

Interpreting the Australian Constitution: Express Provisions and Unexpressed General Principles¹

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1. *Early Disagreement: British versus American Approaches to Constitutional Interpretation*

Compared with its American counterpart, the Australian Constitution is “a prosaic document expressed in lawyers’ language”². It consists almost entirely of structural and machinery provisions establishing the institutions of the national government (legislative, executive and judicial), and dividing powers between them and between the national and state governments. It lacks the grand and inspirational declarations of national values or principles that are found in the American Declaration of Independence and federal Constitution. The Australian Constitution includes a handful of provisions designed to suppress regional favouritism, and to curb the power of the federal Parliament, but no Bill of Rights. Its framers were heavily influenced by the design of American federalism, but with respect to rights, they were influenced more by the

British than the American constitutional tradition. Australian federation resulted not from armed rebellion against perceived tyranny, but from calm, pragmatic reform by colonial politicians encouraged and assisted by the imperial government. In general, the framers thought it both unnecessary and unwise to fetter their parliaments. Given the progress of liberal ideas under British institutions, democratically elected parliaments seemed to them the best possible guardians of liberty³. It was necessary to arm an independent federal judiciary with power to enforce the terms of the federal compact. But, with a few minor exceptions, the traditional British doctrine of parliamentary supremacy was disturbed only to that extent⁴.

The Constitution, set out in a statute enacted in 1900 by the British Parliament, says nothing about how it should be interpreted. In choosing principles of interpretation, the High Court initially had two traditions to draw upon: first, the way that courts in Britain and other British colonies had in-

terpreted statutes, including colonial constitutions such as that of Canada; and second, the way the American Supreme Court had interpreted the United States Constitution. Since the Australian Constitution combines the British system of responsible government with an American-style federal system, it was appropriate that the Court seek guidance from both traditions. But by 1900 they were arguably different: British courts tended towards literalism and formalism, whereas the American Supreme Court was widely believed to have adopted a more purposive or even creative approach. The interpretive principles that have predominated in Australia since 1920 emerged from an initial contest between these two traditions. In that year, the High Court in the *Engineers'* case authoritatively adopted the British rather than the American approach. But the underlying disagreement between these interpretive approaches has subsequently resurfaced.

In 1900, both approaches were consistent with the modern theory (or cluster of theories) of interpretation that are called "originalism". The core thesis of originalism is that the meaning of a constitution is fixed at the time it is enacted or adopted, and can be lawfully changed only through the procedures for amendment prescribed by the constitution itself. Principles of statutory interpretation inherited from Britain were consistent with that thesis. One such principle was that, until they are formally amended, statutory provisions mean what they meant when they were enacted⁵. The principle was endorsed in Sir Edward Coke's *Institutes of the Laws of England* in the early seventeenth century⁶. In 1888, Lord Esher affirmed that "the words of a statute must be construed as they would have

been the day after the statute was passed"⁷. The author of a leading textbook stated that this was "obvious"⁸, presumably because otherwise Parliament's statutes would be, in effect, vulnerable to amendment by extra-parliamentary means.

A closely related principle concerned the nature of this fixed, original meaning. By 1900, British courts had held for many centuries that the main object of statutory interpretation "is to determine what intention is conveyed either expressly or by implication by the language used", or in other words, "to give effect to the intention of the [law-maker] as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed"⁹. In 1844, this was described as "the only rule" of statutory interpretation¹⁰. It can be found as far back as the fifteenth century¹¹, and many early authorities consistently attested to legislative intention being the crucial ingredient in statutory interpretation¹².

In the United States, these principles of statutory interpretation had also been inherited from Britain, and unquestioningly applied to the interpretation of the Constitution for the first century after its adoption¹³. The idea of a "living" or "organic" constitution, with an evolving meaning that adapts to social developments, did not appear until the late 19th Century, and had little influence until political progressives adopted it in the 1920s to attack the Supreme Court's *laissez-faire* constitutional jurisprudence¹⁴.

So the contest between the British and American approaches to interpretation did not concern the principle that the objective is to clarify the Constitution's original, intended meaning. Instead, it in-

volved disagreement about the nature of that meaning, and in particular, whether it could legitimately be found only in the Constitution's express provisions, or also in more general principles that it was reasonable to suppose the express provisions were intended to implement. Should a constitution be regarded as a set of discrete written provisions, or as a more holistic normative structure whose written provisions are intended to give effect to more abstract principles that are judicially enforceable even when not expressly stated? To what extent should unwritten but arguably implicit principles be recognised and applied? Potentially at stake in this contest were, first, the possibility that the High Court might mistakenly add to the Constitution general principles that the framers never intended it to include, and secondly, the greater scope for judicial discretion and creativity that usually attends the application of abstract principles compared with concrete rules. This was bound to be controversial, given that (as previously noted) the Australian Constitution consists mainly of structural and machinery provisions, and expressly enunciates few if any abstract principles.

Many of the Australian framers were aware of the potential for considerable judicial creativity in constitutional interpretation, but disagreed about its desirability. Some had studied the British writer James Bryce's *The American Commonwealth* (1889) – once called the “bible” of the Australian framers – in which he applauded the creative development of the American constitution by the Supreme Court¹⁵. In the Constitutional Conventions, and subsequently, some framers and lawyers expressed admiration for the work of the American Court,

and criticised the more literal approach of the Judicial Committee of the Privy Council (the highest court of appeal from colonial courts in the British Empire) in interpreting the Canadian Constitution¹⁶. One of them summed up the difference by arguing that constitutions lay down broad, general principles, and courts must therefore be guided “by a far higher and broader apprehension than the mere lawyer who is dealing with an ordinary Act of Parliament” – in short, it must adopt a “statesmanlike” approach¹⁷. But many others criticised American judicial creativity for being political rather than legal, and argued that the Constitution should be interpreted strictly, as a British statute¹⁸. They insisted that the Constitution should be changed only by formal amendment, and not by creative judicial interpretation¹⁹.

Many early cases involved claims of intergovernmental immunity: that is, immunity of the organs of government at one level of the federal system (Commonwealth or state) from legislation passed at the other level. The Constitution is deficient in not including express provisions dealing generally or comprehensively with the issue²⁰. The first High Court adopted the doctrine of intergovernmental immunity previously developed in American cases such as *McCulloch v Maryland* (1819) and *Collector v Day* (1871)²¹. That Court consisted of three judges – Chief Justice Griffith, and Justices Barton and O'Connor – who were all eminent lawyers, but also experienced politicians who had been actively involved in framing the Constitution. In *D'Emden v Pedder* (1904), they emphasised similarities in the drafting of the Australian and American constitutions, and maintained that “some, if not all” of the framers of the Constitution

(including, presumably, themselves) were familiar with the American Constitution, and “intended that like provisions should receive like interpretation”²². But in reality, the Court was not really concerned with specific provisions, but with inferences from unexpressed premises on which the whole federal system was supposedly based²³. It held that the Commonwealth and the states were all intended to possess sovereignty in exercising their respective powers; that “sovereignty subject to extrinsic control is a contradiction in terms”; and therefore that each was entitled to exercise its powers without any interference or control from the others²⁴.

This American doctrine was a prime example of the kind of purposive, and arguably creative, judicial approach that some Australian lawyers admired, but others disapproved of²⁵. The Privy Council was believed to have discouraged its adoption in Canada, and the High Court, therefore, to have preferred American to British authority²⁶. Its endorsement of the American immunities doctrine encouraged hopes that it would favour similar reasoning in other contexts.

In the third constitutional case to arise, *Tasmania v Commonwealth*, one party argued that “[t]he Constitution is only a declaration of principles for guidance”²⁷, and that the Court should “look beyond the letter of the Constitution”, identify principles of “inter-State ethics”, and interpret the text accordingly²⁸. But in this case the same judges rejected the proposal that the Constitution should be governed by special rules of interpretation²⁹. Ordinary principles of statutory interpretation had to be applied. These principles required a statute to be interpreted according to the intent of

the legislature, but if its words – understood in their ordinary and natural sense – were unambiguous, they constituted the best evidence of that intent³⁰. Only if the words were ambiguous could the legislature’s intention be “gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances”, namely, “the history of the law”, consisting of “previous legislation... [and] the historical facts surrounding the bringing of the law into existence”³¹. One of the judges was a little more flexible, holding that the “spirit and intention” of the legislature, to be gathered from the Act itself, might be “so plain and cogent as to shake, and, perhaps, control, the otherwise plain meaning of the words themselves”³². But even he was adamant that principles of abstract justice, equity, or public policy should not be used in this way, absent clear evidence within the Act itself that the legislature intended to implement them³³.

These judges denied that there was any difference between British and American principles of interpretation³⁴. They argued that ordinary principles of statutory interpretation themselves required the special nature of a constitution to be taken into account. They frequently quoted Chief Justice John Marshall’s statement in *McCulloch v Maryland* that “we must never forget, that it is a *Constitution* we are expounding”³⁵. The Constitution was special in that it was not a detailed code, so that many powers and rights were conferred by implication rather than expressly³⁶. *McCulloch* was influential in the development of the doctrine that, by implication, every express legislative power includes an implied power over matters that are “incidental and ancillary” to the principal subject-matter.

The Court was wrong to regard the doctrine of intergovernmental immunities as consistent with orthodox British interpretive principles. The Constitution expressly confers supremacy on federal law, grants some exclusive powers to the Commonwealth, exempts the states from some Commonwealth powers, and exempts the property of both the states and Commonwealth from one another's taxes. The maxim *expressio unius exclusio alterius* suggests that no further immunities were thought necessary. After all, the Commonwealth is able to protect itself from state interference by enacting overriding legislation, and the framers expected the states to protect themselves through their equal representation in the Senate. In this regard the framers have been proved wrong: in practice, the Senate has operated as a party rather than as a states' house³⁷. Nevertheless, this was their expectation. And there is no evidence whatsoever that a significant number of the framers had any knowledge of the American doctrine of intergovernmental immunities, let alone that they intended – without expressly providing – that it be part of the Constitution. Indeed, there is no reference to the doctrine in the Convention Debates, which there surely would be if they really had such an important doctrine in mind³⁸. In reality, the judges relied on their own, *post hoc*, understanding of what kind of federation a majority of the framers had wanted to establish, and what was necessary for it to function effectively. But some of the framers subsequently disagreed with them³⁹, and since the matter was not discussed, it is impossible to know what a majority would have intended. In any event, the judges' *post hoc* understanding was not manifested in the words of the

Constitution itself: in effect, they were correcting what they regarded as a major oversight in its drafting⁴⁰. Whether or not this was justified, it was an exercise of creative statesmanship that went well beyond the application of orthodox interpretive principles⁴¹.

When a relevant case was appealed from a state court directly to the Privy Council, it rejected the doctrine of intergovernmental immunities, criticising the High Court's suppositions about what the framers had in mind as an "expansion" of orthodox interpretive principles, and upholding the *expressio unius* argument⁴². But its reasoning was marred by a failure to grasp some consequences of written constitutionalism. In a scathing response, the Court disparaged the quality of the Privy Council's interpretation of the Canadian constitution – "the subject of much criticism" – by quoting James Bryce's quip that the United States would never have achieved greatness had its constitution been interpreted in a similar manner⁴³.

2. *The Engineers' Case*

In the end, the opinion of the Privy Council prevailed. In 1906, two new Justices – Sir Isaac Isaacs and Henry Higgins – were appointed to the High Court. They, too, had been active participants in the Constitutional Conventions, but did not accept the doctrines of intergovernmental immunities and reserved state powers. Applying the same interpretive principles as the Privy Council, Justice Isaacs insisted that the Court should be guided by the Constitution's language alone, rather than

"wander at large upon a sea of speculation searching for a suitable intent by the misty and uncertain light of what is sometimes called the spirit of the document, for that is largely fashioned subjectively by the pre-conceptions of the individual observer"⁴⁴. Justice Higgins described Chief Justice Marshall's judgment in *McCulloch v Maryland* as "the utterance rather of the statesman than of the lawyer"⁴⁵, and disapproved of uncritical reliance on American cases, which often overlooked crucial differences between the two constitutions⁴⁶. He denied that the Court had a duty to ensure that the intention behind the Constitution was not defeated: "Our function is to construe the [Constitution], not to improve it, or to alter it on the ground of probable intention"⁴⁷.

By 1920, the original three judges had departed, and three out of four new judges joined Justices Isaacs and Higgins to overrule the doctrine of implied intergovernmental immunities⁴⁸. In the celebrated *Engineers'* case, the majority affirmed that British rather than American interpretive principles should be applied. The Court's duty was "faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed", "clear of any qualifications which the people of the Commonwealth or, at their request, the Imperial Parliament have not thought fit to express"⁴⁹. Orthodox principles did permit the recognition of "necessary" implications⁵⁰. But the rejected doctrines were necessary only in a political, and not a legal, sense. They were "based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction. But possible abuse of pow-

ers is no reason in British law for limiting the natural force of the language creating them"⁵¹.

Here, the majority was strongly influenced by the British tradition of parliamentary sovereignty, which was antithetical to American distrust of government, and relied on political rather than legal control of government. In British law,

the extravagant use of the granted powers in the actual working of the *Constitution* is a matter to be guarded against by the constituencies and not by the Courts... If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper⁵².

The rejected implications were also condemned as "referable to no more definite standard than the personal opinion of the Judge who declares it", based on "a vague, individual conception of the spirit of the compact"⁵³. They were too subjective and contentious to provide a proper basis for legal judgment.

The *Engineers'* case did not put an end to disagreement about the proper approach to constitutional interpretation. In 1937, the Court was criticised for rejecting the "thoroughly relevant learning" of American precedents

in favour of 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 constitution⁵⁴.

But in 1936 another commentator criticised American precedents for paying excessive regard "to considerations of policy,

necessity, and other vague notions which can have no place in a statutory constitution”⁵⁵, and praised the Court for being “as jealous of the written word as the Privy Council, if not more so”⁵⁶. Both views continue to be advocated to this day.

3. *Later Developments*

Ever since the *Engineers*’ case, the Court has been wary of so-called “top-down” reasoning that deduces conclusions from abstract principles – especially unexpressed ones – rather than concrete provisions⁵⁷. Chief Justice Garfield Barwick once asserted that constitutional disputes are “not to be solved by resort to slogans or to political catch-cries or to vague and imprecise expressions of political philosophy”, but instead, “by the meaning of the relevant text of the Constitution having regard to the historical setting in which the Constitution was created”⁵⁸.

Nevertheless, the Court has often been guided by general principles that it regards as underlying parts of the Constitution. Even Justice Isaacs, who wrote the majority judgment in *Engineers*, referred in another case to “the silent operation of constitutional principles”⁵⁹. The most important are federalism, the separation of powers, responsible government, representative government, nationhood, and the rule of law. Some judges have recently added popular sovereignty to this list.

These principles have frequently been used to interpret specific provisions, for example, in cases involving textual ambiguity or vagueness. They have also been used to derive implications from the text,

but that has been much more controversial, given the Court’s disapproval in *Engineers* of implications not firmly based on “legal”, as distinct from “political”, necessity. But as Justice Dixon later insisted, a rule completely excluding implications “would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied”⁶⁰.

Justice (and later Chief Justice) Dixon, a dominant intellectual force on the Court from the 1930s until the 1960s, led a gradual revival of new doctrines of intergovernmental immunities, which are still being refined. These prohibit both the Commonwealth and the states from either (1) passing laws that impose discriminatory disabilities or burdens on one another; or (2) interfering in certain ways with one another’s “capacities” as independent governments⁶¹. The precise rationale of these immunities remains unclear. The Court has relied on reasoning not dissimilar to that which was rejected in the *Engineers*’ case, and American decisions have once again been extensively cited⁶². These immunities are apparently regarded as practically necessary to ensure the minimal degree of autonomy that is required by governments in any genuine federation. They have been distinguished from the pre-*Engineers* immunities on the ground that they are exceptional rather than typical⁶³. Their impact has therefore been relatively infrequent and not of major practical significance.

The way in which the first three Chapters of the Constitution follow the American pattern of dealing separately with legislative, executive and judicial powers, and vesting each in a distinct branch of government, was regarded as powerful ev-

idence that the Constitution embodies the doctrine of the separation of powers, modified by the system of responsible government and considerations of practical convenience⁶⁴. That inference is debatable, since the Convention Debates offer little evidence that the framers had any such intention, although they clearly wanted to protect the independence of the federal judiciary⁶⁵. Nevertheless, the Court has established a fairly strict separation of judicial and non-judicial powers, but not of legislative and executive powers. The Court has always been zealous in protecting the exclusivity and independent exercise of judicial power, at least at the federal level. As we are about to see, this is the area in which the Court has most frequently succumbed to the temptation to stray beyond the limits of orthodox *Engineers* legalism, and engage in “doctrinal basket weaving”⁶⁶.

4. Since 1990

Judicial reasoning based on underlying structural principles became much more common in the 1990s⁶⁷. Australian judges were increasingly influenced by the global trend of expanding judicial power to protect rights, either by the adoption of bills of rights, or by creative interpretation of their existing powers. Previously, they had tended to express scepticism about the desirability of a bill of rights, partly because they did not feel well qualified to make the inherently political judgments that it would require of them⁶⁸. But the balance of judicial opinion began to shift. An increasing number of judges appeared to be losing faith in parliamentary supremacy, partly

because of the extent to which parliaments seemed to be dominated by executive governments⁶⁹. These judges seemed less content with their subordinate and generally passive role in protecting rights. One way of expanding their role was to rely on unexpressed general principles.

In *Kable v Director of Public Prosecutions for N.S.W.* (1997), the Court stretched the principle of the separation of federal judicial power far beyond the provisions from which it was originally inferred⁷⁰. These concern federal jurisdiction only. They allow Parliament to vest state courts with federal jurisdiction, but say nothing about their exercise of state jurisdiction. Nevertheless, the Court held in *Kable* that no state court vested with federal jurisdiction may exercise, even in cases of state jurisdiction, any non-judicial power that might jeopardise its reputation for independence from the political branches of the state government. This was supposedly because damage to that reputation might also taint its exercise of federal jurisdiction. That principle is sound, but its application in *Kable’s* case was dubious and has been subject to harsh criticism. The Court held invalid a state law that applied to only one man, and authorised the State Supreme Court to order that he be imprisoned if it concluded from evidence that he was more likely than not to constitute a danger to the community.

It is difficult to see how this power damaged the Supreme Court’s integrity or independence at all, given that the Court eventually decided to release *Kable*⁷¹. But it is even more difficult to see how the challenged powers could possibly have undermined either the actual or perceived integrity or independence of the Supreme Court *when exercising federal jurisdiction*.



The first bench of the High Court: Edmund Barton, Samuel Griffith and Richard O'Connor seated, with court officials in the background. Photo taken at the first sitting of the court on 6 October 1903. (Photo from Wikipedia)

It is implausible to think that, if Supreme Court judges are obligated by state law to depart from traditional judicial practices in dealing with particular matters in their state jurisdiction, they are more likely to depart from such practices in exercising federal jurisdiction when they are not legally required to do so. Not only is the actual integrity and independence of Supreme Court judges far stronger and more resilient than that⁷², there is simply no reason whatsoever to think that this might happen. The majority's reasoning was described by Professor George Winterton as "barely even plausible"⁷³; by Professor Geoffrey Lindell as "imaginative and strained", indicating "the lengths that judges are now prepared to

go" in order to protect rights in the absence of a bill of rights⁷⁴; and by Professor George Williams as not "adequately ground[ed] in the text and structure of the Australian Constitution" and having "the appearance of being contrived" in order "to protect fundamental freedoms"⁷⁵. Dr Greg Taylor suggested that the majority's reasoning was a rationalisation of a conclusion desired for policy reasons⁷⁶. Nevertheless, what is now called the "*Kable doctrine*" has been further expanded and applied in a series of subsequent cases whose facts did not make its application any more plausible than in the parent case⁷⁷.

In 1992, the Court held that the Constitution includes an implied freedom of

political communication⁷⁸. The judges disagreed about its basis. Some held that it was implied by a few specific provisions requiring that members of Parliament be "directly chosen by the people". Others argued that it was implicit in the principle of representative democracy, which underlies numerous provisions dealing with Parliament, the executive, and constitutional amendment. Some judges also suggested that, with Australian independence from the United Kingdom, the Constitution had come to rest on the sovereignty of the people, an even deeper principle than that of representative democracy.

The judges held that the people would be unable to make a genuine electoral choice, or that true representative government or popular sovereignty would be impossible, in the absence of freedom of political communication. The freedom was therefore a necessary implication in that it was practically necessary for the Constitution to achieve some of its most fundamental purposes. On these grounds, the Court invalidated legislation that prohibited political advertising on radio and television stations during election campaigns, and in lieu thereof, required stations to provide free time for the broadcast of political messages⁷⁹. The declared purposes of the legislation were to reduce the dependence of politicians on the donors of the vast funds needed for political advertising, with its associated risks of undue influence or even corruption; to reduce inequality, due solely to variable economic resources, in the ability of citizens to influence public opinion; and to improve the quality of public political debate.

These decisions gave rise to the hope, or fear, that the Court would go much further,

and find other rights implicit in the principles of representative democracy or popular sovereignty. One of the more activist judges said in a speech that the gradual development of an implied bill of rights was a possibility⁸⁰, and in *Leeth v Commonwealth*, he and another judge held that the Constitution contained an implied right to equality⁸¹. A new era of bold judicial creativity was widely anticipated⁸².

These developments provoked a vigorous theoretical and critical commentary. In addition, they aroused heated disagreement within the Court itself, between those who derived the implied freedom of political communication from specific provisions, and those who derived it from general principles. In *Theophanous v Herald & Weekly Times Ltd.*, Justice McHugh, in dissent, objected that judges who treated the principle of representative democracy as if it were part of the Constitution independently of specific provisions, "unintentionally depart from the method of constitutional interpretation that has existed in this country since the time of the *Engineers' Case*"⁸³. Another dissenter, Justice Dawson, insisted that implications must be

necessary or obvious having regard to the express provisions of the Constitution itself. To draw an implication from extrinsic sources... would be to take a giant leap away from the *Engineers' Case*, guided only by personal preconceptions of what the Constitution should, rather than does, contain⁸⁴.

In *McGinty* (1996), it was argued that either the words "directly chosen by the people", or the principle of representative democracy, required that Commonwealth elections conform to the principle of "one vote, one value", and therefore that the

number of voters in electorates be as equal as possible⁸⁵. But the composition of the Court had changed, and those who had dissented in *Theophanous* found themselves in the majority. Justice McHugh repeated his complaint that representative democracy should not be treated as an independent or “free-standing” constitutional principle⁸⁶, and added that insofar as they so treated it, the previous decisions were “fundamentally wrong and... an alteration of the Constitution without the authority of the people under s 128”⁸⁷. One of the new judges, Justice Gummow, agreed that the earlier cases were inconsistent with orthodox interpretive principles and should be reconsidered⁸⁸.

McGinty suggested that a majority of the Court was unwilling to develop implied rights in the creative fashion that many had hoped for, and others had feared. The judges then attempted to resolve their interpretive disagreements. In *Lange* (1997) they delivered a unanimous judgment, which was a remarkable achievement, given their previous passionate disagreements. The implied freedom of political communication was held to be based on “the text and structure of the Constitution”, rather than on representative democracy as an independent general principle⁸⁹. This appeared to concede the main objection of Justices McHugh and Dawson. But they, too, were required to compromise. Justice McHugh had previously insisted that the implied freedom operated only during federal election campaigns, but this was rejected in *Lange*. As for Justice Dawson, he had not previously conceded that there was an implied freedom of political communication at all. The decision left the implied freedom intact, but by rejecting the

broader of the two grounds on which it had previously been based, appeared to reduce the likelihood that further implied rights would be recognised. In *Kruger* (1997), a majority rejected the previously suggested implied right to equality, but left open the possibility of an implied freedom of movement and association⁹⁰.

Doubts remain about the consistency of the implied freedom of political communication with the interpretive orthodoxy established in the *Engineers’* case. Its recognition made a substantial change to Australia’s system of government, which to many, seemed more like a constitutional amendment than the discovery of a genuine implication. It signified a change in judicial approach to implications. When the very activist Justice Murphy suggested, in 1986, that the Constitution included an implied right to free speech, his brethren treated the suggestion with disdain⁹¹. In 1975, Chief Justice Barwick said

It is very noticeable that no Bill of Rights is attached to the Constitution of Australia and that there are few guarantees... [U]nlike the case of the American Constitution, the Australian Constitution is built upon confidence in a system of parliamentary Government with ministerial responsibility. The contrast in constitutional approach is that, in the case of the American Constitution, restriction on legislative power is sought and readily implied whereas, where confidence in the parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers⁹².

By deciding against a bill of rights, the framers entrusted to parliaments, not courts, the responsibility for striking the necessary balances between competing rights, and between rights and other community interests, balances that require political rather than legal judgment. The

implied freedom had escaped the notice of Australian lawyers and judges (other than Justice Murphy) for the previous ninety years, despite cases such as *Communist Party* (1950) in which it might have proved decisive⁹³. Moreover, this in itself suggests that the implied freedom is not necessary, either for the existence of representative government, or for the people to make genuine electoral choices. The fact is that Australia had such a government, and the people were able to make such choices, throughout those ninety years. It would undoubtedly be legitimate for the Court, in enforcing express provisions requiring that the people directly choose their representatives, to invalidate legislation restricting political communication so severely that it prevents them from doing so. But the Court has gone one step further, and derived from those provisions an implied freedom that it then applies largely independently of them, invalidating laws deemed to infringe

the freedom whether or not they prevent genuine electoral choices⁹⁴.

In other words, the implied freedom is vulnerable to the same kind of objection that Justice McHugh raised, to representative democracy being treated as a free-standing general principle, independent of the express constitutional provisions from which it is inferred, and which give it only partial effect. That is the very issue that divided the Court in its formative years. The implied freedom is very difficult to reconcile with the orthodox approach to interpretation established in 1920 in *Engineers*. Disagreement about the recognition of unexpressed general principles that supposedly underlie the Constitution's express provisions therefore continues, and will probably always do so.

¹ This article includes material previously published in J. Goldsworthy, *Australia: Devotion to Legalism*, in J. Goldsworthy (edited by), *Interpreting Constitutions. A Comparative Study*, Oxford, Oxford University Press, 2006, pp. 106-160.

² A. Mason, *The Australian Constitution in Retrospect and Prospect*, in R. French, G. Lindell, C. Saunders (edited by), *Reflections on the Australian Constitution*, Sydney, Federation Press, 2003, p. 8.

³ J. Goldsworthy, *The Constitutional Protection of Rights in Australia*, in G. Craven (edited by), *Australian Federation Towards the Second Century*, Melbourne, Melbourne University Press, 1992, pp. 151, 152-154.

⁴ J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney, Angus & Robertson, 1901, pp. 509-510; *D'Emden v Pedder* (1904) 1 CLR 91, 110, per Griffith CJ; *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495, pp. 503-504, per Williams J.

⁵ D.J. Hurst, *The Problem of the Elderly Statute*, in «Legal Studies», 1983, p. 21.

⁶ 2 Co Inst 2.

⁷ *Sharpe v Wakefield* (1888) 22 QBD 239, p. 242.

⁸ P. Langan, *Maxwell on the Interpretation of Statutes* (12th ed.), London, Sweet & Maxwell, 1969, p. 264.

⁹ P.P. Maxwell, *On the Interpretation of Statutes* (1875), p. 1; *Attorney-*

General v. Carlton Bank [1899] 2 QB 158, p. 164, per Lord Russell.

¹⁰ *Sussex Peerage Case* (1844) 8 ER 1034, p. 1057, per Tindall CJ.

¹¹ S.B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (1936), New York, American Scholar Publications, 1966 reprint, p. 294; P. Hamburger, *Law and Judicial Duty*, Cambridge, Mass., Harvard University Press, 2008, pp. 52-58.

¹² S.E. Thorne (edited by), *A Discourse Upon the Exposition and Understanding of Statutes* (pre-1567), Lawbook Exchange Ltd, 2003 reprint; *Stradling v Morgan* (1560) 1 Plowd 199, p. 205; 4 Co. Inst. 330 (1630s); F. Bacon, *New Abridgement of the Law* (1736);

- W. Blackstone, *Commentaries on the Laws of England* (1765); F. Dwaris, *A General Treatise on Statute* (2nd ed.), London, 1848, pp. 551-52 and 556-560. These and other early authorities are cited in R. Berger, 'Original Intention' in *Historical Perspective*, in «George Washington Law Review», vol. 54, 1986, pp. 299-308; R. Berger, *The Founders Views - According to Jefferson Powell*, in «Texas Law Review», vol. 67, 1989, pp. 1059-1065.
- ¹³ See J. Story, *Commentaries on the Constitution of the United States*, 1833, pp. 678-682, 693-698; S. Miller, *Lectures on the Constitution of the United States*, 1893, pp. 100-103; H. Black, *Handbook of American Constitutional Law* (3rd ed.), 1910, pp. 75-81; W. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth*, 1995, pp. 234-236.
- ¹⁴ T. Peebles, *A Call to High Debate: The Organic Constitution in Its Formative Era, 1890-1920*, in «University of Colorado Law Review», vol. 52, 1980, p. 49.
- ¹⁵ London, McMillan, 2nd ed. 1889, pp. 267-268, 363-368, 373-375. For its influence on the Australian framers, see J. La Nauze, *The Making of the Australian Constitution*, Melbourne, Melbourne University Press, pp. 18-19, and J. La Nauze, *The Name of the Commonwealth of Australia*, in «Historical Studies», vol. 15, 1971, p. 59.
- ¹⁶ G. Craven, *Heresy as Orthodoxy: Were the Founders Progressivists?*, in «Federal Law Review», 31, 2003, especially pp. 104, 116-117, 108-109, 113-115 and 117-118.
- ¹⁷ Ivi, p. 117.
- ¹⁸ Ivi, pp. 107-108, 117-121.
- ¹⁹ *Ibidem*.
- ²⁰ There are only a few relevant provisions that deal with particular aspects of the issue, some granting immunity, and others excluding it. Compare ss 51(13) and 51(14) and s 114 with s 51(31) and s 98.
- ²¹ *McCulloch v State of Maryland* 17 US 316 (1819); *Collector v Day* 78 US 113 (1871).
- ²² *D'Emden Pedder* (1904) 1 CLR 91, 113. See also *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208 (HCA) 239-240, per O'Connor J.
- ²³ Comments of the Privy Council in *Webb v Outtrim* [1906] HCA 76; (1906) 4 CLR 356 (PC), p. 359.
- ²⁴ *D'Emden Pedder* (1904) 1 CLR 91, p. 110, plus later cases extending the same doctrine to protect the states.
- ²⁵ Views of Higgins J noted in *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087 (HCA), p. 1164.
- ²⁶ *Re Income Tax Acts (No 4); Deakin's and Lymes's Cases* (1904) 29 VLR 748 (VSC), pp. 763-764.
- ²⁷ *Tasmania v Commonwealth* (1904) 1 CLR 329, p. 335.
- ²⁸ Ivi, p. 338 and p. 359.
- ²⁹ Ivi, p. 338, per Griffith CJ, pp. 358-359, per O'Connor J, and clearly assumed by Barton J. See also *Federated Sawmill Timberyard & General Woodworkers Employees Association of Australasia v James Moore & Sons Pty Ltd* (1909) 8 CLR 465, p. 486 and p. 501.
- ³⁰ *Tasmania v Commonwealth* (n 27), pp. 338-339, per Griffith CJ.
- ³¹ Ivi 359, per O'Connor J. For an example of the practical application of this approach, see *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, pp. 239-240, per O'Connor J. See also *Deakin v Webb* (1904) 1 CLR 585 (HCA), p. 630.
- ³² *Tasmania v Commonwealth* (1904) 1 CLR 329, pp. 348-349.
- ³³ Ivi, pp. 347-350.
- ³⁴ *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, pp. 237-238.
- ³⁵ Eg, *Attorney-General (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469 (HCA), p. 612.
- ³⁶ *Tasmania v Commonwealth* (1904) 1 CLR 329, p. 338, per Griffith CJ; *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087, p. 1105; *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309, p. 343 and p. 356.
- ³⁷ S. Bach *Platypus and Parliament*, The Department of the Senate Parliament House Canberra 2003, pp. 143-145.
- ³⁸ Even the better informed framers seem to have had little knowledge of American case law: in 1898, even Sir Edmund Barton acknowledged that he had not heard of *Marbury v Madison*: see J. Williams, *The Emergence of the Commonwealth Constitution*, in H. P. Lee and C. Winterton (edited by), *Australian Constitutional Landmarks*, Cambridge, Cambridge University Press, 2003, pp. 23-24.
- ³⁹ See the views of Justices Isaacs and Higgins, described in section 2.
- ⁴⁰ Many of these points are made in G. Sawyer, *Implication and the Constitution Part II*, in «Res Judicatae», vol. 4, 1948-1950, pp. 88-90.
- ⁴¹ G. Sawyer, *Australian Federalism in the Courts*, Melbourne, Melbourne University Press, 1967, p. 200.
- ⁴² *Webb v Outtrim* (1906) 4 CLR 356, pp. 359-361.
- ⁴³ *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087, p. 1110; see also p. 1111.
- ⁴⁴ *Huddart, Parker and Co Pty Ltd v Moorehead* [1909] HCA 36; (1909) 8 CLR 330, 388. See also *Federated Sawmill Timberyard & General Woodworkers Employees Association of Australasia v James Moore & Sons Pty Ltd* [1909] HCA 43; (1909) 8 CLR 465, 486, 536-537.
- ⁴⁵ *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087 (HCA) 1164. See also HB Higgins 'McCulloch v Maryland in Australia' 18 (1905) Harvard L Rev 559.
- ⁴⁶ *Huddart, Parker and Co Pty Ltd v Moorehead* [1909] HCA 36; (1909) 8 CLR 330.
- ⁴⁷ *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087 (HCA) 1164, 1169-70.

- ⁴⁸ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers)* [1920] HCA 54; (1920) 28 CLR 129. The Court also rejected another doctrine that had been based on implication, called the doctrine of reserved state powers. This will not be discussed here.
- ⁴⁹ Ivi, p. 142 and p. 160 respectively.
- ⁵⁰ Ivi, p. 155.
- ⁵¹ Ivi, p. 151.
- ⁵² Ivi, pp. 151-152.
- ⁵³ Ivi, p. 142 and p. 145 respectively.
- ⁵⁴ RTE Latham, *The Law and the Commonwealth* (1937), London, Oxford University Press, 1949, p. 563; see also p. 56 and p. 567.
- ⁵⁵ W. Anstey Wynes, *Legislative and Executive Powers in Australia*, Sydney, Law Book Co of Australasia Ltd, 1936, p. 20; see also p. 23.
- ⁵⁶ Ivi, p. 76; see also p. 14 and pp. 42-43.
- ⁵⁷ *McGinty v Western Australia* (1996) 186 CLR 140, n 427 (McHugh J), quoting R. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, in «University of Chicago Law Review», vol. 59, 1992, p. 433.
- ⁵⁸ *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth* (McKinlay's case) (1975) 135 CLR 1, p. 17.
- ⁵⁹ *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* [1926] HCA 8; (1926) 37 CLR 393, p. 413.
- ⁶⁰ *West v Commissioner of Taxation (NSW)* [1937] HCA 26; (1937) 56 CLR 657, p. 681.
- ⁶¹ This abstract summary necessarily glosses over various complications, and possible differences, in the way that the states and the Commonwealth are protected.
- ⁶² Sawer, *Implication and the Constitution Part I* cit.; G. Sawer, *Australian Federalism in the Courts*, Melbourne, Melbourne University Press, 1967.
- ⁶³ M. Coper, *Encounters With The Australian Constitution*, Sydney, CCH Australia, 1988, p. 177.
- ⁶⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (the *Boilermakers' case*) (1956) 94 CLR 254.
- ⁶⁵ J.M. Finniss, *The Separation of Powers in the Australian Constitution*, in «Adelaide Law Review», vol. 3, 1968, p. 159; F. Wheeler, *Original Intent and the Doctrine of the Separation of Powers in Australia*, in «Public Law Review», vol. 7, 1996, p. 96; Sawer, *Australian Federalism in the Courts* cit., pp. 152-153.
- ⁶⁶ L. Zines, *The Present State of Constitutional Interpretation*, in A. Stone and G. Williams (edited by), *The High Court at the Crossroads: essays in Constitutional Law*. Sydney, Federation Press, 2000, p. 224 and p. 231.
- ⁶⁷ J.J. Doyle, *Constitutional Law: At The Eye of the Storm*, in «University Western Australia Law Review», vol. 23, 1993, pp. 20-21, and p. 27.
- ⁶⁸ E.g., Sir G. Barwick, *A Radical Tory*. Sydney, Federation Press, 1994, p. 24.
- ⁶⁹ H.P. Lee, *The Implied Freedom of Political Communication*, in H.P. Lee and G. Winterton (edited by), *Australian Constitutional Landmarks*, Cambridge Cambridge University Press, 2003, p. 391.
- ⁷⁰ *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51.
- ⁷¹ E. Handlsey, *Do Hard Laws Make Bad Cases? – The High Court's Decision in Kable v Director of Public Prosecutions (NSW)*, in «Federal Law Review», vol. 25, 1997, pp. 176-177; G. Taylor, *The Constitution of Victoria*, Sydney, Federation Press, 2006, p. 448.
- ⁷² See Heydon J in *Wainohu v NSW* [2011] HCA 24, para. 148 (Supreme Court judges' "actual impartiality as between the government and the governed has never been questioned... they have the touchy pride of Castilian aristocrats").
- ⁷³ G. Winterton, *Justice Kirby's Coda in Durham Holdings*, in «Public Law Review», vol. 13, 2002, pp. 165-170.
- ⁷⁴ G. Lindell, *The Australian Constitution: Growth, Adaptation and Conflict – Reflections About Some Major Cases and Events*, in «Monash University Law Review», vol. 25, 1999, pp. 276-277.
- ⁷⁵ G. Williams, *Human Rights Under the Australian Constitution*, Melbourne, Oxford University Press, 1999, pp. 242-243 and p. 246.
- ⁷⁶ Taylor, *The Constitution of Victoria* cit., p. 449 and p. 456.
- ⁷⁷ The most recent are *South Australia v Totani* (2010) 242 CLR 1, and *Wainohu v NSW* [2011] HCA 24.
- ⁷⁸ *Australian Capital Television v Commonwealth (ACTV)* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1.
- ⁷⁹ The legislation did not affect the discussion of political issues on news, current affairs, or talkback programs, or political advertising in the other mass media.
- ⁸⁰ J.J. Toohey, *Government of Laws, and Not of Men?*, in «Public Law Review», vol. 4, 1993, Public L Rev 158, p. 170.
- ⁸¹ [1992] HCA 29; (1991) 174 CLR 455.
- ⁸² Doyle, *Constitutional Law: At The Eye of the Storm* cit., p. 15; The Hon. Mr. Justice M. Kirby, *Courts and Policy: The Exciting Australian Scene*, in «Commonwealth Law Bulletin», vol. 19, 1993, p. 1794.
- ⁸³ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, p. 202.
- ⁸⁴ Ivi, p. 194.
- ⁸⁵ *McGinty v Western Australia* (1996) 186 CLR 140.
- ⁸⁶ Ivi, p. 232.
- ⁸⁷ Ivi, pp. 235-235.
- ⁸⁸ Ivi, p. 289.
- ⁸⁹ *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1987) 189 CLR 520.
- ⁹⁰ *Kruger v Commonwealth (Stolen Generation case)* (1996) 190 CLR 1.

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⁹¹ *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, p. 569 per Gibbs CJ, p. 579 per Mason J, p. 636 per Dawson J.

⁹² *Attorney-General (Cth) (Ex rel McKinlay) v Commonwealth (McKinlay's case)* [1975] HCA 53;

(1975) 135 CLR 1, pp. 23-24.

⁹³ *Australian Communist Party v Commonwealth* [1951] HCA 5; (1951) 83 CLR 1.

⁹⁴ For further details of this criticism, see J. Goldsworthy, *Constitutional Implications*

Revisited, in «University of Queensland Law Journal», vol. 30, 2011, pp. 9-34.