Class 1A: Introduction & Fundamentals

Literalism, Legalism and Judicial Choice (173-176; 176-181)

- **Literalism** – this refers to interpreting the constitution by its **ordinary meaning** (i.e. taking a literal interpretation). It does not permit for courts to use materials outside the Constitution in interpreting the text.
- **Legalism** – also refers to interpreting the Constitution in its ordinary meaning, **however makes use of authoritative legal materials other than the text of the Constitution.**
- **Isaacs J** in the **Engineers Case** took a **legalistic approach** i.e. advocating for literalism, within a context of traditional legal principles and techniques.
    - The court insisted that: "the one clear line of judicial inquiry as to the meaning of the Const. must to be read naturally in the light of the circumstances in which it was made, w/knowledge of the combined fabrics of the common law, and the statute law which precedes it'.
    - This is generally regarded as consummating a triumph of legalism, which is then perceived as having dominated the High Court's approach ever since.

Swearing in of Sir Owen Dixon as Chief Justice

- Dixon CJ (1952) in his swearing in as Chief Justice:
    - "The courts sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of the measure"
    - Famous extra-curial statement on judicial function in relation to federal-state conflicts - **"close adherence to legal reasoning is the only way to maintain the confidence of all parties...there is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism"**

RETIREMENT OF SIR GARFIELD BARWICK AS CHIEF JUSTICE (1981) 148 CLR V

- When we have a statute to interpret we have a text. The legislature has expressed itself in words and those words bind. They cannot be side stepped and Courts tasks is to say what those words mean and there are quite distinct and understandable rules by which courts interpret statutory provisions.
- In the case of the Constitution this is so but to an even greater degree, for there is no room to change the Constitution
- In deciding on the extent of Commonwealth power, "there seems to be a growing tendency to want to put a brand on a constitutional lawyer or a judge that he either favours the Commonwealth or he favours the state. But the truth is that he has no choice. His task is to decide on Commonwealth. power and after that the Constitution works itself out".

- Per **Engineers**, “You take the words, you decide on the Commonwealth power and you do not decide on the Commonwealth power looking over your shoulder as to what effect your decision will have on State power. The Constitution will take care of that”
- This is not to advance the Commonwealth power but it is only inducing it, bringing it out and making it plain
- The function of the court is to give to the words their full and fair meaning and leave the Constitution which places the residue w/the states to work itself out
- Emphasis on 'literalism', although he acknowledge 'the Court must assign a meaning to a language' (court must supply a meaning, not necessarily attached to the words) he also spoke as if the court must ' to the words their full and fair meaning' (meaning they already have)
- His reaffirmation of the refusal in **Engineers** to interpret words by ref to a presupposed context of powers reserved to the State suggest a more general rejection of reference to any interpretive context: the words, as they are, are to speak for themselves.
- This would be very different from the willingness of the joint judgment in the **Engineers** to consider not only the words of the Constitution but also the circumstances of its creation, including the common law, and statutory landscape
- Heydon J pointed out, it is wrong to attribute Barwick CJ or indeed any other High Court judge a strict **literal** approach to constitutional interpretation (that is, a focus on the text of the Constitution to the exclusion of all other considerations).

JD HEYDON, ‘THEORIES OF CONSTITUTIONAL INTERPRETATION: A TAXONOMY’

- What is literalism?
    - Not examining the words in isolation
    - Not examining the words in the context of the Const. as a whole, and nothing more
    - Not, a doctrine which there is only a very limited occasion to search for meaning outside of the text by reference to the wider history of the provisions concerned... (this does not exist)
- Example of literalism can be found in expressions by Barwick CJ, but to only concentrate on little verbal fragments is misleading
- Barwick CJ favoured reading the Constitution in the light of its history in order to ascertain the 1900 meaning. e.g.:
    - A-G (Victoria); Ex rel Black V Commonwealth (1981): "the meaning which 'establishing' in relation to religion bore in 1900 may need to be examined to ensure that the then current meaning is adopted
    - A-G (Cth); Ex rel McKinlay V Commonwealth (1975): "meaning of the Const. was to be decided 'having regard to the historical setting in which [it] was created... In the case of ambiguity, resort can be had to the history of the colonies
- Dixon CJ in Victoria v Commonwealth (Second Uniform Tax Case) (1957): the drafting history of s 96 in Australian History 'may explain why the terms in which it

was drafted have been found to contain possibilities not discoverable in the text as it emerged from the conventions.'

- To treat Dixon CJ as a literalist in the narrowest sense is difficult in view of his preparedness to detect implications in the Const: for implications can only be found in the context.
- It is also difficult given some of his judgments which reveal a deep historical understanding: e.g. use of word 'excise', or view that s 75 'completely informed by the history of provision' (Bank Nationalisation Case)
- **Engineer's** is criticised as embodying a rigid literal approach BUT more supports legalism not literalism because it accepted that the Constitution **has to be interpreted against the historical background and 'in light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the stature law which preceded it.'**
- Hence all extant approaches to interpretation in some degree depend on resort to a context which is wider than the words of the Const. even taken as a whole. It likely that has always been so.
- The additional aids to interpretation emphasised in **Engineers**, as qualifications to 'literalism' lie outside the Const. text, but they all involve reference to authoritative legal material and thus fall within Dixon's conception of legalism: court should display "a close adherence to legal reasoning" aka legal solutions rather than policy
- **Legalism** - interpretive or justificatory reasoning be limited to all sources located within a self-contained autonomous body of the law

Sir Anthony Mason, 'THE ROLE OF A CONSTITUTIONAL COURT IN A FEDERATION: A COMPARISON OF THE AUSTRALIAN AND THE US STATES EXPERIENCE'

- "unfortunately, it is **impossible to interpret any instrument**, let alone a constitution, **divorced from values**. To the extent that they are taken into account, they should be acknowledged and should be accepted community values rather than mere personal values"
- Danger that **strict and complete legalism** will be a clock for undisclosed and unidentified policy values as judges who are unaware of the original underlying values, subsequently apply that precedent in accordance w/the doctrine of stare decisis, those hidden values are reproduced in the new judgement - even though community values have changed
- Const is framed in general terms to accommodate the changing course of events, so that courts interpreting them must take account of community values

MURRAY GLEESON, 'JUDICIAL LEGITIMACY'

- Justices are appointed to interpret and apply the values inherent in the law
- Within the limits of the legal method they may disagree about those values but they have no right to base their decisions as to the validity of the legislation upon their personal approval or disapproval of the policy of legislation

The debate surrounding legalism	
For Legalism	**Against Legalism**
'Strict and complete legalism' is the only safe guide to judicial decision and to maintain confidence of all parties in Federal Conflicts: **Sir Owen Dixon** • the analytical techniques employed by the Court display a 'close adherence to **legal reasoning'**, this has been understood as a reliance on technical **legal solutions rather than consideration of policy** **"The function of the court is to give to the words their full and fair meaning and leave the Constitution which places the residue power with the states to work itself out": Sir Garfield Barwick** • The Constitution gives to the Cth certain powers, legislative powers. It describes those powers briefly in words by reference to subjects. It gives to the States the residue of power after the Cth power is defined and exercised. So, the problem for the **Court is always to decide on the extent of Cth power**. The Constitution decides the State power by providing it to have the residue. "The words of the Constitution set out the limits of the Commonwealth Power": **Sir Garfield Barwick**	However any 'strict' literal or legalist approach is impossible as all existing approaches resort somewhat to context outside words of Const: **JD Heydon** **JD Heydon** notes that in **Engineers case** while it did propel the 'literalist' approach it was ALSO accepted that the constitution had to be interpreted against the historical background. • Is used to be criticised as embodying a rigid literal approach. However, any 'strict' literal or legalist approach is impossible as all existing approaches resort somewhat to context outside words of Constitution: **JD Heydon**

Jumbunna Principle (188-189)

Jumbunna Coal Mine NL v Victorian Coal Miners' Association (1908) 6 CLR 309	
Facts	**Held**
The case concerned the validity of two sections of the CCA Act: 1) First, that s 55 which permitted registration of 'any association' consisting of not less than 100 employees or in connection with industries (hence permitted union registration in one state) 2) Secondly, s 58 recognized registered associations as corporate entities The case turned on the "incidental" power in s 51 but also turned in part on the approach to construing the word "industry" to include cooks, waiters etc. **The issue arose as in s 51(xxxv) the word "industrial disputes" would define the scope of the legislative power of the commonwealth.**	**O' Connor J:** • It was held that the Constitution is intended to be flexible and apply to varying circumstances which change with time. • **The term 'industrial dispute' should be interpreted broadly and overs every kind of dispute between master and workman in relation to any kind of labour** ○ "Where it becomes a question of construing words used in conferring a power of that kind [i.e. a power to deal with a wide-ranging social problem such as 'industrial disturbances'] on the Commonwealth Parliament, it must always be remembered that **we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must evolve"** • The court should always lean to the **broader interpretation** unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose. ○ Where there is uncertainty as to whether an expression used in the Constitution is intended to be in the narrow or broader sense, the court should lean towards the latter, unless *"there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose"*.

Dead Hand and Living Tree (190-216)

(A) Use of Historical Materials

- Movement towards federation & establishment of the Commonwealth was punctuated by the two intercolonial constitutional Conventions of the 1980s
- Conventions were pivotal in providing a forum for detailed debate and discussion about provisions of the Constitution Bill
- In **Tasmania v Commonwealth and Victoria (Drawbacks Case)** – court signalled it would not permit any reference to what was said in the Debates
- In **Drawbacks** case, **O'Connor J** explained his denial by saying that in this respect constitutional interpretation was the same as statutory interpretation

In **Drawbacks Case** the issue was whether historical materials e.g. the drafts of the Constitution could be used in interpreting the Constitution.

- the record of the Convention Debates to support particular interpretation of constitutional provisions were strongly rejected.
- HC allowed use of secondary material but not the primary of which it was relied on.

Tasmania v Commonwealth and Victoria (Drawbacks Case) (1904) 1 CLR 329	
Legal Issue	**Held**
Whether in interpretation if the: a) Drafts of the Constitution could be used (YES); **b) if the opinions of the drafters could be admitted (NO)**	HELD: **we can look at the previous drafts of the constitution to guide us in interpretation but not to the OPINIONS of the drafters** (rejects subjective intentionalism). Subjective intentionalism is looking at the opinion of the drafters of the Constitution. **Griffith CJ** The rules of construction are: 1) where the words are unambiguous, they should be construed as to their natural meaning. However, where ambiguity exists, the intention of the parliament must be taken into account. 2) "it is not up to a court to decide a question of government policy, except, so far as possible, that the policy may be apparent from or consistent with the language of the legislature. **Barton J** To ascertain the proper meaning of the language, we must have reference to the history of the law. **O'Connor J** "you may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it".

(B) The Intention of the Framers

The interpretation of Constitution should adhere to its "original intent" or "the original understanding of its text".

As demonstrated in Work Choices, an appreciation of the **intention of the framers that underpinned the movement towards federalism may inform – but cannot displace – the focus on the constitutional text (textual originalism)** through which that change was ultimately achieved

Arguments about Intentional Originalism	
Against Intentional Originalism	In favour of Intentional Originalism
Stanley Fish, "Intention Is All There is: A critical analysis of Aharon Barak's Purposive Interpretation in Law' (2008) 29 Cardozo Law Review 1109: • Intentional Originalism should not be used as Justice Scalia argues that what is written in the constitution and what the framers had in mind may have indeed been different – **courts must look as what is said, not what is intended**: Stanley Fish referring to Justice Scalia of the US Supreme Court • Also argued that by **trying to figure out the intention of the framers, courts engage in speculation that can lead them to pursuing unexpressed legislated intents**: Stanley Fish referring to Justice Scalia of the US Supreme Court • "Originalist textualism also asserts that because **words or signs…are conventionally correlated with meanings, the meanings they conventionally bear will be understood independently of any worry about an intender or an intention**": Stanley Fish referring to Justice Scalia of the US Supreme Court **New South Wales v Commonwealth (Work Choices Case) (2006) 229 CLR 1** • (Gleeson, Gummow, Hayne, Heydon, Crennan JJ) "To pursue the identification of what is said to be framers' intention, much more often that not, is to pursue a mirage. It is a **mirage** because the inquiry assumes that it is both possible and useful attempt to work out a single collective view about what now is a disputed question of power, but then **was not present to the minds of those who contributed to the debates** ○ A clear example of this with regards to the corporations power in the Constitution i.e. s 51(xx). Corporations law was still developing and it would be inappropriate to ascertain the subjective intention of the framers as it was still being debated.	Greg Craven: "Original Intent and the Australian Constitution – Coming Soon to a Court Near You?" (1990) 1 Public Law Review 166: • *"Words including the words of the constitution, are mere tools of communication to convey the intentions of those from whom they emanate"* • And naturally since words are an imperfect tool to discern intention, the imperfect words should not prevail over intention. • Words are the servants of intention, not the other way around. • The people selected to frame the Constitution were selected to convey their intentions surrounding the federal compact. • **The Constitution consists of nothing more than the words chosen to reflect these intentions and hence the courts ought to give effect to this intention.**

○ Also, the economic life and circumstances vastly differ between now and the time the Constitution was being framed: NSW v Commonwealth • Also **it would be limiting to look at the framers subjective intention** as there have	

(C) Textual Originalism and Evolution

- **Textual originalism seeks to look only at the constitutional text, and interpret the meaning of the constitution to the general understandings of the time** rather than discovering the subjective intentions of the authors
- This approach has been endorsed by JD Heydon who stated "**there is a need to read [the constitution] as a whole with a view to giving effect to the object and purpose its language expresses, to read it in the light of the historical circumstances surrounding its enactment, and to give it the meaning it then bore"**.
    - McHugh J a 'textual originalist' not an 'intentional originalist' "the search is always for the objective intention of the makers of the Constitution" Eastman v The Queen
- The relevant historical facts should be considered to reveal three things:
    1) **What** the framers of a Constitution **may be supposed to have known**.
    2) The **object of Australian Federation**
    3) The **mischief and defect** which the constitutional provision under examination was **remedying**

JD Heydon, 'Theories of Constitutional Intepretation: A Taxonomy' [2007]

- O'Connor J's construction of constitutional interpretation was such that discovering the meaning of the statute consisted of the 'search for the intention expressed in the statute itself'
    - Implicit in this emphasis is that once the meaning of the statute is determined, it remains constant i.e. same meaning in 1904 as 2004
- McHugh J in Theophanous:
    - 'The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture'
    - So far as this involves an inquiry into what the framers in fact took for granted or understood, it is a subjective inquiry which verges on an inquiry into actual intention - McHugh J denied legitimacy of this inquiry
    - Rather, the real inquiry is into what the framers may be supposed to have taken for granted or understood, or what must be taken to have been within their knowledge
- The current approach to statutory construction of the constitution is 'originalist' in the sense that it depends on construing a statute by reference to the concepts current at the time when it was enacted rather than those current at the time when it is construed

Eastman v The Queen (2000) 203 CLR 1	
Held	Details
Constitution should be interpreted broadly in general terms. This is because it is intended to apply to <u>varying conditions</u> as a developing community evolves. **Also affirmed the need to search for the objective intention of the framers.**	McHugh J: • **Opted for the textualism approach**. i.e. establish the meaning of the Constitution from the language. • This **allows the Courts to interpret the Constitution with the current understanding** Rejects the notion that a Constitution is a frozen instrument, rather it has the capacity to evolve to support changing circumstances. • The **traditional approach** to constitutional interpretation in Australia is **"textualism or semantic intentionalism"** (not literalism if literalism = interpreting by reference to its words in their natural sense) • "As many cases show, the **Court has frequently taken into account the consequences of particular interpretations** in determining the meaning of constitutional provisions, as well as the history and circumstances of their making" • **"Because the intention of the makers of the Constitution is one to be determined objectively, the present generation may see that the provisions of the Constitution have a meaning that escaped the *actual understandings or intentions* of the founders"** • "Our constitution is constructed in such a way that most of its concepts and purposes are stated at a sufficient level of abstraction or generality to enable it to be infused with the current understanding of those concepts" • Uses the example of **'industrial disputes'** – today it is to be construed very differently as opposed to how it would have been in 1900 and if it covers things that we regard today to fall into this category it is irrelevant to say the framers "had something else in mind.

<u>Incremental Accodmodation</u>

Incremental Accommodation **refers to interpreting the words and phrases in the Constitution** without reference to historical meanings and **purely in line with modern meanings.**

Arguments in Favour of Incremental Approach

- Often words in the constitution suggest that the framers anticipated developments in the future and worded the Constitution in a way for it to be interpreted in line with contemporary advancements.
- Examples include:
    - R v Brislan: the framers used <u>the words "other like services" in s 51(v)</u> because they had personal knowledge of scientific experiments in Europe, and therefore knew that some new communications technology in the nature of radio was imminent.