

The Right Honourable Sir John Latham GCMG, QC

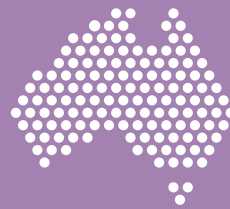
(b. 26.8.1877 d. 25.7.1964) (Chief Justice from 1935-1952)



The Latham Court's constitutional decision-making was characterised by stark contrasts: deference to Parliament and the Executive during World War II followed by a vigorous approach to Judicial review in the post-war period that saw the demise of key parts of the Chifley Government's policy platform. Remarkably, the Court executed this dramatic shift in approach without significant damage to its legitimacy as independent arbiter of the Constitution.

By Fiona Wheeler

John Latham was born in Melbourne in 1877. His father was a Justice of the Peace and Town Councillor. As a school student he won a scholarship to Scotch College. After graduating he went on to the University of Melbourne and achieved a BA in 1897. He became a teacher for two years before returning to university to study law. Latham was admitted to the Victorian Bar in 1904 and for some years worked in the County Court. He supplemented his income by lecturing in philosophy and law at the University of Melbourne and by contributing articles to *The*



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Argus and the *London Standard*. He became involved in politics with the Commonwealth Liberal Party in 1909.

After the outbreak of World War I, Latham was appointed as Lieutenant Commander in the Naval Reserve, and attended the Imperial Conference in London in 1918, and was a member of the Peace Conference in Paris in 1919.

Latham returned to the law in 1919 and quickly developed a thriving practice. His emphasis was on taxation, commercial and arbitration law, but he also took on some constitutional law cases. In 1921 he was invited to become a judge of the Supreme Court of Victoria, but declined. He was appointed King's Counsel in 1922. However, he felt the calling of political life. He stood successfully as an independent Liberal Union candidate in the 1922 election in the seat of Kooyong. Following the election, he attended meetings of the Country Party and was instrumental in the negotiations that forced the resignation of Prime Minister Billy Hughes. In 1925 Latham joined the Nationalist Party and was appointed Attorney-General in the Bruce government, a position in which he set himself up to reform industrial relations in Australia. This led to the failed referendum in 1926 which was an attempt to close industrial relations loopholes created by the overlapping State and Federal schemes.

Latham made a reputation for himself as a fighter against communists and unions and suggested numerous different pieces of legislation to make strikes and lockouts unlawful or to strengthen the penalties for such actions. His strong action in industrial relations is widely said to have caused the government defeat at the 1929 election. He became the Opposition Leader in the new Parliament for 18 months, before he made way for the former Labor Minister, Joseph Lyons, to become leader and create the new United Australia Party. Labor was defeated at the 1931 election, and Latham served as the Attorney-General and Minister for External Affairs and Industry in the new Government.

By 1933 Latham was deputy Prime Minister in the Lyons Ministry and was appointed to the Privy Council. It had become clear at this stage that he had his eyes set on the upcoming post of Chief Justice of the High Court. The Chief Justice, Frank Gavan Duffy, already 81 by this stage, was reluctant to leave his position. Two years later Duffy retired and Latham was appointed as Chief Justice. Prior to his appointment, he had appeared in the High Court on no less than 90 occasions. His early days on the bench were difficult due to conflicts with the other Justices. He made significant contributions to constitutional law and took a strictly legal approach. He considered it no business of the Court to consider whether federal legislation went further than necessary. His approach was to ensure that the legislation was valid with respect to the powers in the Constitution.

Notably, he was given a leave of absence to serve as Minister for Japan in 1940-41. His life-long battle against the communists came to end with invalidation of government legislation through the Communist Party case in 1951. Latham as the Chief Justice was the only dissenter when he took a very generous view of the Commonwealth defence powers in peacetime.

He retired from the High Court in 1952 and spent his retirement years with his wife in Melbourne. Latham died in 1964. On his death, Chief Justice Barwick described him as *"a great Chief Justice and this Court and the professions which works before it and the public which it serves have much reason to be grateful to him and to respect his memory."*

Chief Justice Latham's quotes in constitutional decisions that encapsulate the vision of him as Chief Justice

1. Fiona Wheeler has described the Latham Court's "constitutional decision-making" as: *characterised by stark contrasts: defence to parliament and the executive during World War II followed by a vigorous approach to judicial review in the post-war period that saw the demise of key parts of the Chifley Government's policy platform.*

2 One examples of deference is *South Australia v Commonwealth* [1942] HCA 14; 65 CLR 373, where Latham CJ declared (at 409) that: *It is not for this or any court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation.*

Such questions are for Parliaments and the people.
(Principle: the rule of law)

3. In *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* [1943] HCA 12; 67 CLR 116 at 133, Latham CJ similarly stated that: *It is a well-established doctrine of constitutional law that it is for Parliament to choose the means by which its powers are to be carried into execution. In the absence of a relevant constitutional prohibition it is not a proper function of a court to limit the method of exercising a legislative power.*

4. Contrastingly, in declaring parts of the Chifley government's Banking Act 1947 (Cth) invalid in *Bank of NSW v Commonwealth* [1948] HCA 7; 76 CLR 1, Latham CJ stated (at 162): *It is a practice in some countries to introduce statutes with a statement of the objects of the legislature in making an enactment and an explanation of its general character. ... Where, however, a Parliament, as in the case of the 14 Commonwealth Parliament, has only limited powers, the declaration of Parliament that a law is enacted for the purpose of securing the stated objects cannot bring an enactment within power if its operative provisions have no real connection with a subject with respect to which the Parliament has power to make laws. Such a declaration is entitled to respectful consideration, but it cannot be decisive upon a question of validity. Under a unitary constitution, a parliament may be the judge of its own powers, but that is not the case under the Federal Constitution of Australia*

(Principle: separation of powers)

5. On the respective roles of Parliament and the Court, Latham CJ (dissenting) stated in *Australian Communist Party v Commonwealth* [1951] HCA 5; 83 CLR 1 that (at 140-1, 153, 164):

The powers of the Commonwealth Parliament are defined, and therefore limited, by the Constitution. The Court has held on several occasions that the opinion of the Parliament or the opinion of the Governor-General or of a Minister that a particular matter is within the legislative power of the Commonwealth Parliament did not affirmatively establish that the matter actually is within such power....

... It is not in my opinion a function of a court to determine whether legislation "goes too far" or "is incommensurate" or "is too drastic" or "is or is not reasonably necessary". The only function of a court when the validity of legislation is challenged as ultra vires the Commonwealth Constitution is to determine whether it is legislation "with respect to" a

specified subject matter.

....

In my opinion the Constitution of the Commonwealth has not been so imperfectly framed that, in what the Government and Parliament consider a time of crisis when the national existence is at stake, they can act promptly and effectively, by means of executive action and legislation, only by breaking the law. Upon my understanding of their functions and of the nature of the defence power, they can act within the law to meet the crisis without being subject to the risk of being told by a court that they were acting illegally. In such a case, the Government and Parliament are not left by the Constitution to action under a cloud of legal doubt. It might well happen that the crisis would be over - one way or the other - before the Court had heard the evidence (which could easily be made very lengthy) upon the question whether there was really a crisis or not. In my opinion the Constitution does not create such perilous situations.

(Principle: the rule of law)

