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The Constitution acts to unite the colonies by creating a new level of government – the Commonwealth. It then goes on to legislate about the Commonwealth and not so much the States.

- It restrains the powers of the 3 arms of government – executive, legislature and judiciary.

Section 51 is the core provision which sets out what the heads of power can legislate on.

- For example, the Commonwealth does not have the legislative power to make policies on health, education etc. The Commonwealth however, continually do this. They do this by using s 96 and gaining a ‘grant’ from the States. It is a bargain between the Commonwealth and the State in which the Commonwealth provides financial assistance to the States in exchange to legislate for a particular area.

Three key concepts that underpin our Constitution which may give rise to limitations on Commonwealth power:

- Federalism – two tiers of government in which the power is divided between the Commonwealth and the States
- Representative government – The people elect their representatives. The executive government is answerable to the Parliament and therefore the electors as well.
- Separation of judicial power – courts are entirely independent from the executive government and legislature. Judicial power can only be vested in a court as per under Chapter 3 of the Constitution (s 71) and a court as per Chapter 3 of the Constitution can only be invested with judicial power. This is to prevent the exercise of arbitrary or tyrannical power

SIGNIFICANCE OF PAST JUDICIAL INTERPRETATIONS OF THE CONSTITUTION AS A CONSTRAINT UPON JUDICIAL CHOICE

- The Constitution is semi-permanent in the sense that it is very difficult and rarely amended - this is different from normal statute since they can just be repealed. This means that it is up to the High Court to interpret the Act to be appropriate to contemporary society.
- In interpretation, there is a balance between keeping the Constitution relevant to a contemporary society and maintaining fidelity to the original intention of the creators.
- The Constitution is the Grundnorm – the fundamental law.

PRECEDENT (AND OVERRULING)

The doctrine of precedent imports an expectation that the High Court will normally follow its own prior decisions. However, the High Court is at the apex of the court structure which means that:

- all other Australian State and federal courts are bound by the law as encountered by the High Court
- it entails no necessary logical conclusion as to whether, or when, it should regard itself as bound by its own decisions. i.e. it can simply overrule itself.

REQUIREMENT TO OVERRULE

- CJ French: ‘You don’t need to find an error to overturn a previous decision. The taxonomy of truth and error is not required. There are actually lots of room for different interpretation for the same section. There are different points of Constitutional interpretation.’
- High Court not bound by its own decisions: Isaacs J in Engine-Driver, “duty is to the law not precedent.”
- This is of course not disregarding that precedent has strong influence on the determination of matters and approached.

To overrule, consider:

- Stare Decisis: HC will usually not depart from previous decisions.
  - Leslie Zines in The High Court and the Constitution, explains that stare decisis has less force in Constitutional law than other laws because Pmt cannot rectify decisions with legislation.
  - Some judges also view that the constitution should adapt to changing circumstances.
- Challenges to the HC must be granted leave before it is heard: Evda Nominees.
  - Doubts from Deane J in Evda (dissenting): wrong to follow wrong decisions.
  - And Kirby J in Re Colina; Exparte Torney: judicial obligation to dispose of a controversy before the court. No rule of practice can shackle this judicial obligation.
Once leave is given, **4 criteria in Cth v Hospital Contribution Fund by Gibbs J applied in John v FCT** [Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ]:

1. The earlier decision did not rest upon a principle carefully worked out in a significant succession of cases.
2. Difference between the reasons of the justices constituting the majority in one of the earlier decisions.
3. The earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience.
4. The earlier decisions had not been independently acted on in a manner which militated against reconsideration.

**No well-defined rule:** French CJ in *Wurridjal v Cth.* It is an evaluation of factors for and against ruling. Not an application of manifestly or clearly wrong. Not about ‘wrongness’ because in Constitutional interpretation, it is often about constructional choices.

- A ‘conservative cautionary approach’.

Justices have sometimes refused to depart from precedent even though it conflicts with their perceptions of what the Constitution requires.

- Deane and Gaudron JJ adhered to their earlier views in *Steven v Head* (overruled) but ruled in the opposite.
  - Gibbs and Stephen JJ in the *Second Territory Senators Case* upheld the *First* although contrary to their view.
- On the other hand, they have sometimes determined that they must adhere to their duty to interpret the Constitution → continually dissent:

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**READING DOWN AND SEVERENCE**

Even when a particular statutory provision, or a particular application of such a provision, is held to be unconstitutional, that does not necessarily mean that the entire statute will be struck down.

- Where a particular application of a provision is invalid, the High Court is often able to preserve the validity of the provision in its other applications by ‘**reading it down**’ so as not to apply where it cannot validity do so, while still having a meaningful operation in other cases that are within power.
- Where reading down is not possible, a court may still ‘**sever**’, that is, cut away, the offending parts of an Act, leaving the remainder with a valid operation. However, it must be noted that the court’s role is not to write laws (separation of powers), but simply to interpret them.

To provide consistency at the Commonwealth level, s **15A** of the *Acts Interpretation Act 1901 (Cth)* provides that:

- Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

Similar State provisions were also enacted in their respective State legislation.

Effectiveness can be limited – if the legislation would have to be fully rearranged and beyond the legitimate exercise of severance and reading down: *Stickland v Rocla Concrete Pipes.*

- If severance would render the legislation to make no sense, it is invalid.
- If there are various interpretations, no reading down.

**Examples:**

- ‘Person’ did not include judge in *Wilson v Minister for ATSI Affairs* so it would be constitutional.
- In *Russell v Russell*, reading down prevented legislation from being struck down.
Changing trends from the original bench to the bench today.

- Higgins and Isaacs dissent ultimately becoming majority.
  - A persistent dissent is different to that of the British: RTE Lantham in *The Law and The Cth.*
- ‘Reserved state powers’ out-dated and incorrect approach to Australian Constitutional Interpretation.
- It is no longer about ‘federal vision’ but interpreting the written words as a special statute. New judges are not barristers who were involved in the drafting of the Constitution.
- Not worried about abuse: entrenched Diceyanist value of Responsible Government.
  - In *Retirement of Dir Garfield Barwick as Cj*, Barwick expressed that it is not about looking over the shoulder about what the effect of interpretation is on State powers.
    - Give the words its full and fair meaning.
    - Words are read naturally and in light of the circumstances it was made.

**THE DIVISION OF LEGISLATIVE POWER**

The Australian Constitution assigns to the Commonwealth Parliament a specific list of powers relating to a range of subjects and purposes. Powers thus not assigned are left to be exercised by the States.

- Thus, it is to the States that the unspecified fund of legislative power or ‘residual’ powers, is left, and declared by s 107 of the Constitution to ‘continue’.

However, the general arrangement is one of **concurrent powers**: that is, even in an area where the Commonwealth has a clear grant of law-making power, the State Parliaments will still normally have power in that area too.

It is because of this assumption of concurrent law-making power that the possibility arises of conflict between State and Commonwealth laws. This possibility is acknowledged by s 109 of the Constitution which provides that in the case of conflict, the Commonwealth law shall prevail.

- There are exceptions to concurrent power in the case where the Constitution provides the Commonwealth exclusive law-making power.

The effect of the Constitution was to originally limit Commonwealth power.

- There is only a very short exclusive list in s 51 that lists what the Commonwealth has power over which means that the States get residue power.
- In Canada, the situation is reversed. The Canadian Constitution lists powers for both levels of government and the residue is left to the Commonwealth. The Australian Constitution was drafted differently because the Australian states wanted to give away as little power as possible to the Commonwealth in fear that they would be vested with too much power.
- Although the framers intended s 51 to limit the Commonwealth to the list of powers and for the States get the rest, this effect was not achieved. The issue with residue powers is that it is the left-over and cannot be expanded. It is instead, reactive to the express powers vested in the Commonwealth. As a result, courts can only interpret and hence grow and expand the powers in s 51 and cannot do the same with the residual powers of the States.

**Pre-Engineers**

**IMPLIED IMMUNITY OF INSUTRMENTALITIES**

The ‘implied immunities’ doctrine asserted that the two levels of government operating in the same geographical territory must normally be immune from each other’s laws. This was an idea which was not provided in the Constitution, but rather thought to be necessarily implied in the very idea of federalism.

- In *D’Emden v Pedder*, Giffith Cj: each power (Cth and State) is sovereign, subject only to the restrictions of the Constitution. Drawn from the US case in *McCulloch v Maryland*.
- In *Webb v Outrim*, the PC decided that this implied immunity was wrong. The HC in *Baxter* held that PC was speaking out of jurisdiction and not binding. Therefore, implied immunities was reinstated.
- In *Railway Servants Case*, it was held to work both ways. Both were immune from each other’s law.

**RESERVED STATE POWERS**
The ‘reserved State powers’ doctrine is the idea that the Constitution had impliedly ‘reserved’ to the States their traditional areas of law-making power, and hence the grants of law-making power to the Commonwealth must be narrowly construed so as not to encroach on these traditional powers of the States. I.e. once a power was reserved for the State, the Commonwealth could not exercise this power.

- Commonwealth express power read narrowly to preserve state powers.
- Argument in Peterswald v Bartley and furthered in R v Barger that it was clear that power must be vested somewhere. If it was in the State’s it cannot be in the Cth’s.
  - Power to impose excise was in Cth. However, the court characterised this as a power to regulate the industry and conditions of manufacturing agricultural equipment.
  - Higgins and Isaacs JJ (dissenting): this approach looked at what was residual first then what remains is for the Cth. It should be express then residual.

**REJECTION OF THE IMPLIED DOCTRINES OF THE CONSTITUTION**

The Engineers Case was the culmination of a steady weakening of both implied doctrines over the preceding years.

**THE ENGINEERS CASE (1920)** → Give the words of the grants of the power in the Constitution their plain and ordinary meaning and don’t read them in an artificially restrained way as to protect some perceived reserved power for the States.

- Start with the text of the Constitution and not the theory of federalism, politics or political economy
- Constitution not to be interpreted using theories to control, modify or organise the meaning of the Constitution unless they can be deduced from the structure of the Constitution
  - Court held that the States were not focusing on the text of the Constitution. Rather, they were making implications which were ‘[145] formed on a vague, individual conception of the spirit of the compact’ (necessary due to their political views) and this is invalid.
- The correct approach to interpreting the Constitution is to ‘[152] read it naturally in light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute which preceded it’
- Put simply, when interpreting the Constitution, courts will:
  - read the constitution based on its plain, ordinary and natural meaning and
  - take into consideration the legal context, that is, the common law and statute
- If the Cth uses its power to abuse the states, the court held that it would not intervene. The courts will read the constitution as it was written by its ordinary meaning but it will not balance the Cth and state powers and will not constrain power.
  - The solution that the courts provided for this was the concept of responsible government – that the representatives are voted in and if they are abusing their power, they will simply be voted out. Governments are held to account through the parliamentary process and the democratic system. It is not the court’s role to deal with this.
- In cases of conflict between Cth and States, supremacy goes to the Cth due to s 109 (inconsistency).
- Triumph of legalism – sticking to the legal words. Literalism in the context of the legal principles.

The Engineers Case does NOT say that you can never make implications from the Constitution. Rather, the court was saying that the basis of these implications must be made from the text and structure of the constitution, not broad based implications based on political necessity.

Gaegler (2009): The idea of Federation is not based on distrust; the purpose was to empower individuals by giving them a double democracy. We are constituents of the government of NSW and of the Cth. This is an enhancing effect.

- The court will only intervene when the mechanisms of accountability are under threat by government (e.g voting laws)

**THE JUMBUNNA PRINCIPLE**

The Jumbunna principle provides that we should favour a broad interpretation rather than a narrower interpretation when construing the Constitution.
CASE: Jumbunna Coal Min NL (1908)

*Jumbunna* principle: The court should always lean to the **broader interpretation** unless:

1. The use of the word in its wider sense offends against any **prohibition** of the Constitution, or is it **inconsistent** with any of its provisions...

   - The Constitution is meant to evolve and endure changes in society. It is something that should be accommodating to development rather than exclude them.

2. 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.

   - O’Connor J: Where it becomes a question of construing words used in conferring a power of that kind 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 involve. For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, *the Court should, in my opinion, 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.*

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**Post Engineers, Jumbunna.**

- **Plain and ordinary meaning**
  - Express grants in s 51 can only expand as more things come under express over time but residual can only decline. Canadian Constitution – States have express and their powers grew.
  - Especially due to interactions of s 109 (inconsistency)
  - Read as a statute therefore, broad interpretation unless there is something else limiting it.

- **Some powers are to be determined through its purpose and proportionality.**

- **It is not that judges cannot import implications. Just not vague aspirations of how the country should work. It must be anchored somewhere in the Constitution.**
  - Existing implications from Dicey – responsible government, rule of law.
  - Other existing implications – separation of powers.

- **Gageler in Foundations of Australian Federalism and the Role of Judicial Review – responsible government is the accounting mechanism. Australia has become ONE nation and celebrates popular sovereignty.**

- **Windeyer J in Payroll Tax Case: Australian people have become one. Federalism was sought after and Cth supremacy is not an issue.**

- **Engineers is accepted and successful because of the role of the Constitution to create a whole nation: RTE Lantham, The Law and the Cth.**

  - Judges are unelected officials. Cannot be said that they truly reflect community values and needs.

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3 – **The High Court and Constitutional Interpretation B**

- **Literalism** is the interpreting of words in their plan, and ordinary meaning in a strict sense.

- **Legalism** is interpreting the words in the context of common law in general and statute (legal context). It is the acknowledgement that we are interpreting a statute and not just words in any other document.

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**LITERALISM AND LEGALISM**

The **Engineers Case** is generally regarded as consummating a triumph of **legalism**, which is then perceived as having dominated the High Court’s approach ever since.

- Issac J stressed he was advocating legalism within a context of traditional legal principles and techniques, not pure literalism.
  - Use of the common law precedents to aid in interpretation – usage of authorities, previous judicial opinion etc.
  - Technical terms of art – usage of the common law to aid in determining what that word meant at the time

- Legalism still relies on the text but allows for looking at other materials in the case of ambiguity

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1. **SWEARING IN OF DIXON CJ (1952):** → advocates legalism
• “There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.”

2. RETIREMENT OF SIR GARFIELD BARWICK CJ (1981): \(\rightarrow\) literalistic approach to interpretation

• “There is no room for the Court to change the Constitution. When the Court has to decide what the Constitution means, it has to assign a meaning to language...(The States are given residue power,) so the problem for the Court always, is to decide on the extent of Commonwealth power.”
• “Because attention is focused on the Commonwealth power, the tendency is to think that the Court is advancing Commonwealth power, whereas in fact, 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 with the states to work itself out.” (Engineers Case)

**JD HEYDON, “THEORIES OF CONSTITUTIONAL INTERPRETATION: TAXONOMY” (2007) \(\rightarrow\) Rejects the Courts use of literalism but also provides that legalism is not complete.**

- **Literalism is a myth and no judges have ever advocated or practiced it.**
  - ‘If by ‘literalism’ is meant examining the words in isolation, no-one advocates it. If by ‘literalism’ is meant by examining the words in the context of the Constitution as a whole, and nothing more, no-one advocates it.’
  - “All extant approaches to interpretation in some degree depend on resort to a context which is wider than the words of the Constitution, even taken as a whole.”
- “Legalism” does not insist that interpretive or justificatory reasoning be limited to any one source, but only that all its sources be located within a self-contained autonomous body of law.
  - The problem with legalism is that is suggests that there is no judicial choice happening where in reality, there is.
  - This is because the legal authoritative materials usually result in conflicting views which need to be decided upon by judges. The law does not decide on its own.

AR BLACKSHIELD, ‘THE LAW’ (1981) \(\rightarrow\) criticism of legalism

A “rule”, in Pound’s usage, is “a definite detailed provision” which prescribes “a fixed and definite result for a fixed and definite situation of fact”.

When there is an inconsistency in rules, we look towards:

1. **Principles**: formulated at a higher level of generality than rules. In formulating a principle, a court lays down a sweeping generalisation as an authoritative premise for judicial and juristic reasoning where rules of law are wanting or inapplicable or inconvenient.
2. **Conceptions**: shorthand “counters” which lump together all fact situations of a common type, along with the entire bundle of rules, principles and legal consequences pertaining to fact situations of that type.
3. **Standards**: measures of conduct that are embedded in rules and principles and requiring an evaluation of the facts at issue.
4. **Ideals**: a body of traditional or received ideals as to the nature of politically organised society and the purpose of the legal ordering of human relations, and hence as to what legal precepts should obtain, what the content of precepts should be, and how they should be applied.

Legal materials will be interpreted differently by different minds. The ‘ideal element’ described by Pound circumscribes the interpretive role of the judges. To think of the authoritative legal materials as merely restrictive on what judges can do is to ‘settle for ‘an ideal picture of the legal order’ which is simply illusory’.

- Contemporary theories of constitutional interpretation reject the simplistic idea that the pre-existing body of authoritative legal materials contains a uniquely predetermined ‘right answer’ to any legal problem, and that the task of the judge is to ascertain this by an essentially mechanical process.

**JUDICIAL CHOICE**

Authoritative legal materials are an inexhaustible source of rhetorical and interpretational potential which necessitates choice.
The fact that there are appellant courts is evidence that the law is not self-decisive. Also, the fact that there are a bench of judges rather than just one.

There are two different categories of judicial choice:

- **Intra-systemic:** judges philosophy
- **Extra-systemic:** The actual judge affects the interpretation as they exercise choice. Broadly, there are 2 approaches:
  1. Finding the ‘right’ answer despite precedent
  2. Deciding the ‘wrong’ answer in agreement with precedent in order to establish certainty in the law

- John Austin in *Lectures on Jurisprudence:* judicial choice is present as Common Law is not miraculous but judge made law.
  - (But due to Pmt sovereignty), any doubt about the legitimacy of judge made law can be overcome by appointment process reflecting the interests of the community at large and statutes > CL.

  - Even though there is written and judge made law, there is only effectively, judge made law as they interpret the written laws too.
  - Quoting Bishop Hoadly: “whoever hath an absolute authority to interpret any written or spoken laws… is truly the law giver to all intents and purposes, and not the person who first wrote or spoke them.”

- When there is choice, it is at the discretion of the judge. Legal doctrines cannot always solve a problem when faced by choice. Therefore, they may be categories of illusory reference; Julius Stone.

- In *Principled Decision Making and the SC,* Martin Golding,
  - Courts are expected to be principled in the exercise of discretion. It approximates moral decision making.
  - Most involve an element of personal choice and thinking consciously about when or whether or how far or in what circumstances and justification to be used – more thoughtful contributions develop guidelines and criteria to help judges think.

**JUDICIAL ACTIVISM**

- Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law.
- Robert French (2008): ‘Whether ‘activism’ is occurring depends on how much legitimate scope for judicial choice a person is prepared to accord to the courts.’
  - Much discussion of ‘judicial activism’ is really a discussion about separation of legislative, executive and judicial power and the reciprocal restraints that accompany that separation.
- When there is a choice between self-restraint and activism, it is often legitimised through creating criteria otherwise eschewed.
  - Proceduralism – activism cannot be legitimately used for the service of substantive social and political values but can be used to defend those procedures – yet some of those values cannot easily be distinguished.

**ORIGINALISM vs PROCEDURALISM**

**Originalism** is a doctrine that seeks to find the ‘original intention’ of the framers by accessing the original record.

- Criticism is that the original intention may not be historically recoverable and that it sometimes masks a conservative political agenda.
- Originalism was not used in Australia because the High Court did not allow the reliance on the convention debates for a long while.
  - This however, changed in *Cole v Whitfield* where the High Court allowed the use of historical documents (convention debates) regarding the drafting of the Constitution
  - The subjective intentions of the framers in the convention debates were not used in interpretation, but it can explain the language that was used. It could give us an understanding of the subjective words that were used in the 1900s
Proceduralism is the argument that in a democracy, judicial activism cannot legitimately be deployed in the service of substantive social and political values, but can legitimately be deployed in defence of the social and political procedures by which our conflicts over substantive values are managed.

- For example, Gaegeler (1987) has referred to [189] trust of the political process and judicial deference to legislative will’ as being ‘wider implications of responsible government’.
  - He also argued that ‘[152] political accountability provides the ordinary constitutional means of constraining governmental power’.
- United States v Carolene Products Co (1938) is a foreign source for this view.
- The objection to proceduralism is that it’s essential distinction between substantive and procedural values cannot be sustained.

**DANIEL FARBER, ‘THE ORIGINALISM DEBATE’ (1989) → rejects the need for a theory**

- The real problems may be that originalism is less desirable than some other global theory of constitutional law, but that no global theory can work.
- We should not get wound in an attempt to create a theory of constitutional interpretation and just get on with the business of actually interpreting the Constitution.
  - Better off abandoning attempt to create theory of constitutional interpretation
- All the theories are not formulaic. We should simply think about whether the interpretation is done well or poorly, rather than as an application of some explicit general theory.
- Content with an approach to constitutional law that leaves some room for judicial discretion while attempting to channel that discretion.

**Interpretation models: dead hand or living tree**

**USE OF HISTORICAL MATERIALS**

- The use of historical material in order to discover the intentions of the framers was endorsed by O’Connor J in *Tasmania v Commonwealth and Victoria (Drawbacks Case) (1904)*:
  - O’Connor J: constitutional interpretation differs in no way from the interpretation of a statute
    - History of the law, previous law and historical facts surrounding the bringing the law into existence
    - However this case disallowed the usage of Convention Debates to deter people from arguing the subjective intention of the framers
  - Barton J: declare what seems to us to be the proper meaning of the language and we are to arrive at that meaning by reference to the words themselves and to the history of the law.
- Previously, documents such as the Constitutional drafts were allowed but it was only until *Cole v Whitfield (1988)* that the use of the constitutional debates was made admissible as evidence of intention
  - They stated that the use of the Convention Debates was only to identify the contemporary meaning of the language used, the subject being described and the nature and objectives of the movement towards federation
  - Could not be used to subject the meaning of the words with the subjective intention the founding fathers intended the section to have

**ORIGINALISM: THE INTENTION OF THE FRAMERS**

The originalism principle is that the constitution should adhere to its ‘original intent’ or original understanding of the text.

- **Greg Craven, Original Intent and the Australian Constitution (1990):**
  - The ultimate duty is to find intention.
  - Naturally words are imperfect and imperfectly convey intention
  - It is the duty of the courts to give full effect to intentions – the acts of preparation of federation were highly publicised.
  - Originalism is more suited in the Australian constitution than American
    - More democratic principle and legitimacy strengthened.
    - Intentions are more accessible and recent and therefore easier to identify.
    - The HC uses other methods of literalism and progressivism to shift power (S to Cth) unlike the US, used for human rights.
  - Originalism is when “[a] judge who is genuinely committed to a theory of original intent...is unlikely to view the bare words of the constitution which he or she is applying as ultimately controlling. To such a judge, the intention of the founders is the grail: the words of the
constitution will be an indispensable tool in discerning that intention, but they will not be the only tool…"

Courts make it clear that they follow the principle of *textual originalism* which holds that one must be faithful to the original meaning of the words that were written, as would have been understood by the people of the time, **not the intention of the framers**. To discover this, one should consult a dictionary or find out what the words would have meant to a reasonably informed person at the time of their production.

- Endorsed in *Cole v Whitfield*
- Stanley Fish discussing the views of Justice Scalia of the USA who endorsed textual originalism
  - Justice Antonin Scalia, men can intend all they want but it is only the laws they enact which binds us.
  - Intention is superfluous or dangerous because it leads away from solidity of text in the direction of unstrained speculation.
  - Under the guise of unexpressed intentions, judges will pursue their own objectives and desires.

This is as opposed to ‘intentional originalism’ which is an attempt to establish what was in fact the subjective intention of the framers

- Cases which resent intentional originalism
  - *Cole v Whitfield*
  - *Work Choices*
- An important case is *Tasmania v Commonwealth and Victoria (Drawbacks Case)*
  - It disallowed the usage of convention debates to deter people from trying to argue intentional originalism.
- Scalia criticises intentional originalism as dangerous as judges may pursue their own objectives and desires under the guise of unexpressed, inferred framers intent
  - Other criticisms is that maybe the framers made a mistake in writing down their intention in the constitution.
- Arguments appealing to the original intent usually fail in the High Court. This was illustrated in *New South Wales v Commonwealth (Work Choices Case)*:
  - ‘To pursue the identification of what is said to be the framers’ intention, much more often than not, is to pursue a mirage’ – Majority of Gleeson CJ, Gummow, Hayne, Heydon, Crennan JJ
  - The court also ruled that in relation to this case, the framers could not possibly have foreseen the importance and ubiquity that corporations would come to play in the Australian economy
    - Raises an issue with intentional originalism in that there is simply no way the Framers intentions could properly be applied to new facts and contexts (particularly technology) that they could not possibly have foreseen to exist in the future
- There are however, reasons why ‘original intent’ is more suited to the Australian constitution than to the USA
  - Process by which the founders were appointed and the constitution ratified was far more democratic
  - Far easier to determine the intention of our framers (accessible records such as the convention debates)

Important aspect of intentional originalism and textual originalism is that if you could favour intentional originalism then you could even say that if you could find exactly the subjective meaning of the framers it would trump anything written.

**TEXTUALISM**

Textualism is just discerning the contemporary meaning of the text (i.e. what it means now) whereas **textual originalism** is uncovering the meanings of the words as they would have been understood at the time they were being written (which may be different to what those words mean today).

- Good example of an area where the difference between these two terms is quite poignant is the idea of marriage: In a textual originalist interpretation, marriage could only ever mean between a man and woman but using textualism, marriage could conceivably be said to be between the same sexes.
- A textual originalist argument, however, could be that the text gave the parliament the power to legislate on marriage, and then what marriage is now up to parliament.
Textual originalism's focus is on the constitutional text, with no attempt to discover the subjective intentions of the author but rather with an attempt to establish the meaning that the language would have had according to general understanding of the time

- Described by O'Connor J in *Tasmania v Commonwealth & Victoria (Drawbacks Case)* (1904)
- The construction of the Constitution does not change “from time to time to meet the supposed changing breezes of popular opinion” – Griffiths CJ in *R v Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild*
  - Affirmed by Barwick CJ in *King v Jones* (1972)
  - Described by O'Connor J in the *Drawbacks Case* as the approach where “the historical facts surrounding bringing the law into existence” should be examined to discover the contemporary meaning.
  - The relevant historical facts are the technical meaning as used in a legal context, the subject matter of the legislation, what the law was at the time of the enactment, and what particular deficiencies existed in the law before the statute was enacted
  - What counts is not what the Framers intended but what the document they made actually did
  - Enquiry is into what the framers knew or took for granted or what was within their knowledge is objective
  - *Eastman v The Queen* (2000)
  - “The tradition approach to constitutional interpretation in Australia is probably best described as textualism or semantic intentionality. It is not literalism, if by literalism is meant no more than [that] a statute is to be interpreted by reference to its words according to their natural sense and in the context of the document
  - “This is consistent with the notion that our Constitution was intended to be an enduring document able to apply to emerging circumstances while retaining its essential integrity”
  - “Is to leave us slaves to the mental images and understanding of the founding fathers and their 1901 audience, a prospect which they almost certainly did not intend”
  - The search is always for the objective intention of the makers of the Constitution.
  - Difference in meanings is not an anomaly. The framers may not have foreseen many things prevalent today. E.g. that freedom of political information is crucial to responsible government.
  - Australian constitutional interpretation is NOT literalism as pronounced after *Engineers* and McHugh describes it as textualism

The Constitution accommodates for change through:

1. Ambulatory language – accommodates movement either by open-ended phrase (*R v Brislan*) or accommodation within a phrase of great, albeit limited, breadth (*Grain Pool*)
2. Essential characteristics (e.g. representativeness in ‘jury’ *Cheatle*)
3. Connotation (essential meaning of an idea or word) and denotation (things that fall within the connotations from time to time) – fixed attributes that new developments may acquire.
4. There is ‘centre and circumference’ with ‘enactment intentions and application intentions’ – there is a core idea which we can work from

**INCREMENTAL ACCOMMODATION**

Idea that evolution in meaning is permissible because its foreseeability was built into lawyer’s understanding at the time

- Heydon J stated extrajudicially that such evolution in meaning and application is permitted provided that they share the essential characteristics and purpose of the original constitutional words