

LAWS2150

Federal Constitutional Law

Comprehensive Course Notes

University of New South Wales | Faculty of Law

Constitutional Interpretation | Legislative Powers | Implied Freedoms | Judicial Power

Topic 1A: Introduction and Constitutional Interpretation

Overview

Federal Constitutional Law is fundamentally about power: what the Commonwealth has the power to do, and what methodologies and theories the High Court uses to determine the limits of that power. At its heart it is a statutory interpretation subject, though the Constitution is no ordinary statute. It is the foundation stone of a legal and political system, and its interpretation interacts with the life of the nation in complex ways, both influencing and being influenced by federal and state politics.

All Commonwealth laws must be characterised as 'with respect to' at least one head of power. The division of legislative power is effected by designating enumerated powers to the Commonwealth Parliament in ss 51, 52 and 122, leaving residual power to the States under s 107. Section 109 provides that where a valid Commonwealth law conflicts with a State law, the Commonwealth law prevails.

Methods of Constitutional Interpretation

Method	Description and Key Features
Literalism	The literal or plain meaning of the words of the Constitution. Cannot be used alone because the literal meaning of words changes over time. No judge advocates pure literalism (per Heydon, 'Theories of Constitutional Interpretation: A Taxonomy' (2007)).
Textual Originalism	What did the text mean at the time it was drafted (1900)? Allows reference to historical materials including Convention Debates. Distinction between connotation (essential meaning, fixed) and denotation (reference, changes over time). The connotation of a term like 'vehicle' is fixed; its denotation expands to cover new forms.
Intentional Originalism	What did the framers of the Constitution intend the provision to mean? Allows reference to debates and drafting history to ascertain the founders' subjective intentions. Criticised as difficult to apply given divergent intentions.
Dynamic / Purposive	The Constitution is an 'evolving project', a 'living tree'. It should be interpreted in a way that carries out its purposes and fulfils values consistent with the present. Allows text to apply to circumstances unforeseen in 1900.
Legalism	Constitutional interpretation is done according to pre-determined statutory interpretation methods that prevent judges' personal values from influencing outcomes. Provides a justification for striking down democratically enacted legislation by reference to objective legal principles rather than judicial preferences.

The Same-Sex Marriage Case (*Commonwealth v Australian Capital Territory* (2013) 250 CLR 441)

The High Court considered the meaning of 'marriage' in s 51(xxi) of the Constitution. The question was whether the constitutional meaning of 'marriage' had changed to include same-sex marriages, or whether it retained its 1900 meaning as exclusively heterosexual. The Court declined to adopt a single theory of constitutional interpretation. It characterised 'marriage' as referring to a 'topic of juristic classification' with a changing meaning over time, but concluded that it still maintains an 'essential meaning': a 'consensual union formed between natural persons in accordance with legally prescribed requirements'. This allowed the Commonwealth to legislate for same-sex marriage, while retaining the requirement that marriage be between natural persons. The approach is a mixture of originalist (essential meaning) and purposive (changing denotation) interpretation.

Literalism and Legalism

Literalism means giving words their literal meaning, but this cannot be used in isolation as the literal meaning of words changes. Sir Owen Dixon's famous statement (upon taking the oath as Chief Justice, 1952) cemented legalism as a dominant ideology: 'It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.'

Dixon's legalism followed a period of political turmoil for the Court, including the Communist Party Case (1951) and the Bank Nationalisation Case (1948). Legalism provided a justification for the Court striking down democratically enacted legislation by reference to legal principles rather than political preferences. It maintained the fiction that law and politics were strictly divided.

Sir Anthony Mason's Critiques of Legalism

During his tenure as Chief Justice (1987-1995), Mason articulated critiques of strict legalism:

- Legal interpretation is always informed by values. The pretence that it is not produces hidden value choices rather than eliminating them.
- It is better for judges to articulate and defend the values underlying their decisions than to hide behind the mask of legalism.
- The Mason Court introduced new doctrines including the implied freedom of political communication, Mabo and Dietrich, which attracted criticism as 'judicial activism'.
- The doctrines of the Mason Court have largely survived, but have been given a more legalistic flavour. For example, the implied freedom of political communication was initially justified by reference to values; it has been reformulated as derived from the constitutional text and structure.

Current status: the debate has moved somewhat from legalism versus activism. The focus today is on what the text and context of the Constitution say about values. Strident defences of legalism are less common, but the constitutional text remains the starting point for all constitutional analysis.

Structure of the Australian Constitution

Provision	Content
Section 51	Commonwealth Parliament's concurrent legislative powers: laws for the peace, order and good government of the Commonwealth with respect to listed matters. Most important head of Commonwealth legislative power.
Section 52	Exclusive Commonwealth legislative powers (where States cannot legislate): seat of government; Commonwealth public service; matters declared by Constitution to be within exclusive power.
Section 90	Exclusive Commonwealth power over customs, excise, and bounties. States may not impose such duties once Commonwealth exercises the power.
Section 96	Commonwealth may grant financial assistance to States on 'such terms and conditions as the Parliament thinks fit'. Very broad grants power.
Section 107	States retain all powers not exclusively conferred on the Commonwealth or withdrawn from States. This preserves the 'plenary' or residual legislative power of the States.
Section 109	When a Commonwealth law is inconsistent with a State law, the Commonwealth law prevails and the State law is invalid to the extent of the inconsistency.
Chapter III	The federal judicature: the separation of judicial power from executive and legislative power. Source of the Boilermakers principle, Kable principle, and Lim principle.

Section 128

The procedure for altering the Constitution: approval by absolute majority in both Houses, then referendum requiring national majority plus majority in at least four of the six states.

Topic 1B: The Engineers Case and Legalism

Background: Two Pre-Engineers Doctrines

(1) The Doctrine of Implied Immunity of Instrumentalities

Established in *D'Emden v Pedder* (1904) 1 CLR 91, this doctrine held that the Commonwealth and States were each sovereign entities within their respective spheres. As a result, Commonwealth legislation did not bind State government officials and vice versa, unless the Constitution expressly provided otherwise.

D'Emden v Pedder (1904) 1 CLR 91

Henry D'Emden, Commonwealth Deputy Postmaster-General for Tasmania, gave a receipt for his salary without paying Tasmanian stamp duty. Griffith CJ (for the Court) held that the State law could not apply because Commonwealth officers were immune from State laws. The Court held that 'each [Commonwealth and State] is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution.' A sovereign body cannot be subjected to the laws of an equal. The Commonwealth officer was not bound by Tasmanian stamp duty laws.

(2) The Reserved State Powers Doctrine

Under s 107, States have plenary powers to legislate on any topic, with exception of the few powers exclusive to the Commonwealth (e.g. ss 52 and 90). Under the reserved powers doctrine, the Commonwealth's concurrent powers in s 51 were to be narrowly interpreted so as not to intrude onto the States' reserved or residual legislative powers. Restrictions in one head of power were used to read down the ambit of other heads of power.

R v Barger (1908) 6 CLR 41

Challenge to a law exempting goods from excise duty if manufactured with fair labour conditions. The High Court found that the 'true nature and character' of the law was not taxation (s 51(ii)) but a law regulating labour conditions. Because the Constitution gave the Commonwealth power to regulate only industrial disputes extending beyond State limits (s 51(xxxv)), the regulation of labour disputes within states was reserved to the States. This is the reserved powers doctrine in operation: an express limit on one head of power (s 51(xxxv)) was used to restrict another head (s 51(ii)).

The Engineers Case (1920)

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case) (1920) 28 CLR 129

Facts: An industrial award made under Commonwealth industrial relations legislation purported to bind State sawmills in Western Australia. The question was whether this was constitutionally valid.

Joint judgment (Isaacs, Rich and Starke JJ): The Court found it necessary to 'turn its earnest attention to the provisions of the Constitution itself. That instrument is the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament, and it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed.'

Held: (1) The doctrine of implied immunities of instrumentalities was abolished. (2) The reserved state powers doctrine was abolished. (3) The Constitution is to be interpreted as an ordinary statute, applying the 'Golden Rule' of statutory construction. (4) Nothing in s 51(xxxv) suggests that Commonwealth industrial relations powers cannot bind State instrumentalities. (5) Section 107 does

not reserve any power from the Commonwealth that 'falls fairly within the explicit terms of an express grant in s 51'.

Consequences of Engineers

Immediate consequences:

- The doctrines of implied immunity of instrumentalities and reserved state powers were both abolished.
- Latham (later Chief Justice) criticised the decision as adopting 'the crabbed English rules of statutory interpretation, which are one of the sorriest features of English law, and are particularly unsuited to the interpretation of a rigid constitution'. He suggested the 'real ground' of Engineers was the political acceptance of centralised federal power.

Long-term consequences:

- Together with the Jumbunna principle, Engineers produced a progressive expansion of the ambit of the Commonwealth's legislative powers under almost every head of power.
- The decision has generally been accepted by all sides of politics because it allows whichever party is in government federally to implement its policies through broad federal legislative power.
- Engineers ushered in a new era of legalism: constitutional interpretation according to pre-determined statutory interpretation methods that prevent judges' personal values from influencing outcomes.

The Jumbunna Principle

Jumbunna Coal Mine v Victorian Coal Miners' Association (1908) 6 CLR 309

The Court stated: '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 involve.' This established a presumption towards broader interpretation of Commonwealth legislative powers unless there is something in the context or the rest of the Constitution indicating that the narrower interpretation will best carry out the Constitution's object and purpose.

Significance: combined with Engineers, the Jumbunna principle means that Commonwealth legislative powers are to be interpreted broadly unless there is a specific reason to read them more narrowly. This has driven the progressive expansion of Commonwealth power over time.

Legalism: The Dominant Ideology

The Engineers case, though it did not use the word, ushered in a new era of legalism. Constitutional interpretation is done according to pre-determined statutory interpretation methods that:

- Prevent judges' personal values from influencing outcomes (or are said to do so).
- Provide a justification for the High Court striking down democratically adopted legislation: the Court is not making political choices but applying neutral legal principles.
- Maintain the appearance that law and politics are strictly divided.

Sir Owen Dixon's speech at his swearing in as Chief Justice (1952) cemented legalism as a dominant ideology. This followed the political turmoil of the Communist Party Case (1951) where the Court struck down the government's attempt to ban the Communist Party, and the Bank Nationalisation Case (1948). Dixon's legalism was partly a response to critics who saw the Court as insufficiently deferential to democratic outcomes.