Chapter Two

Implied Rights and Federalism: Inventing Intentions while Ignoring Them

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The thought of undertaking an exegetical analysis of the case law surrounding Australia's implied rights decisions and the division of powers federalist decisions, and doing so in 30 minutes at great speed, was a fairly unappealing prospect to me. More to the point, I reckoned it would have next to no appeal to any of you.

Instead, I thought I would try something a bit different. So I'm going to begin by asking you to remember your Jane Austen. Recall her novel *Emma*. Emma is the heroine who is the incorrigible matchmaker. Having tasted some success in this pursuit, she sets out on a new mission to arrange matters so that the local clergyman and a nice young woman of indeterminate parentage might come to see each other's attractions. Of course, the vicar misunderstands Emma's attentions on behalf of the young woman. Indeed, matters reach the point that when, by chance, Emma and he are left alone together in a carriage the vicar alludes to marriage. He does not at first explicitly state that he wants to marry Emma. Rather, he attempts to convey that meaning indirectly, to insinuate it. In other words, the vicar implies his intentions.

At first Emma misunderstands, thinking he refers to the young woman for whom Emma has been trying to matchmake. Only when the vicar is forced to be explicit – to state his intentions directly and clearly – does Emma understand. Embarrassment, rejection and hurt feelings follow.

Now my point isn't that Jane Austen's novels make for better reading than almost all statutes and judgments, though I daresay that wouldn't be an impossible case to try to make. No, my point is that attempting to imply meaning – as opposed to stating it explicitly – carries risks. The implication can be missed; it can be misunderstood.

Of course, in everyday life people imply things all the time. Generally little rides on any potential misunderstanding, and anyway we can always ask for clarification if we have any doubts about the inferences we are drawing as regards the implications our friend is making. In other words, implying something, rather than explicitly stating it, can sometimes have advantages in the day-to-day world of social interactions.

When it comes to a country's written Constitution, the framework by which its institutions will be structured and its government operated, the attractions of implying something – rather than stating it explicitly (if sometimes none the less in rather vague, amorphous and indeterminate terms) – is rather less obvious. In fact, in something as important as a Constitution we would not expect any crucial matters to be conveyed implicitly rather than explicitly.

Try it. Put yourself in the shoes of the framers of a written constitution. Make it one of the oldest democratic constitutions going. Let's pick Australia's.

And let's remember what the purpose of a written Constitution is. Its purpose is to lock things in. So perhaps a Constitution might contain an enumeration of federal and possibly State powers, or rules related to how members of the chambers of Parliament are to be selected, or provisions related to who chooses the most senior judges, or maybe even an enumerated list of embedded rights. Consider how Justice Antonin Scalia of the US Supreme Court puts it – and I like to cite Scalia, because in some self-consciously progressive academic circles the mere mention of his name is guaranteed to elicit a reflexive eye-rolling response, as though the roller were self-evidently more intelligent than Justice Scalia. But leaving aside my own sources of amusement, here's what Scalia says about Constitutions:

> "It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole point is to prevent change".[1]

Put slightly differently, a written Constitution makes a few matters hard to alter, certainly harder than the regular statute-enacting process. As the American legal scholar Larry Alexander puts it – and you can relax because he doesn't elicit the eye-rolling response – in going down the route of a written Constitution we have decided that "risking rigidity rather than risking security"[2] is the better bet. (Parliamentary sovereignties such as New Zealand, and maybe still the United Kingdom – though the European Union is greatly undermining the UK's claim to parliamentary sovereignty status – have made the opposite bet.)

Now this fact about the very point of having a written Constitution that locks certain things in has a distinct bearing on how best to interpret such a document. I, personally, think there are good grounds for thinking statutes ought to be approached on a different interpretive basis than a written Constitution.[3] And I think it bears on the competing merits of "living tree" or "living document" or "progressivist" type interpretive approaches, as opposed to "original intent" or "original understanding" type approaches. In my view the latter are far more easily defended, not least on democratic grounds, as approaches to interpreting a written constitution. But that is a talk or a paper for another day.[4]

For today, let's go back to where you were putting yourself in the shoes of the framers of the Australian Constitution. Now why would you – or they – want to resort to implication when it comes to laying down society's fundamental legal framework, the core of its Rule of Recognition? More to the point of this talk, let's suppose that you and the rest of the framers wanted to include an embedded right or two that would trump the statutes of the democratically elected and legitimate Parliament. Maybe you and the framers think some sort of right to freedom of political communication is warranted.

Let me ask the question whose answer seems pretty obvious. Would you explicitly state or lay down that this right will exist? Or would you cross your fingers and hope that the explicitly laid down provisions for a system of representative democracy (say, ss 7 and 24) implied your intentions and that maybe, just maybe, some nine decades down the road a majority of top judges might "discover" or "find" this implied meaning of yours – a meaning or insinuation that lay buried in the "text and structure" of the Constitution?

If one seeks to link implications to any real life person's or group's actually held intentions, then of course things get worse. They get worse because we know that the actual Australian framers were well aware of the protection given to free speech in the First Amendment to the United States Constitution and we are well aware that those actual framers deliberately – after discussion and debate – chose not to insert any similar sort of Bill of Rights-type provision (and indeed no Bill of Rights either) into the Australian Constitution.

Nor is this some minor or ancillary matter. We are talking about a right that will afford the unelected judges the power to trump the decisions of the democratically elected legislature. As a result, one might be inclined to think that something of this magnitude would warrant an explicit provision, that the framers would not simply hope that the meaning they nowhere expressed explicitly would some day be "discovered" or "found" buried in the "text and structure" of those things they did explicitly state and lay down.

Provided one is still using the notion of an "implication" in a way that connects it to the intentions of real life human beings, then things get even worse for defenders of the so-called implied rights cases.[5] They get worse because the content, and scope, and substance of this right – today, some century later – is provided overwhelmingly by what some handful of unelected judges said in the *Lange* case,[6] and not by the nebulous, rather gaseous notions of "representative democracy" or "representative government" or anything else in the text of the Constitution. And it gets triply worse because, as s. 116 illustrates, the framers were prepared to lay down an explicit right "that the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion". Why bother to do that explicitly, but merely imply a right to freedom of political communication? Hard question, isn't it?

Of course, once a precedent has been laid down, one let us suppose that has been wrongly decided, very difficult issues arise for later-in-time top judges who both recognize that this earlier precedent has been wrongly decided, but also understand the immense certainty-enhancing benefits of the doctrine of *stare decisis* – of following binding precedents. I attempted to discuss this vexing issue in my paper to this Society last year. Suffice it to say here that there is no simple formula of what to do in such circumstances and that smart, reasonable people (and that includes top judges) will differ on a case-by-case basis. It would be a brave person, luxuriating as he would be in all the benefits hindsight affords, who would criticize any top judge's choice (between following the perceived-to-be-wrongly-decided precedent, or overturning it and upsetting settled expectations) in such circumstances.

Returning to this year's topic, however, my point is that the so-called implied rights look an awful lot like judicially made-up rights. Or rather, that is the case for those who tie the concept of an implication to the

actually held intentions of real life human beings. So here's the next question. Can the notion of implications be sensibly or coherently divorced from that of actually held (but not explicitly stated) intentions of real life human beings?

I will not delve into this issue in overly great depth. Suffice it to say that such a task will be difficult. The most obvious approach to take in travelling down this route, and attempting this divorce, starts by noting that words – and marks on paper – do and can convey meaning against a backdrop of shared conventional meanings. So symbols can conceivably convey meaning even if there be no actual author (e.g., random typings by monkeys that after some huge period of time reproduce a Shakespeare sonnet). More to the point, words can convey a meaning (given some shared conventional backdrop), regardless of what the author or authors intended them to mean.

But this sort of "words can have a meaning separate from the one intended by their author or authors" does not overly much help the proponents of the implied rights jurisprudence. To help them more you would have to posit that the words used – as conventionally understood – convey a meaning in opposition to the actually held intentions of the framers. This is conceivably possible. But it seems highly unlikely as regards constitutions generally, and is even more unlikely or implausible as regards the specific question of whether the words in Australia's Constitution, given their conventional meaning, imply a right to the freedom of political communication.

Such a line of thought – that public meaning has somehow diverged from, or more accurately put, has taken on the exact opposite sense of, the intended meaning – requires you to posit a giant screw-up on behalf of the authors.

An alternative approach in attempting to divorce the notion of implications from any actually held intentions of any real life people requires you to think of constitutions not as devices to lock certain things in, but rather as some sort of vehicles for expressing society's fundamental values, in some sort of nebulous, undefined, and *Kumbaya*-singing way. And these vehicles, you need to think, were never meant to lock in the judges in any way. Lock in the rest of the voting public? Yes. The judges? No. I don't find that a remotely attractive or compelling alternative. Nor is it one which puts many – maybe no – limits or constraints on how the concept of an implication can be used by the point-of-application interpreters.

Don't get me wrong about the implied rights cases. In many ways I like the outcomes. I am a wannabe American in my attachment to wide open, vigorous free speech. I very much like the idea that there should be few constraints on speech, and particularly so in the context of matters political. I think good consequences for society follow from forcing people to have thick skins.

I am also of the view, though, that having unelected judges announce such a policy *ex cathedra* is undemocratic, illegitimate, and undermining of all the many good consequences that flow from what are sometimes referred to as the republican virtues of self-government.

That ends the first part of my appointed task, trying to convince you that our so-called implied rights cases look more like cases that invent or create or legislate rights. The framers may conceivably have intended to imply the existence of a right to freedom of political communication, but it just seems so unbelievably unlikely that this was in fact the case. Nor does any appeal to public meaning – to the understandings of the voters of the various colonies in approving the Constitution – help save the concept of implication here. It is almost always – not always, but almost always – the case that public meaning correlates or corresponds with intended meaning. There has been a giant screw-up when it does not. And there are no grounds to posit the framers' intentions were misunderstood – were turned into their polar opposites – on this issue. Only by conceiving of constitutions as loose and open vehicles for transmitting nebulous, indeterminate social values – values whose updating and "living tree"[7] or "keeping pace with civilisation"[8] aspects are handed over to the unelected judges – is there a realistic prospect of rescuing the concept of implication. Such a rescue, however, is purchased at far too high a cost. Travel down this road not only guts the concept of implication of most, if not all, of the constraints or limits on what it allows a user to do. It also elevates today's unelected judges into latter day redrafters, updaters and all-purpose fixers of the Constitution. A less appealing prospect is hard to imagine.

What about federalism then? Does the concept of an implication fare better there than it does with the right to freedom of political communication? The short answer is an unequivocal "Yes". But let me try out a rather longer answer on you.

To start, notice that there is no need here to sever the notion of implication from the actually held intentions of the framers. As Justice Callinan stated in no uncertain terms only two years ago, the Constitution "expressly,

and in many places by clearest of necessary implications, recognises the continuing existence of the States".[9] That reference to implications is a reference to actually held intentions of the real life framers, shown in part by their repeated reference to the States, not least in s. 107 and all the rest of Chapter V.

Of course, there are easy questions one can ask about federalism in Australian and hard questions. An easy question, at least an easy one in my view and the view of my colleague Nicholas Aroney, is whether the individual heads of federal power in s. 51 have been interpreted by Australia's top judges so as to extend Commonwealth power in ways that would not just have been unexpected by the framers, but wholly opposed by them? We think the answer is clearly "Yes".[10] Most obviously, the external affairs power (s. 51 (xxix)) has been used to allow the Commonwealth to move into internal affairs,[11] and the corporations power (s. 51 (xx)) has been used to allow it to move into industrial matters.[12]

In fact Nick and I have argued "that Australia's High Court has taken the *Australian Constitution* and created a … product … that ignores (or discounts so massively its weight that it amounts to ignoring) (1) the obvious attempt to create a federal system in fact, not just in name; (2) the process used to adopt the *Constitution*; (3) its structure as a whole; (4) the *Convention Debates* and drafting history; (5) various *failed* referenda aimed at increasing Commonwealth powers; and (6) the logic that tells you that a narrower, more circumscribed power that has been explicitly laid down and granted to the Commonwealth in some area (as in s. 51 (xxxv) ["Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of any one State"]) forecloses granting the Commonwealth a wide-open, virtually uncircumscribed power over that same area via some other head of power (as via s. 51 (xx))".[13]

Another way to make the same point is to note that the cumulative way our Constitution has been interpreted, where things stand today, allows the Commonwealth a largely untrammelled legislative power, but not the States. More particularly, it allows the Commonwealth noticeably more such power than would seem was intended by the framers, or understood by the voters approving the Constitution. I'd bet that none of the Constitution's framers would ever have imagined that a century or so later the States would be as emasculated as they are today, and so dependent on the Commonwealth for their finances.

In that sense, intentions – and the implications that flow from the intended meanings of real life human beings – have been ignored when it comes to federalism.

However, there are a number of harder, more specific questions related to federalism that raise the concept of an implication, and so of original intentions. (I do not think that when it comes to federalism disputes there is any need to have recourse to the secondary ploys of i) saying public meaning diverges from intended meaning, or (ii) saying that the whole point of a constitution, and hence how it ought to be interpreted, is just to state society's most important values and hence create a vehicle through which these values and guidelines can "advance" and "grow".)

For instance, ought the s. 51 heads of power to be read individually and separately or ought they to be read as a whole? The gist of the question here is an interpretive one. Can the interpreter imply something about one head of power from reading the others or ought each one to be read in isolation. Both approaches are conceivable. The former approach can be described as requiring recourse to an implication.

And related to that issue is the so-called reserve powers doctrine, one that argues that the limited way in which a head of power is conferred on the Commonwealth bears on what powers have been reserved to the States in s. 107. Call this a negative implication if you want, the idea being that what is *not* granted to the Commonwealth under a head of power is almost as telling as what *is* granted.[14]

Again, both sides of the argument are plausible. I think intentions matter in resolving the dispute. I also think there is plenty of textual support for my pro-federalist readings here, though the text is not conclusive.

But let us be clear, the High Court from 1920 (and the *Engineers Case*)[15] onwards has overwhelmingly not agreed with that pro-federalist reading.

There are other specific matters that require recourse to implied meaning to resolve – for example, the issue of intergovernmental (or State-Commonwealth) immunities – but the two first mentioned ones are probably the most important.

There are also secondary, or ancillary questions that only indirectly bear on federalism disputes. One such ancillary question is whether failed referenda – referenda that aimed to increase Commonwealth powers but were rejected by the voters – are relevant in deciding the Constitution's meaning should the Commonwealth seek to enact legislation none the less under the unamended head of power (or without some new head of power). Can we infer that a failed referendum reinforced the generally received meaning of the words?

Think about that for a moment. In the *Work Choices Case*,[16] the majority of the High Court comprehensively rejected the claim that prior failed referenda were relevant. They stated there were "insuperable difficulties in arguing from the failure of a proposal for constitutional amendment to any conclusion about the Constitution's meaning".[17] Not only was there a lack of overlap or equivalence between the issue before the Court and the subject of the referenda, said these majority *Work Choices* Justices, but as well:

> "…..few referendums have succeeded. It is altogether too simple to treat each of those rejections as the informed choice of electors between clearly identified constitutional alternatives. The truth is much more complex than that …. [and so we reject the suggestion] that failure of the referendum casts light on the meaning of the Constitution".[18]

My intention here is not to detail the history of what the High Court has said about the relevance of referenda to how the Constitution ought to be interpreted. It is not even to note that Justice Callinan had a view much more in line with thinking these failed referenda *were relevant*.[19] Professor Anne Twomey has done all that already in an excellent article in the *University of Queensland Law Journal*.[20] For our purposes here I simply want to do two things.

Firstly, I want to point out that if one really thinks that a failure by the electors to grant the Commonwealth some new power under an amended head of power is not relevant in any way (conclusively so, or even less than conclusively so) to the question of whether the Commonwealth can already exercise some portion of that sought after power under the existing heads of powers – that, in effect, the judges are now saying that the Commonwealth *always* had this part of the power but it did not know that was the case, nor did the electors, nor did the States, nor (perhaps) did the then existing Justices of the High Court – that this seems to me to amount to a rejection of any sort of implication at all. I, for one, cannot see how one can maintain that sort of purist line ("we need explicitness of correlation between the referendum and the court case before the former will be considered in any way at all") while accepting the thinking in the implied rights cases. If there are "insuperable difficulties in arguing from the failure of a proposal for constitutional amendment to *any* conclusion about the Constitution's meaning"[21] (a claim I find wholly unpersuasive), then there must surely be insuperable difficulties – indeed a good many more such insuperable difficulties – in arguing from the "text and structure" of the Constitution to any conclusion about the Constitution's meaning as to whether one or more implied rights are there waiting to be discovered by present day top judges.

Secondly, I want to make it clear that I do not think it follows in any way from the fact that "few referendums have succeeded"[22] that Australia's procedure for amending its Constitution is a procedurally difficult one. The procedures to amend the Constitutions of Canada and the United States, involving the need to gain the agreement of the legislatures of large pluralities of the States and Provinces (and in the case of Canada in some instances, *all* of them), set much higher procedural hurdles. The record here simply shows that the electors like their Constitution and do not think that change is wise. That in no way amounts to a "pitiful Australian record of constitutional amendment".[23] Nor is it relevant to dismissing these failed referenda as irrelevant in the way the High Court did in *Work Choices*, without an implicit assumption that those voting against some, or all, of the proposed referenda were stupid, dumb or perhaps in need of re-education. That is the needed premise to make the failures wholly irrelevant, at least from the perspective of latter day judges deciding a head of powers dispute today.

I am completely in agreement with Justice Callinan, therefore, when he responded to this sort of thinking in the *Work Choices Case* by saying that he was "not prepared to regard the people as uninformed".[24]

In various ways, then, the concept of an implication arises in federalism, and more particularly in heads of powers, disputes. It seems to me that in all such disputes the intentions of the framers are relevant, and I would say often point in the opposite direction to the pro-Commonwealth decisions of the High Court. (In some ancillary matters one might be able to argue that the same applies to the electors in referenda, in my view.)

But let me finish by pointing to a certain irony when comparing the so-called implied rights cases and the division of powers cases. In federalism cases the High Court has generally come down on the side of *increasing* Commonwealth government power. In the free speech or implied rights cases, though, the Court's decisions have led to *decreased* or more constrained Commonwealth and State government power. In deciding the former, the federalism disputes, the judges have ignored original intentions and the various sorts of federalist implications based on intentions in favour of a sort of textual literalism. Yet in deciding the free speech

cases the same judges have put aside literalism in favour of vague appeals to the underlying structure of the document – appeals with little, if any, support from actually held intentions of real life people.

The irony of this bifurcated approach only breaks down in so far as both outcomes might be seen to be in keeping with what a "keep the Constitution up to date" desire would dictate.

Endnotes:

1. Antonin Scalia, *A Matter of Principle* (1997), p. 40.
2. Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (1998), p. 4.
3. See James Allan, *Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of Original Intent*, (2000) 6 *Legal Theory* 109-126.
4. In fact, it's one I have done in various ways already. For example, see *ibid.*, and also *Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century*, (2006) 17 *King's College Law Journal* 1-26.
5. See, for example, *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1; later revised in *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520.
6. *Ibid.*. See Callinan J's judgment in *Coleman v. Power* (2004) 220 CLR 1, where he makes this point.
7. Lord Sankey. Notice how this metaphor of a constitution as a live thing is so implausible on examination.
8. Cooke.
9. *Sweedman v. Transport Accident Commission* (2006) 226 CLR 362 at 421.
10. James Allan and Nicholas Aroney, *An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism*, (2008) 30 *Sydney Law Review* 245.
11. *Commonwealth v. Tasmanian Dam* (1983) 158 CLR 1 ("*Tasmanian Dam*").
12. *New South Wales v. Commonwealth* (2006) 229 CLR 1 ("*Work Choices*").
13. James Allan and Nicholas Aroney, *op. cit.*, pp. 287-288.
14. See Nicholas Aroney, *Constitutional Choices in the* Work Choices Case*, or What Exactly is Wrong with the Reserved Powers Doctrine?,* (2008) 32(1) *Melbourne University Law Review* (in press).
15. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ("*Engineers*").
16. *New South Wales v. Commonwealth* (2006) 229 CLR 1.
17. *Ibid.,* p. 100. The majority Justices were Gleeson CJ, and Gummow, Hayne, Heydon and Crennan JJ.
18. *Ibid.*.
19. *Ibid.*, p. 300.
20. Anne Twomey, *Constitutional Alteration and the High Court: The Jurisprudence of Justice Callinan*, (2008) 27 *University of Queensland Law Journal* 47.
21. *Work Choices Case*, p. 100, italics mine.
22. *Ibid.*. I believe the record is that 8 out of 44 have succeeded. And all but six failures lost on the first leg of the test, that they failed to get half of all electors to agree. (The others lost on the federalist leg of needing the electors in a majority of States to agree.)
23. Anne Twomey, *op. cit.*, p. 50.
24. *Work Choices Case*, p. 300.