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Class 1A Introduction & Constitutional Interpretation

FedCon law concerns the interpretation of the Constitution to resolve disputes regarding the limit to its power. HCA determines if legislation falls within Commonwealth or State power → judicial interpretation of the provision becomes precedent if settled.

HCA decides an average of six constitutional cases a year. Very rarely does a new / novel cases of statutory interpretation of the Constitution come up as the controlling source of law is the previous precedent.

LEGALISM

• **Importance of Constitutional Interpretation:** Important for the validity of legislative + executive acts
  ○ Invalidating legislation contradicts the wishes of representatives that the people have elected
• **Meaning of Legalism:** Close adherence to legal reasoning
  ○ Avoidance of political or policy considerations
  ○ Reliance on authoritative legal sources
• Legalism does not require using only text, as it permits reference to:
  ○ History
  ○ Common law background
  ○ Established legal principles
• But all sources must remain within a self-contained legal framework
• Court prefers technical legal reasoning, NOT policy balancing
• **Owen Dixon**
  ○ Argued that the Court's role is strictly to interpret the constitutional description of power
  ○ Decide whether legislation falls within it
  ○ Court has no role in judging merits or policy of legislation
  ○ Advocated to STRICT + COMPLETE legalism as the only safeguards in federal conflicts
• **Barwick CJ**
  ○ Reaffirmed approach of Engineer's Case
  ○ Stated that the Court must:
    ▪ Decide the extent of Commonwealth power
    ▪ Not consider the effect on State Power
    ▪ Give constitutional words their full + fair meaning
  ○ Rejected labelling judges as "pro-commonwealth" or "pro-state"
  ○ Sometimes suggested that the words speak for themselves + also accepted that meaning may require historical examination
• **Dyson Heydon**
  ○ Argued that "strict literalism" is largely a myth as no judge interprets the Constitution in isolation from context or without historical inquiry
  ○ Even judges seen as "textualist", will refer to history, detect constitutional implications + use broader contextual reasoning
  ○ All approaches rely on context beyond bare text
• Even legal materials often require judges to –
  ○ Choose between competing interpretations
  ○ Use historical + contextual judgment
• **Judith Shklar**
  ○ Legalism is more a professional mindset than a strict theory
  ○ Treats law as a separate, self-contained system
  ○ Downplays the inevitable element of judicial choice
• Judges claim to apply to the law objectively but interpretation always involves discretion + choice, even within a legalistic framework
  ○ Lead to the question of how much judicial choice exists + whether legalism genuinely eliminates it
• Legalism as the dominant ideal → courts interpret law, not policy
• **Meaning of Literalism:** Primacy to literal meaning of words used rather than other legal materials
  ○ Issue is that the literal meaning of words changes all the time
  ○ Meaning of constitution would change all the time according to meaning of the word without formal amendment

ENGINEERS CASE

- Rejection of implied limits eg. implied immunity + reserved state powers
- **HELD:** Interpretation must read the Constitution according to its works with consideration to context it was drafted + surrounding context such as states / common law
- Rejected vague implied protections of State power
- TEXT - based interpretation, NOT pure literalism
- Shifted Constitutional interpretation towards textual + legal reasoning

AMERICAN LEGALISM

- Judges in US more openly seen as shaping legal + social policy → flexible use of precedent
- Roscoe Pound attacked "mechanical jurisprudence" (rigid rule application)
- **American Legal Realism:** Centred on judicial creativity, role of values in decision-making, limits of rule-based determinacy
- Judging is not automatic rule application as it involves choice + policy
- American legal realism exposed the indeterminacy within legal materials.

POUND'S THREE ELEMENTS OF LEGAL MATERIALS

Element	Description

Precept Element
 	
Substantive Materials
	Legal categories group together similar fact situations where once a case fits a category, the associated rules + principles apply
	• Operate like "pigeonholes" organising legal reasoning
	• Legal materials contain more than just rules –
	  ◦ Rules are clear, fixed directives for defined factual situations, aimed to reduce "hard case" but do not resolve them
	  ◦ Common in property, commercial + criminal law
	• **Principles –**
	  ◦ Broader, more abstract premises should be used when rules are unclear to create new ones, interpret old ones + resolve conflicts
	  ◦ Involve evaluative choice
	  ◦ Competing principles often exist where there is no rule to determine which to choose
	  ◦ Choosing between principles reflects value judgements
	• Flexible evaluative measures eg. reasonable person, due care → which require judgement about degree + context
	• The more courts rely on principles + standards, the more indeterminate law becomes

Technique Element Judicial Craftmanship	Traditional methods of interpreting + applying law, includes – • Doctrine of precedent • Methods of statutory interpretation • Preferences in remedies Important distinction is that precedent is NOT rule of principle but a method of reasoning with past decisions • Each legal system develops distinct habits of reasoning + characteristic approaches to statutes + precedents

Ideal Element !!
 	
Underlying Legal Values
	Judges operate with a background of inherited ideals about nature of society, justice + purpose of law
	• These ideal pictures shape how rules + principles are chosen / applied
	  ◦ Are also embedded within the legal tradition itself
	  ◦ Change gradually over time
	• Shifts from medieval hierarchy → classical liberal individualism → modern social justice ideals
	• Even when judges think they are applying law neutrally, underlying ideals influence outcomes

APPLICATION OF AMERICAN REALISM TO AUSTRALIA (JULIUS STONE)

- Argued that legal materials are inherently indeterminate as they contain:
  - Ambiguities
  - Competing principles
  - Contradictory starting points
- Judges must choose between alternatives
  - Where a judge chooses between two versions of the law, that choice cannot itself be dictated by law
  - Reflects judge's evaluative judgement
- Judges have to choose between competing legal possibilities

DECLINE OF STRICT LEGALISM (ANTHONY MASON)

- Argued it is impossible to interpret a constitution without values
- Strict + complete legalism can conceal unacknowledged policy choices
- If values influence interpretation, they should be acknowledged + reflect community values, NOT personal preferences
- Warned that legalism + stare decisis can entrench outdated values
- Hidden assumptions become repeated through precedent
- **Mason Court Era:** Often described as more candid + policy-aware
  - **Mabo v QLD:** Recognised native title in AU law
  - **Australian Capital Television v Commonwealth:** Recognised implied freedom of political communication
  - This era features greater openness about evaluative reasoning, using factor-based + balancing approaches
  - Departure from Dixon's claim that correct answers are simply deducible from precedent
- **Backlash + Return to Legalism:** Court of Mason faced strong public criticism
  - Being too activist
  - Overstepping constitutional boundaries
  - Subsequent courts reasserted legalism to protect institutional legitimacy
- **Murray Gleeson**
  - Defended legalism as essential to judicial legitimacy
  - Judges must stay within legal methodology
  - Avoid personal policy preferences
  - Judgement may be literalistic, but abandoning legal method undermines legitimacy

ONGOING DEBATE & TENSION

- **Tension –**
  - Legalism claims judges apply objective legal rules
  - Realism shows legal materials are open-ended + require choice
- **Competing Views –**
  - Legalist view is that judicial legitimacy depends on strict adherence to legal reasoning
    - Dixon, Gleeson
  - Realist view is that values are inevitable in constitutional interpretation
    - Mason
  - Candour about them strengthens, not weakens, legitimacy
- Can courts remain legitimate while openly acknowledging that constitutional interpretation inevitably involves value-based choice?

BROAD APPROACH TO CONSTITUTIONAL INTERPRETATION

Jumbunna Coal Mine v Victorian Coal Miners' Association

- HCA unanimously adopted a broad interpretive method
- Relied on reasoning similar in McCulloch v Maryland
  - Approach contrasted with stricter legalist or literalist methods associated later with the Engineers' Case
  - Constantly competing approached between strict textual + legalist vs broad + purposive + flexible
- **Constitutional Issue:** Validity of the Conciliation and Arbitration Act 1904 (Cth)
  - Challenged under s 51(xxxv) of the Constitution (power over interstate industrial disputes)
  - Main arguments raised –
    - Act allowed registration of unions whose members were confined to one State

        - Act recognised registered associations as corporate entities
    - HCA upheld the validity of the legislation in both respects
- Express constitutional powers included authority to make laws reasonably incidental to achieving their purpose
- **O'Connor J's Interpretive Method**
    - Addressed whether "industrial dispute" should be given a –
        - Narrow meaning → limited to manufacturing / production industries, or
        - Broader meaning → covering trades like cooks, waiters, hairdressers
    - His reasoning combined –
        - Literalism → examining the ordinary meaning of words
        - Historical usage → reviewing dictionary definitions + legislative practice in the 1890s
        - Purpose-based reasoning → considering the constitutional objective
    - Concluded that "industrial" had both narrow + broad meanings at federation
    - Nothing in the Constitution required the narrow meaning + broader meaning better fulfilled the constitutional purpose
    - Constitution is "broad + general" in its terms, intended to apply to changing social conditions (O'Connor)
    - If two meanings are possible → courts should lean towards the broader interpretation unless context clearly requires the narrower one
    - **Underlying Rationale:** Power was granted to remedy interstate industrial disturbances + should not be artificially confined in a way that defeats that purpose
- This reasoning has been frequently cited as authoritative
    - **R v Public Vehicles; Ex parte Australian National Airways:** Affirmed that Commonwealth powers under s 51 should be construed with "all the generality which the words used admit"
- Jumbunna approach emphasizes that Constitutions are framed in broad language + must be interpreted to accommodate social development
    - Courts should not unduly narrow express powers without strong textual reason
- This case supports broad, purposive, flexible interpretation of constitutional powers, standing in tension with rigid conceptions of literalism
- Constitutional language should be read expansively where consistent with structure + purpose

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<tr><th colspan="2">EVOLUTION OF THE USE OF HISTORICAL MATERIALS</th></tr>
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Should courts use historical debates to interpret the Constitution?</td><td>AU Constitution emerged from two major Conventions where detailed records of the debates were kept, regarding what framers discussed + why provisions were drafted as they were

Early Refusal: Initially, HCA strongly rejected reliance on Convention debates

Constitution is interpreted like a statute so intention must be derived from the text itself + judges cannot go beyond the instrument (O'Connor J) – Tasmania v Commonwealth & Victoria
Intention is gathered from the words, context within the document + surrounding historical circumstances, NOT from speeches made during drafting – Municipal Council of Sydney v Commonwealth

Forbidden Fruit Problem: Despite the ban, tensions persisted

Counsel + judges openly acknowledge the Convention Debates could clarify meaning but they were not permissible – Strickland v Rocla

Judges sometimes hinted at knowledge of debates
Some admitted (informally) to reading them

Situation became paradoxical as the Court allowed use of draft versions of the Constitution + secondary sources but NOT primary Convention Debates themselves

Turning Point: After Cole v Whitfield, Convention Debates would be used

HELD: Debates may be used to identify contemporary meaning of language, subject matter addressed + purpose of federation
CANNOT be used to substitute the subjective intention of framers
NOT for the actual words enacted
Contextual + objective use is permissible but enforcement of private intentions is impermissible

After 1988, the Court regularly used pre-federation history, convention debates + drafting materials

Convention debates used to identify the subject matter to which s 44(v) was directed; treated as legitimate contextual assistance – Re Day No 2

Historical sources now routinely assist in identifying purpose, textual meaning + constitutional structure

Legal history often influences outcomes
After Cole, approaches focus on purpose, values + contemporary meaning but inevitably rely on history to some extent

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<u>Tension</u>

Dead Hand View: Constitution’s meaning is fixed at federation

Historical materials help uncover original meaning
Authority of the founding compact is preserved

Living Tree View: Constitution is broad + adaptable

Meaning evolves with changing conditions
Historical context informs but does not rigidly control

<u>Summary</u>

Before 1988, Convention Debates were formally excluded where interpretation emphasised textual legalism → After Cole v Whitfield, history became a legitimate interpretive tool only to clarify meaning + purpose, NOT to enforce subjective intention. This shows development in AU’s constitutional interpretation as it moves from strict textual isolation towards a historically informed methodology without fully embracing rigid originalism

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Originalism

Debate between textual & intentional originalism

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Cole v Whitfield opened the door to a form of originalism in AU, but the Court endorses only textual originalism, not intentional originalism

Textual Originalism: Focuses on the meaning the constitutional words would have had in 1900

Objective inquiry into how the informed readers would have understood the text
Legitimate because it is carrying out democratic wishes
Words bind, not private intentions
Meaning is conventional + public
Looking for hidden intent risks judicial speculation
Court regard the ORIGINAL PUBLIC MEANING of the constitution

Intentional Originalism: Seeks the actual subjective intentions of the framers

Looks behind the text to what founders MEANT to achieve
Words are tools for conveying intention
If words imperfectly express intention, intention should prevail
Framer debates + ratification are relevant
Some argue that the Constitution is the framer’s work + ratified by the people so courts should give effect to the framer’s intentions

However, this approach assumes a single, identifiable collective intention exists → that it can guide modern disputes

Rejected by the HCA

Limits of Intentional Originalism: Convention debates are sparse + equivocal without establishing any collective, settled intention – The Work Choices Case

Isolating statements suggesting breadth or narrowness risks distorting the debate
Question must ultimately be answered by the constitutional text + interpreted according to accepted principles
Economic + legal role of corporation have radically changed since Federation → modern corporate structures not foreseen by framers
Impossible to attribute to the framers an intention about modern corporate regulation
Constitution cannot be frozen to 1890s economic realities
Dissent: Intention of framers + their understandings are relevant, so the convention debates are valuable evidence (Callinan J)

The lack of substantial debate about corporations power suggests it was not intended to be far-reaching but if it was contemplated, then it would have had attention
Constitution should not be interpreted in a way that expands federal power beyond what the founders contemplated
However, only generally consensual framers intention should matter

<u>Problems with Intentional Originalism</u>

There is no single collective intention as debates showed disagreement

Statements were often ambiguous / sparse
Delegates may not have contemplated modern issues

There is selective quotation (cherry picking) speeches where individual remarks may not reflect collective understanding
Popular ratification does not show precise legal meaning + debates / public understanding are difficult to understand (historical opacity)

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	• **Principle.** The categories of non-punitive, involuntary detention are not closed.
	  ◦ **Whether detention is punitive depends on whether it is reasonably capable of being seen as necessary for a legitimate non-punitive objective.**
	  ◦ If it can be so characterised, it does not attract Ch III.
	Kruger
	• Ordinance was directed at Aboriginal welfare where the Chief Protector duties included provision of food, shelter, medicine, education + protection
	• This welfare purpose, prima facie, precluded a finding that the detention was punitive
	  ◦ Court was not endorsing the Ordinance as acceptable by contemporary standards
	  ◦ The welfare framing of the Ordinance was just sufficient to pass the test of being non-punitive
	• Challenge therefore failed on thai ground

✦ CHU KHENG LIM V MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT & ETHNIC AFFAIRS (1992)	
Facts	**Migration Act 1958 (Cth)** • **Section 54L** required designated persons to be kept in custody until removed from Australia or granted an entry permit, capped at 273 days. • **Section 54N(2)** required re-detention even of those previously released by court order. **Plaintiffs** • Plaintiffs were non-citizen asylum seekers detained under Div 4B of the Migration Act 1958 (Cth).
Issue	Did ss 54L and 54N validly authorise executive detention of the plaintiffs, or did they infringe Ch III by vesting punitive detention power in the Executive without a court order?
Rule	**Involuntary Detention** • Involuntary detention by the Commonwealth is presumptively punitive and requires a Ch III court order. **Aliens** • For aliens, the s 51(xix) aliens power permits executive detention only as an incident of executive alien powers (exclusion, admission, processing, deportation). • The detention must be limited to what is reasonably capable of being seen as necessary for those purposes. If not so limited, it is punitive and contravenes Ch III. **Citizens (Obiter)** • If the provisions had applied to citizens, they would have been invalid. • The citizen immunity is much stronger; the exceptions are narrow.

Application	**Section 54L**
	• Custody until removal or grant of entry permit
	  ◦ Purposively linked to the processes of admission and deportation.
	  ◦ Properly characterised as an incident of executive alien power.
	  ◦ **Limited Detention.** The 273-day cap was significant in supporting the characterisation of detention as limited, not open-ended.
	Section 54N(2)
	• Re-detention of those previously released by courts
	  ◦ Potentially more problematic, but upheld because the re-detention still occurred in the context of pending removal/processing
	  ◦ Not as punishment.
	• The plaintiffs were aliens, so the stronger citizen immunity did not apply.

Outcome	Provisions upheld as valid laws of the Commonwealth. Plaintiffs' challenge failed.
Ratio	• Parliament may authorise executive detention of aliens without a court order • Provided detention is limited to what is **reasonably capable of being seen as necessary for deportation**, removal, or processing an entry permit. • Such detention takes its character from the executive power of which it is an **incident** and does not exercise Ch III judicial power. • Detention that exceeds this, whether open-ended, punitive, or disconnected from those executive functions — is invalid.

✦ PLAINTIFF M76/2013 V MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS & CITIZENSHIP

What is the High Court's current position on whether the Commonwealth can regulate agents of constitutional corporations (such as directors and employees)?

HCA accepts that s 51(xx) extends to regulating the conduct of those through whom a corporation acts, including directors and employees (Work Choices). Such regulation is valid where it forms part of a scheme governing the corporation's activities or business.

What is the High Court's current position on whether the Commonwealth can regulate the conduct of third parties towards corporations?

The Commonwealth may regulate third parties where their conduct affects or is capable of affecting the activities or business of constitutional corporations (e.g., Fontana Films; affirmed in Work Choices). However, there must be a real and substantial connection; mere reference to a corporation as a trigger is insufficient (Re Dingjan).

RACES POWER

Background Questions

What mention does the Constitution make of Aboriginal and Torres Strait Islander peoples?

The Constitution does not expressly mention them by name. Before 1967, the races power excluded "aboriginal race in any state" + s 127 excluded Aboriginal people from population countries → both were removed by the 1967 referendum. Today, they fall within the phrase "the people of any race" in the races power"

When does a person belong to 'the people of any race'?

HCAhas treated "race" as a broad, non-technical concept, encompassing descent and shared history, culture or identity (Tasmanian Dam). In practice, courts often use the **tripartite test** (descent, self-identification, community recognition) from Mabo, applied in Love. Race is therefore assessed by a mix of biological ancestry + social / cultural recognition

Can a law be made for some of the people of a race?

Yes, the HCA confirmed in Kartinyeri that the races power supports law directed at a sub-group of a race → the phrase "people of any race" does not require the law to apply to all members of that race

Can a law of general application be 'special'?

Yes, in the Native Title Case → the court said a law can be special if it confers a benefit or imposes a burden of special significance on a particular race. Even if a law operates more broadly, it may still be "special" where its differential operation affects a race in a distinctive way.

Is s 51(xxvi) limited to beneficial laws?

HCA has not definitively held that s 51(xxvi) is limited to beneficial laws. In Kartinyeri, Kirby J argued for a benefit-only interpretation, but other judges rejected or avoided that conclusion → leaving the issue unresolved. Current position is that the text does not clearly confine the power to beneficial laws, though strong judicial unease remains about adverse race-based legislation.

DEFENCE POWER

How is the defence power different from those we have considered so far? What is the test for characterisation under the power?

Defence power is different because it is PURPOSIVE, not a subject-matter power. Its scope expands + wanes depending on factual circumstances such as war, emergency or threats to national security

Test for characterisation is whether the law can **reasonably be seen as conducive to defence** or, in other formulations, whether it is **reasonably necessary, or reasonably appropriate and adapted, to a defence purpose**. The court looks at the law's purpose, operation, and the surrounding circumstances

What two aspects of the defence power are drawn by Fullagar J in the Australian Communist Party v Commonwealth (1951) 83 CLR 1 (Communist Party Case)?

(1) Primary aspect covers laws directly and immediately concerned with defence, such as enlistment, training, munitions, and prevention of obstruction to defence preparation

(2) Expanded operation of the power in times of war or national emergency allows laws on matters not ordinarily connected with defence, but only where the emergency brings them within the defence power as incidental to meeting that crisis

What important principle associated with the separation of powers and rule of law was established in the Communist Party Case?