Chapter 27

Theories of Constitutional Interpretation: A Taxonomy*

Introduction and disclaimers

There is no express provision in the Constitution mandating the principles on which it is to be interpreted. It was enacted in 1900 as a statute of the Imperial Parliament, but the Interpretation Act 1889 (Imp), which was in force in 1900, enacts no principle of constitutional interpretation. However, the Constitution does have characteristics which some have taken as pointing to particular approaches. Thus Higgins J said: “it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be”.1 O’Connor J said that its terms are “broad and general … intended to apply to the varying conditions which the development of our community must involve”.2 Because it creates “one indissoluble Federal Commonwealth”, it will last indefinitely,3 perhaps until Australia loses independence after total defeat at the hands of a foreign power, or until human existence itself ends. And the Constitution provides for only one means of amendment—the difficult route marked out by s 128. But although these indications in the Constitution have been used to support various theories of interpretation, the reasoning underlying them is not commanded by the Constitution itself. As McHugh J has said, “[a]ny theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself”.4

This lecture seeks to examine some of these theories as expounded in the High Court. This lecture is not to be taken as a criticism of any of them, or as an expression of preference for any of them, or as a defence of, or a departure from, conclusions

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1 A-G (NSW) v Brewery Employes Union of New South Wales (1908) 6 CLR 469 at 611-612 (emphasis in original).
2 Jumbunna Coal Mine NL v Victorian Coal Miners’ Association (1908) 6 CLR 309 at 367-368—unless the particular context or the rest of the Constitution suggests otherwise.
3 Baxter v Commissioners of Taxation (NSW) (1907) 4 CLR 1087 at 1105 per Griffith CJ, Barton and O’Connor JJ.
4 McGinty v Western Australia (1996) 186 CLR 140 at 230.
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