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Legalism, realism and judicial rhetoric in constitutional law

Professor Leslie Zines AO

Introduction

Leslie Zines requires no introduction. The author of successive editions of *The High Court and the Constitution*, distinguished constitutional scholar, Dean of the Law Faculty of the Australian National University, Goodhart Professor of Legal Science at Cambridge, member of the Constitutional Commission and the holder of positions and author of publications on important topics too numerous to list.

In this lecture, Professor Zines addresses issues of constitutional interpretation which are not unique to Australia. Indeed those nations which have judicially enforceable written constitutions almost immediately encounter the problem of how the foundational document is to be interpreted: is it to be approached in light of modern conditions or is its meaning to be ascertained by a consideration of what was understood at the time of its drafting? What role does policy play in its interpretation? Should judges seek to ascertain its meaning within the strict confines of its text or may they look further afield?

In systems where the foundational document has embraced the protection of significant individual liberties the ensuing debates about the proper approach to constitutional interpretation have been fierce. In the United States, for example, the meaning to be ascribed to the Eighth Amendment's prohibition on the infliction of 'cruel and unusual punishment' has given rise to an intense debate as to whether the content of that concept is to be gauged by a consideration of what the founding fathers understood or by reference to more modern notions. In the same vein, much of the heat in the debate about abortion and the United States Supreme Court's decision in *Roe v Wade*¹ has centred on issues of originalism.

In nations where individual freedoms have not been made the subject of constitutional guarantees the question of how a constitution should be interpreted

1 410 US 113 (1973).

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