

CONSTITUTIONALISM AND THE RULE OF LAW

Theme/Idea Political versus legal constitutionalism	
General Argument Overview <p>Political constitutionalism = individuals and groups who exercise power are held to account through the political process; requires a vibrant and robust political scene, an independent body to perform scrutiny (Australian Electoral Commission), public elections</p> <p>Legal constitutionalism = individuals and groups who exercise power are held to account by means of the judicial process, courts and the law; requires a judicial branch completely independent of the executive and legislature</p> <p>The key differentiating feature between political and legal constitutionalism is the extent of power granted to the judiciary to ‘check’ the use of power.</p>	
Arguments for Political	Arguments for Legal
Electoral accountability reinforces the expression of popular sovereignty within the Australian political system, as ‘the people’ utilize their voting power to elect/eject Parliamentarians at will, and subsequently hold poor decision makers to account	The political process excludes groups from participation (prisoners, minors, refugees, asylum seekers)
Democracy upheld through the exercise of representative and responsible government (responsible to the people) In contrast to the judiciary, who are appointed rather than elected. Judges are not held accountable by the principle of responsible government, as they are not responsible to the particular constituents of their electorate	The judiciary help to protect against the under-enforcement of rights resulting from the potential pathologies & blind spots affecting politically accountable legislatures & executives Rights of minorities may become an oversight to the legislature
The judiciary have limited mechanisms to effect actual change, rendering legal constitutionalism an ineffective mechanism to hold power to account	Judiciary are given discretion to comment on the validity of executed power in a wide range of situations
The political process is participative and robust; all can access Those who cannot afford access to the courts to sue on matters of government policy are found without recourse under legal constitutionalism Suing is expensive, limiting legal recourse to only the well-resourced	Example: Interpretation of S 44 in <i>R v Canavan</i> and <i>Sykes v Cleary</i> directly impacted upon the composition of Australia’s representative parliament; it is otherwise inappropriate for the legislature to deal with matters relating to its own composition, as this could be viewed as a conflict of interest

ACQUISITION OF LEGAL INDEPENDENCE

Theme/Idea Was Australia legally independent at the time of Federation?	
General Argument Overview <i>Phillips v Eyre</i> (1870) defined repugnancy under the <i>Colonial Laws Validity Act 1865</i> as ‘repugnancy to an Imperial Statute or order made by authority of such statute, applicable to the colony by express words or necessary intendment’. Colonial legislature could override legislature of the British parliament, with exceptions. The <i>Colonial Laws Validity Act</i> confirmed that statutes passed by the colonial legislatures could override received English statutes and common law, but this did not extend to colonial laws whose effect would be repugnant to the British statutes applicable by paramount force.	
For	Against
<i>R v Burah</i> held that dominion legislatures were intended to have the same plenary powers as the Imperial Parliament.	As a consequence of <i>R v Burah</i> , the states were still bound by the limitations placed upon the British Imperial parliament itself.
The <i>CLVA</i> provided that the dominion parliaments could override British Imperial statute, but not in all cases.	The <i>Colonial Laws Validity Act</i> was not repealed by the enactment of the Constitution in 1901, and was subsequently still operating at the time of Federation.
	The Constitution was officially enacted through the British Imperial Parliament through paramount force, limiting the notion that Australia was legally independent at the time of federation.

Theme/Idea Is Australia legally independent now?	
General Argument Overview The historical doctrines of repugnancy and extraterritoriality ceased to hold over the Australian Dominion after the introduction of the <i>Colonial Laws Validity Act 1865</i> , yet the British Imperial Parliament retained the power to legislate through paramount force. However, the doctrines applied to the states until the assent of the <i>Australia Act 1986</i> . The <i>Australia Acts</i> also removed the power to appeal to the Privy Council, making the HCA the highest court of appeal in Australia.	