

# PUBLIC LAW (JURD7141/LAWS1141)

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# Constitutional Hybrid

## Constitution of the US

3 basic mechanisms in the Constitution which are established in the name of 'the People':

1. **Representative government** (feature of Westminster Constitutionalism). Delegation of the government to a small number of citizens elected by the rest. A chosen group of individuals whose wisdom and virtue meant that they are less likely motivated by factional or sectarian considerations, factionalism can be reduced. Results in greater security and prevents monopoly of one party.
2. **Separation of governmental powers**. For a balanced government. Allocation of functions between federal and state governments ensure no one government would be in a position to dominate its citizens (vertical plane). Diffusion of governmental power in legislature, executive and judiciary (horizontal plane) allows checks and balances and moderation of exercise. Bicameral legislature consists of House of Representatives chosen by 'the People', Senators chosen by legislatures of the States and a President who is given power to veto legislation.
3. **Judicial review**. Federal Judiciary has power to void any act of legislature or executive in contravention of the Constitution.

### Separation of Power

**Horizontal:** Legislature, executive, judiciary. UK is led by a Prime Minister appointed by a Monarch- has to have majority support in House of Commons. US President is elected head of executive independently of which party holds the majority in Chamber of Congress. UK Ministers must be members of British Parliament; President nominates persons outside of Congress to serve in cabinet as Secretaries in charge of nominations. Supreme Court in UK assumes functions of judiciary, whereas US Supreme Court established as independent arm of government.

**Vertical:** federal structure- see below:

[Michael Burgess, Comparative Federalism: Theory and Practice \(2006\)](#)

Philadelphia Convention called to revise Articles of Confederation. Federalism: Condeferal/federal government and unitary/national government. After Constitution in 1789, US saw shift away from confederation to a consolidated form of union- compound republic.

### Weaknesses of the American Confederation:

1. Produced no security against foreign invasion because Congress not permitted to prevent war nor support it by its own authority. Also no power to enforce the states to honour international agreements.
2. No constitutional power to check quarrels between the states and union.
3. US could have acquired many benefits from federal union but it was not available then under the confederation eg. Custom duties, protection from commercial regulations of other states and promotion of commerce.
4. Existing union cannot protect itself against encroachments from constituent states.
5. Articles not superior to the constituent state constitutions.

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# Australian Federalism. Popular Sovereignty.

## Intergovernmental Relations

Federal principle is the 'method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent' (KC Wheare). Neither general nor regional government is subordinate to the other.

RL Mathews' 4 evolutionary phases in Australian Federalism:

- 1) a period of 'co-ordinate federalism brought to an end in 1920 by the *Engineers Case*;
- 2) "co-operative federalism' in 1920s and 30s culminating in developments such as the 1927 Financial Agreement and establishment in 1933 of Commonwealth Grants Commission;
- 3) 'coercive federalism' ushered in by the wartime tax scheme;
- 4) 'co-ordinative federalism'...

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[Robert French, 'The Incredible Shrinking Federation: Voyage to a Singular State?' \(2012\)](#)

External factors such as harsh economics of global markets, international obligations and relationships, have driven the federation to 'shrink'. Responses by Australia to these factors test the ability of the Constitution. A variety of cooperative models have been developed, given the difficulty of amending the Constitution. They deliver national responses with checks and balances on the exercise of central power and derive from conditions and limitations on that power. **Cooperative federalism** contributes towards centralisation because it seems...

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## Popular Sovereignty

Power of sovereignty comes from the people. "We the people..."

### **The Australia Act 1986**

The act was the final step in severing of legal ties with the UK.

**Sue v Hill (1999)** (Hill was disqualified in 1998 federal elections because she still retained her UK citizenship. Hill argued that the UK has residual influence on legislative, executive and judiciary of AU and therefore, shouldn't be regarded as 'foreign power')

S1 denies the efficacy of the Westminster statutes as part of the law of the Commonwealth. "No Act of the Parliament of the UK passed... shall extend, or be deemed to extend". The Act ensured that by terminating any remaining appeals from Australian courts to the Privy Council, that no institutions of government of the UK could exercise any judicial powers in Au. Same for executive power.

It has been accepted that in making the appointment of a Governor-General, the monarch acts on advice of the AU PM. Constitution gives monarch power to appoint a person to administer the Commonwealth government and to authorise Governor-General to appoint duties within any part of the Commonwealth.

S15 allows Commonwealth to repeal or amend both Statute of Westminster and the Australia Act itself. This would allow the Statute of Westminster to be amended or repealed without referendum. This runs counter to the notion of popular sovereignty, and the process is 'subject to the Constitution'. "The Constitution shall not be altered except in the following manner..."

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## Indigenous sovereignty

### Indigenous People

#### Mabo v Queensland (No 2) (1992)

When NSW colony was established in 1788, there existed under traditional laws or customs of the Aboriginal people, special entitlements to use and occupation of defined lands. This 'normative system' was ignored by British officials. Governors of NSW and other colonies did not seek to conclude treaties with local groups to secure co-existence and land for colonisation, instead, they just asserted sovereignty and claimed land. Milirrpum v Nabalco in 1971 led to the introduction of *Aboriginal Land Rights (Northern Territory) Act (1976)* to secure Aboriginal ownership of traditional lands over large parts of NT.

High Court in Mabo v QLD gave legal recognition to Indigenous legal systems through common law. By formulating rights as 'native title' dependent on common law recognition, Court avoided any suggestion of Indigenous sovereignty. In addition, any legislative or executive action of the Commonwealth or its constituent States, or their predecessors in Imperial or colonial powers could extinguish the native title.

Walker v NSW (1994) insists that criminal law must exclude any other law (indigenous laws) when operating because of the need for uniformity and equality.

#### 1967 Australian referendum

Called by Holt Government to approve two amendments to the Australian Constitution relating to Indigenous Australians. First section specified that federal laws- designed to protect all Australians, did not apply to Indigenous people. Aborigines had different rights in different states and cannot access federally funded services like education and social security. Second section prevented Aborigines from being included in the national census.

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# Legislature 3

## (State Parliaments)

### State Legislative Power

#### Introduction

Australian States are self-governing polities. Each has its own constitution and institutions of government. State constitutions first began with Imperial enactments in the 19<sup>th</sup> century, and ended with State constitutions consolidated (except in WA) in a single Act of the State Parliament. This began when the New South Wales Act (1823) established a local Legislative Council appointed by the King on advice by British Secretary of State and controlled by the Governor. Imperial legislation later increased membership and powers of the council so that, for eg,

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