

## From textbook

### Basic approaches

Approaches:

- Originalism
- Textualism
- Contemporary meaning

If the term textualist is taken in a general sense, then everyone is a textualist

The difference is in how you give the textual material a satisfactory meaning

### Intentionalism (p820)

It posits that the overriding duty of the court is to give effect to the intentions of those who formulated the Constitution

Fulfil what was ratified at referenda

Even the dominant literalism of *Engineers* is, at least, based upon the assertion that it provides the best means of getting to the intention

Compared with an *Engineers*-style literalist, an intentionalist will look at Convention Debates or other historical materials

- *Cole v Whitfield* - debates - create a free trade area in the Commonwealth  
- court reassessed the position after this case  
Consult for the purpose of identifying the contemporary meaning and language used, the subject to which that language was directed and the nature and objectives of the movement towards federation  
Use debates in the event of ambiguous text - today, if it's very clear, then don't use intentionalism
- Incorporations case - viewing the drafts suggested that the intention was for the Commonwealth to not control incorporation

An intentionalist may be tempted to bring ambiguities into the text

The founding fathers unquestionably intended that the balance of power in the Australian federation would be considerably more in favour of the States than has come to be the case.

### Textualism (p825)

Focuses on the meaning of the constitutional text (beware - apparently article's author seeks to get the original meaning of the text?)

In textual interpretation, context is everything - give a broad rather than a narrow interpretation, although not an interpretation that the language will not bear

When cases are decided now, you use the logic in those cases, without looking at how far that logic has distanced itself from the original text and understanding, using precedents

- A very common law way of making law for a democratically adopted text  
Courts should not tinker with constitutions if they feel inhibited to tinker with statutes

### Contemporary meaning (p831)

The court has an additional role as the expounder of basic national ideals of individual liberty and fair treatment, even if it is not expressed as a matter of positive law in the written Constitution

We can use the text as sources of legitimacy for judicial development and entrance of shared values - where we get constitutional doctrines?

Interpretive model is not necessarily incompatible with a "living" constitution - contemplate the application of framers' value judgments to new or changed *factual* circumstances

## Constitutional interpretation

3 main approaches:

### 1. **Originalism/intentionalism**

The court should give effect to those who drafted the constitution - see convention debates

Traditionally the HC hasn't gone back to use themselves - but in *Cole v Whitfield* - court reassessed the position

While they couldn't override the subjective intention of the framers, you could use it to look at the contemporary language used at the time

e.g. Incorporation Case - s 51(20) - formation of corporations? - views of the drafts as revealed by the convention debates was that the Cth cannot regulate incorporation

*Cole v Whitfield* - ascertaining the meaning of sections of the constitution (If the text is clear, no need for recourse, but if there is some ambiguity, then you can go back and work out what they meant? But then, when is something ambiguous?)

Might depend on which section of the constitution

### 2. **Contemporary meaning**

Deane's quote that it's a "living document"/"dead hands from the grave" etc...

Starke contrast to the originalist approach

Look to the society that you find yourself in

In relation to rights, this probably has the most serious consequence

With originalism - quite narrow, not much of a concern - and only rights they conceived of in 1901

Contemporary meaning - evolving interpretation that could be given to the constitution - once again, no judge would take this approach since it would go against precedent

Section 80? They had to look back about what trial by jury meant in 1901 - implicit in the judgment that the identity of the jurors changed from 1901 to now (e.g. no women)

### 3. International law/human rights

Only really Kirby would accept this

But - not stable/fixed law? Our constitution doesn't allow us to go beyond the text

He uses international law all the time - puts him in dissent more?

### 4. **Textualist/literalist approach**

Engineers? Go back to text

Rights - some judges said it was ss 7 & 24 - e.g. *Lange* - they said it's important that you make reference to the constitution

Implications - you have to reconcile how Engineers abolished these (external) doctrines (from our federal structure) - we end up with these implications, but where do we get that - e.g. constitution presupposes existence of States