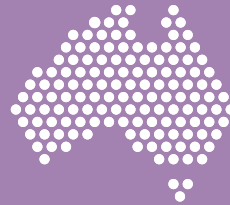




Teacher Reference Document 124



AUSTRALIAN
CONSTITUTION
CENTRE

Unit 14: The High Court and Constitutional Interpretation – Year 10 –
C & C Strand: Laws & Citizens

Topic 10.1: The High Court and Constitutional Interpretation

The Constitution – how should it be interpreted?

The Commonwealth Constitution was negotiated during a number of [Constitutional Conventions](#) in the 1890s, attended by (mostly) politicians from the various Australian colonies. It was a compromise document, which balanced the interests of the rich populous States and the less well-off States with smaller populations. It was built on a number of political assumptions. Some things were specified in detail, particularly concerning the Commonwealth Parliament, while other things, such as the scope of Executive power, were left largely unsaid, in reliance upon convention and history.

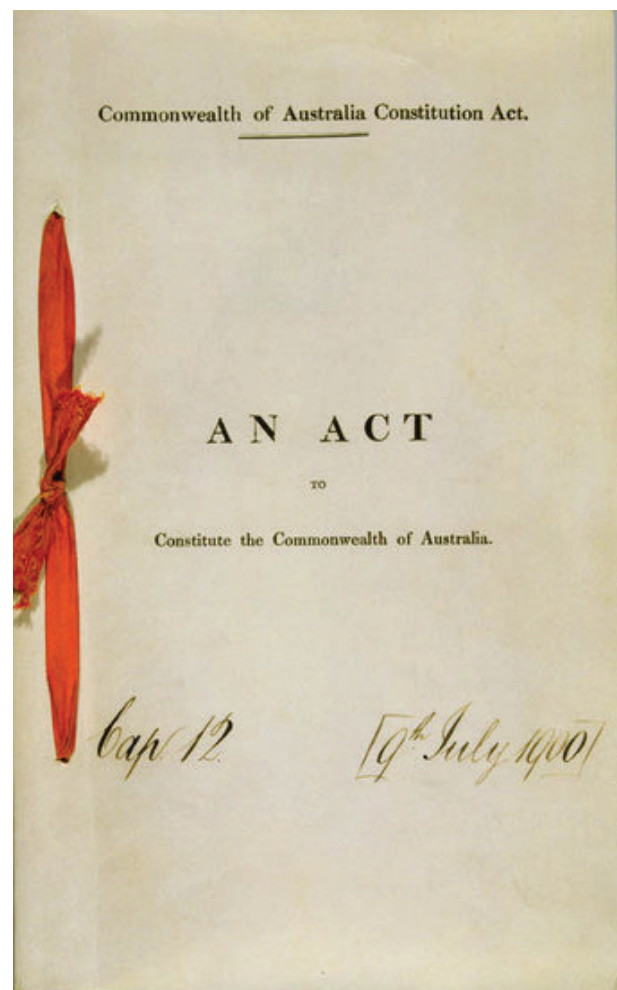
Since the 1890s, the world in which the Constitution operates has changed. In the early years of federation, Australia was still a colony of Britain, with no power to declare war or enter into treaties. Australian laws could be disallowed by the monarch on the advice of British ministers and the Governor-General was usually a member of the British upper classes, appointed by the monarch on the advice of the British government. Australia is now an independent nation, the monarch acts on the advice of Australian ministers with respect to Australian matters, and there have been major changes in transport and communications, overturning assumptions made in the 1890s about economic markets and trade.

So how should we interpret a Constitution made in the 1890s for one world, but which has to operate in another world today?

Original intent or a dynamic interpretation?

Some argue that the Constitution should be interpreted according to the intent of those who wrote it.

One argument for this 'original intent' view is a democratic one. The Constitution provides in [section 128](#) that it can be changed by a bill passed by one or both Houses of Parliament and approved by the people (both overall, and in a majority of States) in a referendum. This gives the ultimate power of constitutional change to the people.



Commonwealth of Australia
Constitution Act 1900 (UK) Source:
National Archives of Australia.

If the Courts change the meaning of the Constitution, without getting that approval from the people, they are denying the people their democratic role and right. Courts are unelected bodies and, some say, have neither the legal right, nor the appropriate mechanisms, to decide what are the social values or community standards that should affect the meaning of the Constitution today. That is a matter for the people, or their elected representatives in Parliament.

An additional argument is that the point of making the Constitution hard to amend, by requiring a referendum, was to ensure that its meaning is stable. If its meaning could change every time judges were appointed to the High Court, no one could rely on it and Parliaments could have no certainty about the validity of the laws they enacted.

On the other side, it is asked why the people of today should be constrained by the 'dead hands' of the framers of the Constitution, who lived in a different world with standards and attitudes very different from our own? The world changes, and the Constitution must be capable of being read in light of the new world. Even the framers recognized that. When dealing with communications technology, which was rapidly changing in the 1890s, they knew they couldn't describe or imagine what was to come. So they referred to 'postal, telegraphic, telephonic, and other like services', encouraging an interpretation that could expand over time to take in developments which they couldn't imagine, such as television and the internet.

The Constitution was written for a colonial Australia which was part of an Empire with a 'Queen of the United Kingdom of Great Britain and Ireland' advised by British Ministers. But it has to be interpreted today as being a Constitution for an independent nation, with a 'King of Australia' advised by Australian Ministers. This cannot sensibly be done by applying a doctrine of 'original intent'. So the argument is made that the Constitution must be interpreted in a dynamic way, to suit the times and the people to whom it applies.

Others have pointed out that it is often impossible to work out the original intent of the framers. While we have records of their debates in the Constitutional Conventions, they just tell us what a few individuals said, and how the majority voted. It might well be that those who voted one way, did so for quite different reasons to those presented by one of the speakers on the topic. The loudest voice in a meeting does not necessarily convey the intent of all the people there.



[Justice Michael McHugh](#)

A Justice of the High Court from
1989 to 2005
Source: HCA

Compromise positions

One view, put by Viscount Sankey in a case relating to Canada, was that the Canadian Constitution was a 'living tree capable of growth and expansion within its natural limits'. This allows for some degree of expansion, but just as a tree cannot grow further than its roots will allow, and therefore has its limits, so too the interpretation of a Constitution cannot extend beyond the fundamental principles in which it is rooted.

Another argument that is both originalist and progressive was made by Justice McHugh in [Eastman v The Queen](#). He thought that the framers did not intend us to be slaves to their mental images and understandings in 1901. They intended the Constitution 'to endure, to be responsive and relevant to the community in which it would operate and to be sufficiently malleable to account for circumstances and conditions that they could not have foreseen.' In other words, it was the original intent of the framers of the Constitution that it be interpreted in a way that adapted with the times.

A slightly different approach is to allow the development of new meanings for constitutional terms, as long as they 'share the "essential" characteristics of the words as used in 1900' and fall 'within the purposes underlying those constitutional words, as distinct from being inferred from later events or points of view'.



Gabo Island Lighthouse
Source: State Library of Victoria

For example, [section 80](#) of the Constitution refers to trial 'by jury'. What is meant by the term 'jury'? At the time the Constitution was written, only men could sit on juries. Does that mean that, in the absence of a constitutional amendment, only men can sit on juries today? One could instead argue that a 'jury' means a panel of one's peers who judge guilt or innocence. Today, a panel of one's peers would include women. So the essential characteristic of the word 'jury' can be retained, in accordance with its underlying constitutional purpose, while its practical application may differ by allowing women to sit on juries.

Another example is the term 'marriage' in [section 51\(xxi\)](#) of the Constitution. At the time of federation, there was no concept of same-sex marriage. Marriage could only be the union of a man and a woman. But one could argue that the essential characteristic of marriage is the union of two people in a permanent family relationship, recognised by society and the law.

How far can this go? Section 51(vii) refers to lighthouses. In the 1890s they were essential to prevent ships from crashing onto rocks. Now this role is fulfilled by global positioning systems ('GPS'). Can one argue that a GPS instrument is really a 'lighthouse' for constitutional purposes? Most would agree that this is going too far, but exactly where do you draw the line?



Topic 10.1 Lesson One



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The High Court and interpretation of the Constitution

Time/Lesson

- 1 hour/ 1 Lesson

Learning Goal

- To understand that the High Court can create precedents by interpreting and applying the Constitution.
- To explain the difference between 'original intent' and 'dynamic interpretation'
- To evaluate the merits of the interpretation of the Constitution by the High Court.

Rationale

Students need to understand role of the High Court, including in interpreting the Constitution (ACHCK092).

Success Criteria

Students can describe how the High Court interprets the Constitution, setting precedents for lower courts. Students can explain the different methods of interpretation and justify why we need a High Court with this power.

Teaching Reference Documents:

[TRD 124 The Constitution - How should it be interpreted?](#)

Resources

VIDEOS:

- [High Court Documentary](#) (12.00)

Tuning In

- WATCH: the [High Court Documentary](#)
- EXPLAIN: As the video explained, the High Court has several roles in the Australian court system, including hearing appeals. What we are going to focus on in this lesson is the role the High Court has in interpreting the Constitution. This may be aided by revising the implied freedom of political communication (Unit 10) and the separation of powers (Unit 8).

Teacher Instruction

READ: TRD 124 THE CONSTITUTION – HOW SHOULD IT BE INTERPRETED?

ANSWER questions on the following:

1. What is the difference between original intent and dynamic interpretation? Which do you believe should be followed? Justify your response.
2. Using the examples of 'jury' or 'marriage' demonstrate different ways these constitutional terms could be interpreted and assess which is preferable.

Group/Independent Learning

DEBATE ONE of the FOLLOWING:

- When the High Court reinterprets the meaning of the Constitution, it usurps the democratic role of the people in a referendum.
- The Constitution is meant to serve the people of today, so it must be interpreted in accordance with current community standards.
- The Constitution is too hard to change by way of referendum, so the High Court should do the job instead.

Wrapping it up

- **CLASS CONVERSATION:** Why is the interpretation of the Constitution left to an independent umpire - the High Court of Australia? What would happen if Parliament or the Government could decide what the Constitution means?

Extension

- **RESEARCH AND COMPARE:** Students research the debate in the United States regarding the interpretation of the Constitution and 'original intent' and compare it to Australia. Why is the debate so political in the United States? Does having a Bill of Rights make a difference?

Assessment strategies

- Check understanding from answers to questions and participation in debate.

