 'acquisition of property' requiring 'just terms'. In *Smith*, however, Hayne J held that since the Act in that case extinguished the accrued cause of action six months after the commencement of the Act, the appellant still had a valuable right, and thus, *Georgiadis* could be distinguished, and there was no 'acquisition of property' requiring 'just terms'.

overruling.[44] By assessing which factors a judge considers most important, an insight can be gained as to the values informing that judge's approach. Specifically in constitutional law, the identification of such values provides information as to the role that the judge believes they have to play in interpreting the *Constitution*. This section provides a discussion of the basic arguments for and against accepting precedent, followed by a discussion of the specific values underlying approaches to precedent. Chapters Two and Three will then seek to identify which values were most important for McHugh J in his approach to precedent in constitutional law.

1 *Arguments for and against Precedent*

Overwhelmingly, precedent is used to promote consistency and predictability in the law.[45] However, if precedent is applied too strictly it can '[destroy] or at least ... [delay] the development ... of principles',[46] meaning that the law may lose its ability to account for changing social conditions.[47]

In constitutional law, precedent carries a special significance, due to considerations respecting the *Constitution*. First, due to the entrenched nature of the *Constitution*, the High Court is more willing to reconsider past constitutional cases rather than non-constitutional cases, since the Parliament is unable to 'correct' a decision that is thought to be erroneous.[48] Second, in constitutional law, judges have two loyalties – loyalty to existing precedent, and loyalty to the *Constitution* itself. Some argue that the reasoning of the Court in past decisions is *only* persuasive,

---

44 See Zines, *The High Court and the Constitution*, above n 24, 443.
45 Kirby, 'Precedent law, Practice and Trends in Australia', above n 3, 243.
46 Lockhart, above n 18, 5.
47 Mason, 'The Use and Abuse of Precedent', above n 2, 94.
48 See *Second Territories Senators Case* (1977) 139 CLR 585, 599 (Gibbs J).

and 'may not be used as a substitute for the *Constitution*'.[49] However, if each judge only followed their own opinion there would be an unacceptable amount of instability within the law.[50] Third, since the *Constitution* is designed to endure over time, previous decisions may need to be reconsidered to take account of changing circumstances,[51] thus, decreasing the strength of a precedent. Consequently, in constitutional law an even more complex array of factors confront a High Court judge when deciding whether to apply precedent.

2 *Underlying Values*

(a) Certainty and Reliance

Promoting consistency and predictability through adhering to precedent can relate to the need to be able to *rely* on decisions of the court, which requires *certainty* in the law.[52] This has been heralded as a 'principal' purpose of *stare decisis*.[53] In constitutional law, a particular emphasis may be placed on *governmental* reliance,[54] since constitutional decisions 'directly affect the institutional shape and powers of ... government'.[55] Reliance of *citizens* can also be important when considering precedent; however, in relation to citizens, reliance is more often referred to in the

---

49 *Damjanovic & Sons Pty Ltd v Commonwealth* (1968) 117 CLR 390, 396 (Barwick CJ).

50 Zines, *The High Court and the Constitution*, above n 24, 433.

51 Ibid. This may be linked to whether the judge prefers 'originalist' or 'progressive' modes of interpretation – discussed further below.

52 Saul Brenner and Harold Spaeth, *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946–1992* (Cambridge University Press, 1995) 2.

53 *Itel Containers International Co v Huddleston*, 507 US 60, [43] (1993) (Scalia J).

54 Edmund Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) 145.

55 Brian Galligan, 'The Australian High Court's Role in Institutional Maintenance and Development' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 184, 185.

context of promoting security of *commercial* transactions.[56] Accordingly, reliance of citizens does not carry the same importance in constitutional law.

(b) Fairness and Equality before the Law

Following precedent may also be used to promote equality before the law. This may be due to the 'rule of law' ideal that like cases should be treated alike,[57] promoting fairness and justice. Counter to this view is that if the earlier decision was itself unjust, then by following precedent the court is simply promulgating unjust outcomes.[58]

(c) Legitimising Judicial Review

A common theme in the American literature is that adherence to precedent is one method of legitimising judicial review.[59] Judicial review needs legitimising because it is argued that it is undemocratic for a court, comprised of non-elected judges, to strike down legislation and actions of elected officials.[60] Consequently, by following precedent the court demonstrates that it is bound by the rule of law, rather than by political motivations, when reviewing governmental action, providing legitimacy to the 'anti-democratic' task.[61]

---

56 See Thomas, above n 54, 148; Brenner and Spaeth, above n 52, 3–4.

57 Brenner and Spaeth, above n 52, 5.

58 Ibid.

59 See, eg, Henry Monaghan, 'Stare Decisis and Constitutional Adjudication' (1988) 88 *Columbia Law Review* 723, 752; James Rehnquist, 'The Power that shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court' (1986) 66 *Boston University Law Review* 345, 354.

60 Rehnquist, above n 59, 353–4.

61 Monaghan, above n 59, 753.

(d) Legitimacy and Confidence in the Court

Arguments may be made both for and against adhering to precedent in order to promote legitimacy and confidence in the court.[62] These values may be fostered through the court providing predictability in the law by adhering to precedent. Also, they may be promoted on 'rule of law' grounds, where the court demonstrates it is engaged in a legal process, and not a political one.[63] Justice Heydon has argued that this value of upholding the 'rule of law' goes to the core of the judicial function – where a judge's function is to 'administer the law', and not 'change ... or undermine' the law.[64] As such, Justice Heydon contends that 'the conscious making of new law' by judges is due to a confusion of the judicial function.[65]

Alternatively, adherence to precedent can prevent development in the law when there are changing social conditions,[66] which could then decrease confidence in the court's ability to perform its role as final arbiter of the *Constitution*. Thus, confidence may be promoted through departing from precedent in certain circumstances. On this approach, the judicial function, as described by Justice Kirby, is to allow for development of the law to account for '[b]asic considerations of ... common justice' in the face of changing social circumstances.[67]

---

62 See Thomas, above n 54, 150–1.

63 Brenner and Spaeth, above n 52, 5.

64 Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 *Quadrant* 9, 17.

65 Ibid.

66 Thomas, above n 54, 145.

67 Michael Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576, 590.

Whilst legitimacy and confidence in the court may be promoted by opposing approaches to precedent, it is the *manner* in which a judge promotes these values that is significant in understanding their view as to the limits of judicial authority in interpreting the *Constitution*. Using the above examples of Justices Heydon and Kirby, it may be possible to gauge where a particular judge sits along this spectrum of judicial philosophy by assessing the *manner* in which that judge attempts to uphold these institutional values.

C *Approaches to Interpreting the* Constitution

A complex interrelationship exists between a judge's approach to precedent and their preferred method of constitutional interpretation. For example, if a judge is concerned, on democratic grounds, that the *Constitution* be interpreted according to the original intent of its framers, then such concerns are also likely to impact the judge's view on their authority to overturn prior decisions of the Court. Whilst this paper does not undertake an in-depth analysis of methods of interpretation, it will become evident in Chapter Three that a basic understanding of 'originalist' versus 'progressive' approaches to interpretation is useful.[68]

A basic description of an 'originalist'[69] approach is that the *Constitution* has a fixed meaning[70] that is found by discerning the 'original understanding of constitutional terms'.[71] One criticism of originalism is

---

[68] For a more comprehensive analysis see Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories Principles and Institutions* (Cambridge University Press, 1996) 13.

[69] 'Originalism' is an overly broad categorisation under which a number of interpretive methods may be classified. See ibid 14–16.

[70] Antonin Scalia, 'The Role of a Constitutional Court in a Democratic Society' (1995) 2 *The Judicial Review* 141, 142.

[71] Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy', above n 68, 14.

that it prevents the *Constitution* developing with changing conditions that were not envisaged when the *Constitution* was adopted. However, one method to respond to this criticism is construing constitutional powers broadly, so that the *Constitution* can apply to circumstances that were not foreseen when it was framed.[72]

Alternatively, a basic description of a 'progressive'[73] approach is that by recognising that the *Constitution* is designed to be capable of adjusting to 'changing conditions',[74] the *Constitution* must be interpreted by determining its *contemporary* meaning.[75] The main originalist criticism to this approach is that it allows the meaning of the *Constitution* to change over time.[76] A modern example of a progressive approach can be seen in Kirby J's judgment in *Al-Kateb v Godwin* ('*Al-Kateb*').[77] Kirby J argued that the *Constitution* must be interpreted 'in a way that is generally harmonious with the basic principles of international law'[78] so that the *Constitution* can be adapted to 'changing times'.[79] McHugh J rejected Kirby J's approach in *Al-Kateb*, claiming it allows the meaning of the *Constitution* to change whenever rules of international law change, amounting to unauthorised amendments of the *Constitution*.[80]

---

72 Ibid 15.

73 See Ibid 16. 'Progressivism' is also a broad label under which a number of interpretive methods may be classified.

74 Ibid 17.

75 Graeme Hill, '"Originalist" vs "Progressive" Interpretations of the Constitution – Does it Matter?' (2000) 11 *Public Law Review* 159, 159.

76 Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy', above n 68, 18.

77 (2004) 219 CLR 562.

78 Ibid 624.

79 Ibid 625.

80 Ibid 592. Note, however, that different methods of interpretation do not, as a matter of course, lead to different results on constitutional issues – see generally Hill, above n 75.

McHugh J was one of the few judges to explicitly explain his interpretive approach whilst on the Court.[81] McHugh J's approach has been described as a 'version of moderate originalism',[82] where his Honour's starting point was to discern the *objective* intentions of the makers of the *Constitution*.[83] This basic understanding of McHugh J's interpretative approach as a form of 'originalism' is useful for understanding his Honour's reasons for rejecting precedent in the cases discussed in Chapter Three. Prior to this, however, Chapter Two will consider the values underlying McHugh J's approach in constitutional cases where his Honour deferred to precedent.

III CHAPTER TWO: DEFERRING TO PRECEDENT

This chapter analyses constitutional cases where McHugh J deferred to precedent and identifies the values informing this approach, providing an insight as to McHugh J's view of the proper role of the judge in interpreting the *Constitution*. These cases demonstrate that, in comparison to other judges on the bench in the same period, McHugh J particularly valued the certainty that precedent provides. Additionally, his Honour's approach necessarily recognises that there are occasions when an individual judge's opinion must give way to that of the court in order to promote the institutional values of legitimacy and confidence in the court.

The 'centre piece' for analysis of McHugh J deference to precedent is his Honour's remarkable judgment in *Tyler* in relation to the jurisdiction of

---

81 See Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 244.

82 Jeffrey Goldsworthy, 'Interpreting the *Constitution* in its Second Century' (2000) 24 *Melbourne University Law Review* 677, 706.

83 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 551 (McHugh J) ('*Re Wakim*'); for an analysis of McHugh J's approach see Selway, above n 81, 244–6.

service tribunals. In *Tyler*, his Honour held that the previous cases were 'binding' on him in a limited way, despite there being no test previously accepted by a majority. The later decisions of *Mewett* and *Austin* are useful as further examples of McHugh J promoting the values that his Honour upheld in *Tyler*.

A *Service Tribunal Cases – Setting the Scene*

1 *Background*

To fully appreciate McHugh J's approach in *Tyler*, an understanding of the significance of the issues is required. The service tribunal cases involved constitutional challenges to the jurisdiction of a military tribunal to hear service offences. If a wide jurisdiction was granted to the tribunals then a wider exception would be created to the protections offered by *Constitution* ch III. A narrow jurisdiction, however, could potentially undermine the ability of the military to enforce service discipline.[84] The first case, *Re Tracey; Ex parte Ryan* ('*Tracey*'),[85] decided in 1989, before McHugh J's appointment to the Court, set the scene for sharp divisions in the Court. In *Tracey* the Court split, providing three lines of reasoning as to the scope of service tribunal jurisdiction, with no line of reasoning attracting majority support.[86]

The divisions in the Court continued two years later in *Nolan*, where all members of the Court that decided *Tracey* retained their views from that case.[87] In *Nolan*, McHugh J, the only new member of the Court,

---

84 See Richard Tracey, 'The Constitution and Military Justice' (2005) 28 *University of New South Wales Law Journal* 426, 426–7.

85 (1989) 166 CLR 518.

86 See *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 471 (Mason CJ and Dawson J) ('*Nolan*').

87 Ibid 474 (Mason CJ and Dawson J), 484 (Brennan and Toohey JJ), 490 (Deane J), 494 (Gaudron J).

concurred with Deane J's reasons from both *Tracey* and *Nolan*.[88] Deane J's view in *Tracey* provided the narrowest scope for service tribunal jurisdiction,[89] thus providing the greatest protection for individual 'rights'. Deane J made two important arguments in *Nolan* that McHugh J necessarily adopted. First, Deane J recognised that no test had been accepted by a majority in *Tracey*.[90] Second, Deane J held that it is out of 'imperative judicial necessity' that he adhere to his own view of the *Constitution* in circumstances where the opposing views detract from the 'fundamental guarantee of the manner of exercise of judicial power'.[91] Thus, McHugh J accepted that a 'fundamental guarantee' was involved and also that no approach had gained majority approval.

Following *Nolan*, McHugh, Deane and Gaudron JJ constituted the minority, providing the narrowest scope for service tribunal jurisdiction. In the majority, Mason CJ and Dawson J provided the widest scope for jurisdiction, with Brennan and Toohey JJ accepting a middle ground, with jurisdiction nevertheless valid on the facts of *Nolan* for their Honours. Thus, there was still no majority acceptance of a single test regulating the limits of service tribunal jurisdiction.

2 *McHugh's J Values* – Tyler

Three years after *Nolan* the issue arose again in *Tyler* and McHugh J sided with the majority on the grounds of precedent. This was a remarkable approach to precedent for a number of reasons. With the bench unchanged since *Nolan*, all other judges retained their views from the earlier cases, arguing that the previous cases had not produced a

88 Ibid 499 (McHugh J).
89 *Tracey* (1989) 166 CLR 518, 591.
90 *Nolan* (1991) 172 CLR 460, 492.
91 Ibid 493.

binding ratio,[92] whereas McHugh J did find the previous cases to constitute binding precedent. However, in holding that the *outcomes* of *Nolan* and *Tracey* were binding on him, McHugh J remarkably did not accept any line of reasoning as authoritative, with his Honour only following the result of the previous cases. This fascinating deferral to precedent by McHugh J is instructive as to the values that are significant for his Honour in the decision making process.

McHugh J held that due to divergent reasoning, *Nolan* and *Tracey* had no ratio. However, that fact did not mean that the doctrine of *stare decisis* had no relevance.[93] His Honour held that a court 'is bound to apply [a] decision when the circumstances of the instant case are "not reasonably distinguishable from those which gave rise to the decision."' [94] Accordingly, whilst McHugh J was convinced that the reasoning of the majority in *Tracey* and *Nolan* was erroneous, he saw no 'legally relevant distinction between the three cases' and consequently his Honour decided *Tyler* in conformity with them.[95] In relation to precedent, his Honour summed up his concerns concisely:

> Uniformity of judicial decision is a matter of great importance. Without it, confidence in the administration of justice would soon dissolve. ... Furthermore, for the Court now to hold that a service tribunal had no jurisdiction to try this case ... would defeat the expectations of the Parliament and those concerned with the administration of discipline in the defence forces.[96]

---

92 *Tyler* (1994) 181 CLR 18, 26 (Mason CJ and Dawson J), 29 (Brennan and Toohey JJ), 34 (Deane J), 35 (Gaudron J).

93 Ibid 37.

94 Ibid citing *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, 479 (Lord Reid).

95 *Tyler* (1994) 181 CLR 18, 39.

96 Ibid.

Thus, for McHugh J, precedent went beyond the ratio of a case, extending to requiring similar outcomes for indistinguishable cases.

B *Valuing Certainty*

McHugh J's reasons for being bound by precedent in *Tyler* indicate that in the circumstances of the case, his Honour was compelled towards the theme of adhering to principle.[97] It is contended, from *Tyler*, that the 'principle' which McHugh J was adhering to was the promotion of certainty in the law, so that government could *rely* on decisions of the Court. Importantly, for McHugh J, promoting certainty in *Tyler* outweighed the desire to maintain an interpretation of the *Constitution* that had a greater protection for individual rights.

1 *Governmental Reliance*

Critical for McHugh J in *Tyler* was that Parliament had formed expectations from past decisions. Similar concerns were displayed by his Honour in *Re Aird; Ex parte Alpert* ('*Aird*'),[98] where the issue of service tribunal jurisdiction was again raised ten years later. This case demonstrates the consistency of McHugh J's desire to promote certainty, at least in the circumstances of the service tribunal cases. In *Aird*, McHugh J argued that Brennan and Toohey JJ's 'service connection' test had gained general acceptance since the previous cases.[99] This was a reference to general acceptance by the government and, in particular, the Judge Advocate in trying the case, rather than referring to acceptance by a majority of the Court. Thus, McHugh J perceived the reliance of the

97 See Guilfoyle, above n 1, 465.

98 (2004) 220 CLR 308. Note that *Aird* was not a good vehicle to analyse precedent since neither party sought to re-open the earlier decisions.

99 Ibid 322.

government, and the Judge Advocate, as significant factors when considering precedent.

It is uncontroversial that constitutional decisions have a key role to play in developing and maintaining governmental institutions.[100] Justice McHugh has argued that this role of shaping the 'social, economic and political fabric of the country' forms part of the *constitutional strength* of the Court.[101] Arguably, McHugh J's recognition, in *Tyler* and *Aird*, of the level of reliance taken by the government, demonstrates that his Honour believes that the Court's strength must be exercised with care. McHugh J considered that if the earlier decisions were to be reversed, then the detrimental effect to the government would be significant, and it was a lesser evil to adopt an interpretation that his Honour considered erroneous. Accordingly, at least in the circumstances of enforcing military discipline *effectively*, McHugh J considered that Parliament must be able to rely on past decisions of the Court. Thus, given the power that Justice McHugh recognises the Court to have, it must be exercised with an appreciation of the *practical* effects that will flow from the decision. In the circumstances of the severe uncertainty pervading the service tribunal cases, McHugh J felt bound to adhere to the 'principle' to provide certainty to the issue.

Support for McHugh J consistently valuing reliance in relation to governmental interests is found in *Austin*. *Austin* was decided late in McHugh J's time on the Court, and concerned the doctrine of state immunity from Commonwealth laws. Significantly, McHugh J criticised the joint judgment for not following precedent. The joint judgment, with

---

100 See Galligan, above n 55, 201; Rehnquist, above n 59, 368.

101 Michael McHugh, 'The Strengths of the Weakest Arm' (2004) 25 *Australian Bar Review* 181, 181–2.

Kirby J concurring on this point,[102] held that the previous decisions on state immunity were consistent with a one limb test, and, rather than overruling precedent, argued that judgments promoting a two limb test were an erroneous interpretation of earlier decisions on state immunity.[103] McHugh J, however, held that a 'long line' of decisions that accepted the two limb test, prevented him from agreeing with the joint judgment that the test comprised only one limb.[104]

In responding to the joint judgment, McHugh J argued that while there may not be a difference between the two tests, if there was a substantive difference, the single limb test 'may lead to unforeseen problems in an area that is vague and difficult to apply'.[105] Significantly, the doctrine of state immunity provides an area of protection for the states from Commonwealth interference. Thus, McHugh J's desire for certainty again related to governmental interests. This reiterates that in certain circumstances McHugh J values adhering to principle to promote certainty in constitutional law, particularly to account for governmental reliance.

C *Value of the Court*

It has been noted by Thomas that a strict approach to precedent necessarily hampers judicial autonomy.[106] Accordingly, in the cases where McHugh J has deferred to precedent, his Honour has favoured

---

102 *Austin* (2003) 215 CLR 185, 301.

103 Ibid 258 (Gaudron, Gummow and Hayne JJ).

104 Ibid 281; the 'long line' includes acceptance of the two limb test by Mason J in *Commonwealth v Tasmania* (1983) 158 CLR 1, subsequently accepted by a majority in both *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 and *Victoria v Commonwealth* (1996) 187 CLR 416.

105 *Austin* (2003) 215 CLR 185, 282.

106 Thomas, above n 54, 141.

restricting individual judicial autonomy as a way of promoting institutional values in the Court.

1 *Promoting Institutional Values*

In *Tyler*, McHugh J linked uniformity of decision with 'confidence in the administration of justice'.[107] Justice McHugh has suggested that one source of the strength of the judiciary is the 'public confidence in the *integrity*, *impartiality* and *capacity* of the judiciary';[108] and maintaining such confidence is critical for the Court to effectively perform its constitutional function.[109] This puts into perspective why confidence was such a critical factor for McHugh J in *Tyler*.

(a) Capacity

In relation to *capacity*, McHugh J may consider that the deep divisions in the Court prior to *Tyler* could harm the public perceptions of the capacity of the Court. Due to the Court's role to provide authoritative determinations on the *Constitution*,[110] if the Court was unable to reconcile the uncertainty, then confidence in the Court's capacity to maintain the *Constitution* may wither. Accordingly, for McHugh J, there are circumstances where the individual must dismiss their own opinion so that the Court can effectively exercise its role as final arbiter of the *Constitution*. This may also be linked to legitimacy of the court, as discussed in Chapter One. If judges are willing to accept that they are bound by decisions of the Court that are contrary to their own view, then

---

107 (1994) 181 CLR 18, 39.

108 McHugh, 'The Strengths of the Weakest Arm', above n 101, 191 (emphasis added).

109 Ibid.

110 See Galligan, above n 55, 186.

they are demonstrating that decisions are made according to law, rather than personal preference.[111]

This *manner* of promoting legitimacy in the functioning of the Court is more closely linked to Justice Heydon's, rather than Justice Kirby's, judicial philosophy, as discussed in Chapter One. Underlying McHugh J's approach is a belief that it is the role of the judiciary to 'administer the law',[112] which includes the law articulated by the Court.

(b) Impartiality

Impartiality of the court evokes the value of 'equality before the law'. The need for impartiality was demonstrated by McHugh J judicially when his Honour argued in *Tyler* that consistent outcomes should apply when cases are 'not reasonably distinguishable'.[113] Accordingly, for McHugh J, for the Court to maintain its constitutional strength, it must be perceived by the public as providing 'fair' or 'just' outcomes by treating like cases alike.

(c) Integrity

A judicial example of McHugh J promoting integrity in the Court can be seen in *Austin*. McHugh J, in criticising the joint judgment, noted that while there may be no practical difference between the one and two limb tests, if there is no difference, there is no advantage gained by 'jettisoning' the two limb test.[114] This demonstrates that, for McHugh J, there is *value* in retaining past analyses of the Court, even if an 'updated' test that has no practical difference to the previous test can be articulated.

---

111 See Rehnquist, above n 59, 353–4.
112 Heydon, above n 64, 17.
113 (1994) 181 CLR 18, 37.
114 *Austin* (2003) 215 CLR 185, 282.

Arguably, for McHugh J, the value of overtly accepting past decisions is in paying due respect to the Court as an institution – and such respect fosters public perceptions of the Court's integrity.

2 *Critique of McHugh J in* Tyler

McHugh J's unique judgment in *Tyler* may be open to criticism. First, McHugh J's judgment in *Tyler* was not pleasing for a 'student of the law', since no test was accepted by his Honour as determinative of the issue. It must be remembered, however, that if his Honour had maintained his position from *Nolan* there also would have been no authoritative test accepted by a majority. Second, Gaudron and Deane JJ may criticise his Honour for abandoning the 'rights protectionist' view before a clear majority had accepted another position. Contrary to this criticism, given the stalemate that had occurred within the Court, McHugh J should be heralded *at least* for attempting to provide certainty to the issue. Given the clear refusal of the other justices to alter their view, McHugh J should be recognised for being the only Justice to overtly consider the potential ramifications for the Court as an institution if it was unable to resolve its internal divisions. For McHugh J, rather than simply focussing on the doctrine involved in the service tribunal cases, his Honour appealed to what, for him, was a higher 'principle' of creating certainty in the law, and protecting the legitimacy of the Court.

3 *Supporting Evidence* – Mewett

The above discussion in relation to the institutional values that McHugh J was promoting in *Tyler* is supported by the more 'classical' application of precedent by McHugh J in *Mewett*. This demonstrates a consistent approach by McHugh J in promoting such values, rather than *Tyler* being a deviation from his Honour's usual approach.

In *Mewett*, McHugh J departed from his own view to follow the precedent set by a majority of the Court in *Georgiadis*. In *Georgiadis*, the majority found that a provision purporting to extinguish an accrued right to sue for common law damages was invalid as being an 'acquisition of property' other than on 'just terms'.[115] McHugh J dissented in *Georgiadis*, holding that the plaintiff's cause of action only had an existence due to federal law, and that it was 'liable to be revoked by federal law', thus, there was no 'acquisition of property'.[116] There were also two other dissenting judgments, on different grounds to McHugh J, in *Georgiadis*.[117] By accepting *Georgiadis* as precedent in *Mewett*, McHugh J accepted the majority reasoning despite there being three dissenting judges in *Georgiadis*. Consequenlty, by holding that he was bound by the slim majority of the Court in *Mewett*, McHugh J was promoting the values of certainty, legitimacy and public confidence in the Court.

A final point on *Mewett* is that McHugh J did not articulate the values that led his Honour to follow precedent to the same extent as his Honour did in *Tyler*. It appears that, for McHugh J, accepting precedent in *Mewett* was a simple and uncontroversial step – which supports the proposition that such an approach is consistent for his Honour.[118]

---

115 (1994) 179 CLR 297, 308 (Mason CJ, Deane and Gaudron JJ), 312 (Brennan J).

116 Ibid 325.

117 Ibid 315 (Dawson J), 320–1 (Toohey J).

118 Note that in *Smith* (2000) 204 CLR 493, McHugh J dissented, concurring with Hayne J, that the provision in question was not an 'acquisition of property' as it could be distinguished from the provisions considered in *Georgiadis* and *Mewett*. The author agrees with Lynch that the provisions could be legitimately distinguished so as to not constitute an attempt to 'attack *Georgiadis* through the back door': Andrew Lynch, *The Impact of Dissenting Opinions Upon the Development of Australian Constitutional Law* (PhD Thesis, University of New South Wales, 2005)

D *The Significance of Individual Rights for McHugh J*

The analysis of *Tyler* has demonstrated that the theme of adherence to principle is evident in McHugh J's approach to precedent; the question is, what role does the second theme of his Honour's jurisprudence, the respect for individual rights, have to play for his Honour?[119] In *Tyler*, even though McHugh J described the protection that *Constitution* ch III provides as a 'fundamental guarantee', this possibility of protecting individual rights was *outweighed* by the need to promote certainty. Thus, while McHugh J recognised that a guarantee of rights was involved, that was only one interest to be balanced as part of the decision-making process. In particular, McHugh J's approach can be contrasted to that of Deane and Gaudron JJ, who each retained their own view from the earlier cases in *Tyler*, due to the fundamental nature of the issue. This contrast highlights the different weightings given to competing values by the judges: while Deane and Gaudron JJ preferred protecting individual rights, McHugh J, clearly valued certainty over protecting individual rights *in the circumstances* of *Tyler*. Consequently, *Tyler* does not demonstrate that individual rights had no role to play in considering constitutional precedent for McHugh J, but rather, in certain circumstances other values must prevail.

1 *Inconsistent Approach?*

One example where the value of individual rights prevailed for McHugh J, when considering precedent in constitutional law, is found in *Street*. In *Street* each member of the Court, in separate judgments, overruled *Henry*

249. As such, *Smith* is *not* an attempt by McHugh J to get around precedent by 'stealth'.

119 These themes were referred to in the introduction: see Guilfoyle, above n 1, 465.

v Boehm ('*Henry*'),[120] to widen the protection that *Constitution* s 117 offered to individuals. *Constitution* s 117 involves an express guarantee of individual rights, preventing a State from imposing discrimination on residents of other states by reason of their inter-state residence.[121] Consequently, McHugh J, along with the rest of the Court, disregarded precedent to increase the protection of individual rights. It is argued, however, that due to the different circumstances in *Street* in regards to precedent, McHugh J's approach should not be viewed as being inconsistent with *Tyler*.

(a) Reasons for Overruling in Street

In holding that the interpretation of *Constitution* s 117 in *Henry* was incorrect, McHugh J appealed to the text of the *Constitution*,[122] contemporary understandings of 'discrimination',[123] consistency of interpretation within the *Constitution*,[124] and the nature of the section as a 'great constitutional protection'.[125] His Honour then outlined the relevant factors that made it proper to overrule *Henry*:

> The decision and essential parts of its reasoning are erroneous; it does not rest upon a principle carefully worked out in a significant succession of cases; there was a dissenting judgment; and the decision has not been independently acted upon in a manner which militates against reconsideration.[126]

---

120 (1973) 128 CLR 482.

121 See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 1175.

122 *Street* (1989) 168 CLR 461, 581.

123 Ibid.

124 Ibid 586.

125 Ibid 582.

126 Ibid 588.

Also 'most importantly', for McHugh J, was that a 'great constitutional protection' would be reduced if *Henry* were followed.[127]

For the rest of the Court, a similarly large array of factors was relied on in overruling *Henry*. These included that the principle from *Henry* was not worked out over a significant series of cases;[128] the decision had not been independently acted upon to an extent which militated against overruling;[129] the previous decision had not stood for a long time;[130] and it was not a unanimous decision.[131] Additionally, the nature of *Constitution* s 117 as a guarantee protecting individual rights[132] and the fact that constitutional developments since *Henry* were inconsistent with the approach taken in that case[133] were recognised as important factors.

(b) Reconciling Street *with* Tyler

In *Street*, most of the factors referred to in *John v FCT*, as well as the fact that *Constitution* s 117 protects individual rights, were recognised as good reasons to overrule *Henry*. Significantly, McHugh J referred to the protection of rights as the 'most important' factor – appearing at odds with his Honour's approach in *Tyler*.

Despite the *apparent* inconsistency, it is contended that *Street* can be differentiated from the circumstances of *Tyler*. First, *Constitution* s 117 does confer individual rights, and since the *Constitution* does not generally confer rights on individuals, McHugh J was more concerned to provide an *effective* protection of such rights. Second, due to the sheer

127 Ibid.
128 Ibid 489 (Mason CJ), 549 (Dawson J).
129 Ibid 489 (Mason CJ).
130 Ibid 549 (Dawson J).
131 Ibid.
132 Ibid 489 (Mason CJ), 518–9 (Brennan J), 527 (Deane J), 569 (Gaudron J).
133 Ibid 518 (Brennan J), 524 (Deane J), 569 (Gaudron J).

number of factors favouring overruling *Henry*, *Street* did not require the judges to 'balance' competing interests in a manner which would demonstrate which factors were most important. In particular, McHugh J noted that the past decision had not been independently acted upon, thus, the issue of reliance did not arise, which was the critical factor for his Honour in *Tyler*.

Finally, the context of *Tyler* was extremely different to *Street*. Whereas *Street* was the first decision on *Constitution* s 117 in 16 years, *Tyler* was the third time the Court had considered the question of service tribunal jurisdiction in recent years, and there was clearly a stalemate amongst the justices. This was certainly a factor influencing McHugh J to prefer certainty over individual rights in *Tyler*. This point is critical for demonstrating the existence of both themes of adhering to principle, and valuing individual rights, in McHugh J's approach.[134] Since reliance was not in issue for McHugh J, in *Street*, no tension arose between protecting individual rights and promoting certainty. However, in *Tyler*, such a tension did arise, and due to the circumstances, his Honour was compelled to promote certainty over individual rights. Consequently, McHugh J's judgment in *Street* should not be seen as inconsistent with *Tyler*, but rather, demonstrates that different circumstances will call for a different balancing of values.

(c) McHugh's J Respect for Civil Liberties

Extra-judicially, Justice McHugh has made it clear that he holds the protection of human rights in high regard.[135] The question is whether this position can sit comfortably with his Honour's approach to the

134 See Guilfoyle, above n 1, 465.

135 See generally Michael McHugh, 'The Need for Agitators – The Risk of Stagnation' (2007) 9 *Constitutional Law and Policy Review* 46.

Constitution. Arguably, the tension between the themes that Guilfoyle[136] contends permeate McHugh J's jurisprudence came to the fore in McHugh J's judgments in the service tribunal cases. McHugh J's adoption of the interpretation providing greatest protection for individual rights in *Nolan* demonstrated that his Honour values protecting civil liberties. However, in *Tyler*, the balance of the competing interests weighed in favour of adhering to principle to promote certainty.

Extra-judicially Justice McHugh has noted that constitutional decisions of the High Court have highlighted that gaps exist in the protection of human rights, and that there is an 'inability [for] Australian judges to prevent unjust human rights outcomes'.[137] This was not an accusation of a failing of the judiciary, but rather an acknowledgment that 'the High Court ... is *not empowered* to be as active as the Supreme Court of the United States ... in the defence of ... human rights.'[138] This understanding was clearly highlighted for McHugh J in the unfortunate case of *Al-Kateb*. While McHugh J recognised the 'tragic ... position of the appellant', his Honour held that there was nothing in the *Constitution* to prevent the Commonwealth Parliament authorising 'indefinite detention of an unlawful non-citizen in circumstances where there is no real prospect' of their removal.[139] In particular, McHugh J noted that '[i]t is not for the courts ... to determine whether the course taken by Parliament is ... contrary to basic human rights'.[140] Instead, his Honour held that if such rights are to be protected through the *Constitution* it must be done

136 Guilfoyle, above n 1, 465.
137 McHugh, 'The Need for Agitators – The Risk of Stagnation', above n 135, 53.
138 Ibid 48 (emphasis added).
139 *Al-Kateb* (2004) 219 CLR 562, 580–1.
140 Ibid 595.

by inserting a Bill of Rights into the *Constitution* using the s 128 amendment process.[141]

Consequently, while McHugh J values protecting human rights, his Honour believes the Court has limited power to undertake an activist role in protecting such rights under the *Constitution*. In light of this understanding, it is not surprising that, in *Tyler*, the value of adhering to principle to promote certainty outweighed protecting individual rights.

E *Choices in Interpretation*

The cases where McHugh J has deferred to precedent also demonstrate that his Honour accepts that there is no single correct answer to constitutional issues, but rather, that choices must be made. Justice McHugh has recognised this, noting that 'justices in constitutional cases often reach diametrically opposed views on the meaning of constitutional provisions even though they all use the same method of ... interpretation.'[142] A more complex understanding of McHugh J's view as to the scope for such choice emerges in the next chapter. As will be seen, for McHugh J, the ability for judges to make choices is not unbounded – and in certain circumstances his Honour has vigorously attacked *methods* of interpretation of the *Constitution* that he considers to fall outside such boundaries.

This analysis of McHugh J's deferral to precedent in constitutional cases is consistent with Guilfoyle's claim that a balance between the themes of adhering to principle and protecting individual rights permeate his Honour's jurisprudence. Due to his Honour's view that the Court has a

---

141 Ibid.

142 Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989–2004' (2008) 30 *Sydney Law Review* 5, 10.

limited role in protecting individual rights under the *Constitution*, in *Tyler*, the value of adhering to principle outweighed protecting individual rights. By adhering to principle, it was seen that McHugh J was concerned to promote certainty and the institutional values of legitimacy and confidence in the Court. It will be seen in the next chapter, however, that his Honour also perceives that that there are circumstances where such values will need to be protected by *rejecting* precedent.

IV CHAPTER THREE: OVERRULING PRECEDENT

This chapter analyses McHugh J's refusal to follow precedent in *Theophanous* and *McGinty*, and seeks to reconcile this approach with the cases in the previous chapter. First, these cases demonstrate that McHugh J used the rejection of precedent as a method of rejecting approaches to constitutional interpretation that were, according to his Honour, impermissible. This also accords with his Honour's value of adhering to principle, with the 'principle' being McHugh J's vision of the limits of legitimate methods of constitutional interpretation. Second, McHugh J also used the rejection of precedent to challenge the majority to synthesise their arguments on a novel and underdeveloped area of the law, so as to 'stimulate more thorough reasoning across the Court'.[143]

A *Political Communication Cases – Context and Background*

In these cases, McHugh J refuses to follow recent decisions of the Court due to his Honour's belief that the majority reasoning was 'fundamentally wrong'.[144] The first case where McHugh J rejected precedent, *Theophanous*, was handed down in 1994, just four months after *Tyler*. Given McHugh J's judgment in *Tyler*, it may seem inconsistent that his

143 See, eg, Lynch, above n 118, 2.

144 *McGinty* (1996) 186 CLR 140, 235.

Honour vigorously rejected precedent in *Theophanous*. However, since the cases were handed down so close to each other, it is most likely to be the case that McHugh J believed that his approach in the two cases could be reconciled. McHugh J's approach in rejecting precedent in *Theophanous* was promoting similar values as his Honour was promoting by adhering to precedent in the cases discussed in Chapter Two.

To fully appreciate McHugh J's approach in *Theophanous*, and understand how the rejection of precedent can be reconciled with *Tyler*, it is necessary to have an understanding of the context surrounding *Theophanous*. Accordingly, it is instructive to briefly outline the precursor case to *Theophanous – Australian Capital Television Pty Ltd v Commonwealth* ('*ACTV*') [145] – as well as other constitutional developments at the time.

1 *The 'New Constitutional Law'*

In *ACTV*, the Court recognised a constitutional implication which limited Parliament's ability to legislate in a manner that infringed communication on political matters.[146] This case provided one example of the 'expansive approach to express and implied constitutional rights and freedoms' in which the High Court was involved during this period.[147] Detmold argued that in this period the High Court was developing a 'new constitutional law' that was creating more 'profound and far-reaching' individual rights.[148]

---

145 (1992) 177 CLR 106.

146 Ibid 137–40 (Mason CJ), 149 (Brennan J), 168 (Deane and Toohey JJ), 186–7 (Dawson J), 212 (Gaudron J), 231–2 (McHugh J); note that some members of the Court refer to their reasons in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

147 See Wheeler, above n 7, 206.

148 M Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228, 230.

In this 'new constitutional law', *Leeth v Commonwealth* ('*Leeth*'),[149] decided in the same year as *ACTV*, is significant. In *Leeth*, Deane and Toohey JJ, in dissent, held that there is implied in the *Constitution* a general guarantee of legal equality.[150] In devising this implication their Honours relied on the common law doctrine of 'legal equality' being incorporated in 'the very structure of the *Constitution*'.[151] This method of deriving the implication opened an 'interpretive door' that was 'very wide',[152] and it was this process which Detmold was heralding as the 'new constitutional law'. Critics, however, argued that such developments may result in governmental power being limited through principles that have only a 'tenuous link with anything in the *Constitution*'.[153] This then had the potential to 'open up a Pandora's box of implied rights and freedoms.'[154] It is in this context that McHugh J's judgments are best understood.

2 ACTV

In *ACTV* there were differences amongst the judges as to the source of the implied freedom of political communication. For McHugh J, the words 'directly chosen by the people' in *Constitution* ss 7 and 24, interpreted against a background of representative and responsible government, refer to a process surrounding elections.[155] In this process, according to

149 (1992) 174 CLR 455.
150 Ibid 486.
151 Ibid 485.
152 Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne Law Review* 24, 32.
153 Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 183.
154 Ibid 177.
155 *ACTV* (1992) 177 CLR 106, 232.

McHugh J, the people have a right to 'participation, association and communication identifiable [from] ss 7 and 24'.[156]

B *Rejecting the 'New Constitutional Law'*

Following *ACTV*, over a series of cases, including *Theophanous* and *McGinty*, McHugh J criticised the majority approach to deriving the implication. Through these criticisms an understanding as to the factors that persuaded McHugh J to reject precedent can develop.

1 *Rejecting Precedent*

(a) Theophanous[157]

In *Theophanous*, the question was whether the *ACTV* implication could provide either a constitutional defence for defamation on 'political matters', or whether the common law defences to defamation could be altered to be consistent with the implication.

In their joint judgment, Mason CJ, Toohey and Gaudron JJ held that the source of the implication was the need to 'ensure the efficacious working of representative democracy',[158] which their Honours held to be a concept 'enshrined in the *Constitution*'.[159] On the question at issue, their Honours formulated a constitutional defence to actions in defamation.[160] Deane J, in the majority, agreed that the source of the implication was 'the doctrine of representative government which forms part of the fabric of the

156 Ibid 231–2.

157 Note that *Theophanous* was heard successively with *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ('*Stephens*'), where the Court was similarly divided as to the source of the implication.

158 *Theophanous* (1994) 183 CLR 104, 123.

159 Ibid 121–1.

160 Ibid 140.

Constitution', and his Honour held that this was established in *ACTV*.[161] Deane J, however, held that the *Constitution* provided a *complete* defence in relation to publications 'about the official conduct or suitability of a member of the Parliament or other holder of high Commonwealth office.'[162] This was a wider view than that expressed in the joint judgment, however, Deane J added that while he was 'unable to accept' the position of the joint judgment, he would agree with them in order to gain majority support.[163]

In *Theophanous*, McHugh J rejected the majority approach to the source of the implication, authoring a forceful dissent. McHugh J could not agree with 'the proposition that the institution of representative government [was] a part of the *Constitution, independently of its text and structure*'.[164] His Honour held that any implication from the concept of 'representative government' can only be to the extent that the concept is apparent in the 'text and structure of the *Constitution*'.[165] Interestingly, it could have been legitimately argued that due to the novel nature of the implication, and the differences between the judgments in *ACTV*, that no approach to deriving the implication had been accepted by a majority there. However, McHugh J held that a majority in *ACTV* had accepted a wider view of the implication,[166] and, consequently, his Honour considered whether he should follow precedent.[167]

In taking the significant step to depart from precedent, his Honour criticised the majority for not following the 'theory of constitutional

---

161 Ibid 163.
162 Ibid 185.
163 Ibid 188.
164 Ibid 195 (emphasis added).
165 Ibid 196.
166 Ibid.
167 See ibid 205–6.

interpretation' that had prevailed since the *Engineers' Case*,[168] which held that it is illegitimate to 'construe the *Constitution* by reference to political principles or theories that find no support in the text'.[169] McHugh J noted that for the Court 'to retain the confidence of the nation as the final arbiter of ... the *Constitution* ... no interpretation ... can depart from the text and structure of the *Constitution*.'[170] Thus, not only was the majority's reasoning incorrect, but McHugh J argued it could lead to drastic consequences for the Court as an institution. Chapter Two demonstrated, however, that McHugh J deferred to precedent, despite believing the majority reasoning was erroneous, on the grounds of promoting confidence in the Court. McHugh J was, however, aware of this different approach to protecting confidence, pointing out that more was involved in *Theophanous* than the conclusion that the reasoning in *ACTV* was erroneous.[171]

To reconcile the prima facie inconsistency as to the manner in which McHugh J sought to protect confidence in the Court, it is critical to understand what his Honour saw as the special circumstances in *Theophanous*. McHugh J was particularly concerned that if the majority approach was accepted there would be 'far reaching ramifications for the federal system'.[172] This appears to relate to Zines' concern that a 'Pandora's box' of rights would be opened, having the potential to invalidate legislation on a large scale. Arguably McHugh J was concerned that a whole raft of unwarranted implications, using the method of the majority, may be derived from the *Constitution*.

---

168 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
169 *Theophanous* (1994) 183 CLR 104, 198.
170 Ibid 197.
171 Ibid 205.
172 Ibid.

Accordingly, McHugh J's approach in *Theophanous* was not simply related to the doctrine of political communication, but was a rejection of the so-called 'new constitutional law'. For McHugh J, this new constitutional law was going past the legitimate authority that the Court has in interpreting the *Constitution*. Consequently, due to McHugh J's view as to the limit of the Court's authority, his Honour was unable to protect confidence in the Court by deferring to precedent, as was done in *Tyler*.

(b) McGinty

The question as to the source of the implication was raised again two years later in *McGinty*. Following *Theophanous*, a clear majority had accepted one line of reasoning, thus, McHugh J's rejection of that view in *McGinty* was a clear rejection of precedent.

In *McGinty*, McHugh J reiterated his contention that the idea of a 'free-standing principle of representative democracy' was contrary to the principles of interpretation outlined in the *Engineers' Case*.[173] His Honour held that the reasoning of the majority was 'fundamentally wrong', amounting to 'an alteration of the *Constitution* without the authority of the people under s 128 of the *Constitution*.'[174] By understanding what was 'fundamentally wrong', according to McHugh J, an understanding as to why his Honour believed the majority had departed from their legitimate authority in interpreting the *Constitution* can be developed.

---

173 *McGinty* (1996) 186 CLR 140, 229–30.

174 Ibid 236.

2 *Protection from Fundamental Errors of Interpretation*

It was noted in Chapter One that Horrigan suggests that terms such as 'fundamentally' wrong merely give force to the judge's conclusion.[175] However, it is contended that, for McHugh J in *McGinty*, the 'fundamental' nature of the error did carry substantive meaning. The error was 'fundamental' for McHugh J because the majority failed to follow the *fundamental* method of constitutional interpretation outlined in the *Engineers' Case*. It has been argued that the majority approach in *ACTV* impliedly overruled the *Engineers' Case*.[176] Thus, in *McGinty*, McHugh J was confronted with two conflicting precedents – the precedent of a settled interpretation method from the *Engineers' Case* versus the precedent set by *ACTV* and *Theophanous*. By rejecting the precedent of *ACTV* and *Theophanous*, his Honour accepted that the *Engineers' Case* was of a more 'fundamental' nature.

Judges are often confronted with a 'choice' between precedents carrying different levels of importance.[177] The choice that is made provides an insight as to which values are of greater importance for that judge. McHugh J considered that a departure from the *Engineers' Case* fundamentally changed the limits of authority that judges have in interpreting the *Constitution*.[178] This fits with arguments that the constitutional developments by the Court in the early 1990s had the potential to '[open] up a vast and uncertain area of constitutional

---

175 See Horrigan, above n 25, 205.

176 See George Williams, '*Engineers* is Dead, Long Live the Engineers!' (1995) 17 *Sydney Law Review* 62.

177 See Henry Abraham, *The Judicial Process* (Oxford University Press, 6th ed, 1993) 325.

178 Such an approach is not surprising given the *Engineers' Case* has been referred to as the 'cornerstone of Australian constitutional jurisprudence': See Williams, above n 176, 63.

limitations ... [increasing] the discretionary power of the judiciary.'[179] Arguably, McHugh J's desire to firmly link the implication of freedom of political discussion back to the text of the *Constitution* was to reign in this increasing area of discretionary power. This goal is linked to philosophical underpinnings of the judicial process concerning the level of 'restraint' or 'activism' that a judge is empowered to employ in interpreting the *Constitution*.[180] By attempting to narrow the scope of the implication, perhaps McHugh J was trying to narrow the scope for judicial activism in the future. This is not an argument that McHugh J was *extremely* conservative. Rather, on a spectrum, his Honour had a greater concern than most other members on the bench, during the same period, of the limits of the authority of the Court being breached. To link this back to the themes that pervade McHugh J's jurisprudence,[181] the interpretive method enunciated in the *Engineers' Case* can be seen as the 'principle' that his Honour was attempting to adhere to.

The approach of McHugh J in preferring the precedent of the *Engineers' Case* is perhaps one manifestation of a consistent approach taken by his Honour in rejecting certain forms of 'progressive' methods of constitutional interpretation. McHugh J's accusation in *McGinty*, that the majority approach amounted to an unauthorised alteration of the *Constitution*, is echoed in other judicial statements of his Honour. In *Al-Kateb*, McHugh J charges Kirby J with 'amending the *Constitution* ... in disregard of s 128' when interpreting the *Constitution* by reference to contemporary rules of international law.[182] Also, in *Re Wakim*, McHugh

---

179 Zines, 'A Judicially Created Bill of Rights?', above n 153, 181.

180 See Williams, above n 176, 1–2. Williams notes that underlying the issues involved in the political communication cases was the 'issue of judicial activism versus judicial restraint'.

181 Guilfoyle, above n 1, 465.

182 (2004) 219 CLR 562, 592.

J remarked that 'the judiciary has no power to amend or modernise the *Constitution*' in response to an argument that the cross-vesting legislation should be validated because it would be a convenient result.[183] Both methods of interpretation that McHugh J is condemning here can be seen to have 'progressive' elements.

In light of McHugh J's similar criticisms in these cases, arguably, in *McGinty*, his Honour was similarly concerned with a 'progressive' method of interpretation, which was forming part of the 'new constitutional law'. Whether or not the majority's method could be classed as progressive,[184] McHugh J certainly thought it was. In *McGinty,* his Honour held that the majority approach required cases to be decided 'by reference to what the principles of representative democracy *currently require*',[185] which fits within the scope of 'progressive' interpretive methods.[186] Thus, recalling from Chapter One, that McHugh J's approach to interpretation can be classed as a version of 'originalism', his Honour sought to protect the *Constitution* from unauthorised amendment through certain 'progressive' methods of interpretation.[187]

It would be too sweeping to argue that McHugh J wished to reject *any* progressive method of interpretation.[188] Rather, it is the context of the

---

183 (1999) 198 CLR 511, 549.

184 Although, see Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29, 42. Stone notes the implication was controversial because it was 'contrary to originalist arguments ... and because of doubts as to its textual foundation.'

185 (1996) 186 CLR 140, 236 (emphasis added).

186 See Hill, above n 75, 159.

187 Goldsworthy notes that the concern of originalism is to ensure that the authority of the people is not 'usurped by a small group of unelected judges' – this accords with McHugh J's criticisms regarding illegitimately amending the Constitution: Goldsworthy, above n 82, 683.

188 Note that McHugh J's own interpretation method is a complex and nuanced method that recognises that the *Constitution* was intended to endure over time, and as such, his Honour recognises the ability for '*current* understanding[s] of ... concepts

'new constitutional law' that provides an illustration of what McHugh J's concerns were in relation to 'progressive' approaches. Through interpreting the *Constitution* in light of contemporary principles and theories, constitutional doctrines may be formed which have the potential to develop 'the full panoply of a bill of rights',[189] resulting in a greater degree of power in the Court to invalidate governmental action. Ironically then, it can be seen that by rejecting precedent in the political communication cases, his Honour was demonstrating his 'rigid adherence' [190] to principle that was demonstrated by deferring to precedent in other areas – with the 'principle' here being authorised limits of constitutional interpretation.

3 *McHugh J's Legacy* – Lange

The uncertainty that was generated in *McGinty* was resolved with a unanimous judgment in *Lange*, where the Court held that the *Constitution* gives rise to an implication of representative government 'only to the extent that the text and structure ... establish it.'[191] Thus, it would appear that McHugh J's approach to ground the implication in the text of the *Constitution* was influential in *Lange*.[192]

In joining the unanimous judgment in *Lange*, McHugh J also necessarily accepted that the common law defence for defamation must be compatible with the *Constitution*.[193] However, his Honour had held in *Theophanous* that it was not possible that the freedom would override the

---

and purposes' to 'infuse' the interpretation of the *Constitution*: *Eastman v The Queen* (2000) 203 CLR 1, 50 (McHugh J). This approach can itself be seen to have some 'elements' of a 'progressive' methodology.

189 Zines, 'A Judicially Created Bill of Rights?', above n 153, 177.

190 Guilfoyle, above n 1, 465.

191 (1997) 189 CLR 520, 567.

192 See, eg, Kirk, above n 152, 49.

193 *Lange* (1997) 189 CLR 520, 571.

common law.[194] Thus, McHugh J was willing to compromise his own view in order to gain unanimous acceptance of the interpretative method for deriving the implication. Justice Heydon has noted that *Lange* involved a 'tactical compromise', where there was 'an agreement by seven people to do what at different stages all seven had thought was wrong.'[195] Accordingly, for McHugh J, the real sticking point was the *method* of interpretation, and not the final form of the doctrine, thus, strengthening the argument that his Honour's rejection of precedent was based on rejecting the developing method of interpretation.

The bottom line from *Lange* is that McHugh J's influence on the source of the implication is part of his Honour's legacy to constitutional law. Arguably, however, this legacy runs deeper, with McHugh J's rejection of precedent, to adhere to the 'principle' of an established method of deriving implications, can be seen to have played a role in preventing the 'realisation of ... "The New Constitutional Law"'.[196]

Due to what looks like a contradictory approach to constitutional precedent of McHugh J in *Tyler* and *Theophanous*, there was the potential for his Honour to be criticised for being inconsistent. However, this prima facie inconsistency is illusory, with both judgments having the ultimate goal of promoting the values of certainty, legitimacy and confidence in the court. In *Tyler*, McHugh J was advocating for certainty on the issue of service tribunal jurisdiction, and promoted the institutional values by attempting to resolve divisions in the Court. In *Theophanous* and *McGinty*, while McHugh J decreased certainty in the doctrine at issue, his Honour was ultimately attempting to provide certainty as to the

194 (1994) 182 CLR 104, 206.
195 Heydon, above n 64, 17.
196 Stone, above n 184, 42.

interpretative method that the Court uses when construing the *Constitution*. McHugh J's vision as to the limits of the Court's authority in interpreting the *Constitution* required his Honour to reject precedent in order to promote the institutional values of legitimacy and confidence in *Theophanous* and *McGinty*.

C *Contribution to 'Ideas' on the* Constitution

McHugh J's rejection of precedent in *McGinty* and *Theophanous* may also be linked to the goal of challenging the majority to refine their reasoning as to the source of the implication. In *McGinty*, McHugh J considered that ultimately the majority approach to the implication may prevail – however, until that time his Honour refused to accept their reasoning.[197] Thus, despite the fact that McHugh J did not believe that his own approach would prevail, his Honour continued to reject precedent. It has been suggested that dissent not only provides an opposing view which may be accepted in the future but can also be used to 'stimulate more thorough reasoning across the Court'.[198] If this was a goal of McHugh J, then it is likely that his Honour considers one role of the individual judge is to 'contribute to the storehouse of ideas about a constitution ... to deepen [our] understanding of it'.[199] Especially in the underdeveloped area of law that was the doctrine of freedom of political communication,[200] at the very least, his Honour may have been able to

197 (1996) 186 CLR 140, 236.

198 Lynch, above n 118, 2.

199 See Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 295.

200 See Williams, above n 176, 65–66: Williams notes that at the time of *Theophanous* the implication of freedom of political communication remained 'vague and imprecise'.

challenge the majority to answer his criticisms with more thorough and precise reasoning.[201]

V CONCLUSION: A MODERATELY CONSERVATIVE APPROACH

It is first important to recognise that the current analysis is not definitive, as the examination of the values influencing McHugh J's jurisprudence have only been considered through the very limited lens of his Honour's approach to constitutional precedent. The central point for the analysis of McHugh J's approach was the two judgments handed down in 1994, *Tyler* and *Theophanous*. This analysis has attempted to resolve the prima facie inconsistency between these judgments, in order to tease out the values that were important for McHugh J in constitutional law.

The cases where McHugh J deferred to precedent demonstrate that a critical value for McHugh J in constitutional jurisprudence was certainty in the law, particularly so that the government could rely on decisions of the Court. McHugh J also sought to protect values inherent in the Court, so as to allow the Court to effectively perform its role as a constitutional court; these were, in particular, the values of legitimacy and confidence in the Court. Thus, by deferring to precedent, McHugh J demonstrated one theme of his jurisprudence, adherence to principle to promote certainty.[202] However, the second theme of his Honour's jurisprudence, respecting individual rights,[203] was not entirely absent. Prior to *Tyler*, in *Nolan*, McHugh J demonstrated a respect for individual rights by adopting the view on service tribunal jurisdiction that provided the greatest protection for individual rights. Also, in *Street*, his Honour was willing to overrule

201 See, eg, Rehnquist, above n 59, 374.
202 Guilfoyle, above n 1, 465.
203 Ibid.

precedent and advocate for an interpretation providing a wider protection of individual rights. What is clear, however, is that when the circumstances of a case brought the two themes of McHugh J's jurisprudence into conflict, his Honour's view of the limited role of the judge in protecting individual rights under the *Constitution* meant that the theme of adherence to principle prevailed.

In rejecting precedent, once the contextual factors are taken into account, it can be seen that McHugh J was not adopting an inconsistent approach to that taken in deferring to precedent, but rather, his Honour was attempting to promote the same values of certainty, legitimacy and confidence. The reason that McHugh J had to reject precedent in order to promote the same values was due to his Honour's view of the limits of legitimate authority that judges have in upholding the *Constitution*. McHugh J believed that the judge has a less activist role to play in interpreting the *Constitution* than most other judges on the bench in the same period. Thus, his Honour was compelled to reject certain methods of constitutional interpretation that had the potential to increase the discretionary power of a judge in interpreting the *Constitution*.

McHugh J's goal in rejecting precedent was to bring back a level of certainty into the methods of constitutional interpretation that could be used, and also to promote the legitimacy and confidence in the Court by keeping constitutional interpretation within certain limits. This again demonstrated the theme of McHugh J's jurisprudence involving adherence to principle, where the 'principle' was what his Honour regarded as the legitimate methods of constitutional interpretation. This strong desire to adhere to principle in order to promote certainty in the law, balanced by a respect for individual rights where, according to his Honour, they can be legitimately protected under the *Constitution*, can be

viewed as a moderately conservative approach to constitutional precedent.