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ARTICLES

Inadequate Interests: Critiquing the Interest-only Approach to the Threshold Stage of Procedural Fairness – *Elliott Cook*

The current approach taken by the High Court in determining when the making of an administrative decision will attract the rules of procedural fairness was set out by the *Court in Plaintiff S10/2011 v Minister for Immigration and Citizenship*. The "interest-only" approach adopted by the Court discards the doctrine of legitimate expectations, simply requires a person's "interest" to be affected adversely by the decision, and links the requisite interest to the interest that, if affected, gives standing at common law and in equity. In doing so the Court has moved away from Mason J's test as enunciated in *Kioa v West* and the need to show a "right, interest or legitimate expectation". No longer does a gradation of different types of interests play a role in determining whether the rules of procedural fairness apply. This article critiques this "interest-only approach", concluding that it generates uncertainty as to the scope and application of procedural fairness. This uncertainty is chiefly caused by the use of the one word (interest) to denote apparently distinct, yet overlapping, concepts in closely related areas of law without the underlying principles to make clear the necessary distinctions. 24

From NFIB to Williams: A Principled Prohibition on Coercion for Australian Federalism – *Colette Mintz*

Despite considerable analysis of the High Court's decision in *Williams v Commonwealth*, nothing has been said, in the years since it was decided, about whether the case disclosed a previously unrecognised, deep principle for Australian federalism. In this article, I discover such a principle. I focus on the majority judges' emphasis on the prohibition on federal "coercion", by reference to the principled justification for a similar prohibition in the American Spending Clause and anti-commandeering cases. I analyse the federalism principles that have been deployed by the US Supreme Court in those cases (culminating in *NFIB v Sebelius*), and test each against Australian constitutional values. I argue that a principle that justifies a rule against coercion in both jurisdictions is what I term "political community". In Australia, this is the proposition that the Constitution enshrines federalised representative and responsible government. In consequence, any attempt by the Federal Government to disrupt the representative relationship between a State government and its citizens is unconstitutional. 47

The Limits of Constitutional Justice – *Murray Wesson*

In recent decades, in many jurisdictions there has been a shift away from a classical liberal conception of the constitution to a conception of the constitution as geared towards the alleviation of social and economic disadvantage. This development is the result of three interlocking trends: the growth of positive obligations; the embrace of substantive equality; and the proliferation of socioeconomic rights. The article explores these developments from a liberal constitutionalist perspective, sourced in the work of John Rawls. With reference to "A Theory of Justice", the article argues that liberal constitutionalism is not wedded to the classical liberal conception of the constitution and so is not inconsistent with these trends. However, in light of "Political Liberalism", the article contends that the liberal understanding of the constitution as a social contract limits these developments by seeking the hypothetical consent of reasonable individuals. This results in an understanding of socioeconomic rights as generating a social minimum, as opposed to more expansive forms of distributive justice; and an understanding of substantive equality as circumscribed by the need to maintain the hypothetical consent of reasonable individuals adversely affected by measures such as positive action. These arguments are illustrated with reference to decisions of the South African Constitutional Court. 63

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