CONSTITUTIONAL INTERPRETATION:
HISTORY AND THE HIGH COURT:
A BIBLIOGRAPHICAL SURVEY

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In this article Dr Thomson analyses the peculiar method of constitutional interpretation adopted by the High Court of Australia. He compares this method to that used by the Supreme Court of America, and he also examines the particular views of the individual members of the High Court as it altered over the years. In particular the author questions the reluctance of the Court to refer to the Convention Debates and other historical material as tools in the interpretation of the Constitution. The article also provides, through its examination of both primary and secondary material, an extremely useful bibliography with which to approach the interpretation of the Constitution.

A law historian, if he has any sense, will refrain from expressing opinions about the meanings given to [the] words of [the Constitution]. . . . he may have opinions, but the grave duty of interpreting the Constitution is not laid upon him. In looking through some of the celebrated judgments of the High Court and the Privy Council, however, he cannot fail to be intrigued by a curious sort of hypothetical history indulged in by various learned judges. . . .

[T]he settled doctrine of the [High] Court is that [Convention debates] are not available in the construction of the Constitution. . . . An academic exercise to explain historically why the Constitution was cast in a particular form is one thing. To identify the meaning of the words in which the Constitution is expressed by examination of its discursive development is quite another. The former . . . has no place in the task of construing the text of the Constitution except perhaps in the case of an ambiguity in that text which cannot otherwise be resolved. But, absent the possibility which such ambiguity may present, the task of deducing the meaning of the words constitutionally employed derives . . . no assistance from a consideration of the process by which that text came into being. Indeed, attention to the course of the convention debates might well distract the
mind from the proper meaning of unambiguous words in the text... [T]he use of historical material generally is... subject to the same observations and limitations.4

That it is a constitution we are expounding... means that our ancestors wrote the document for us as well as for themselves. We are not new men, without umbilical cord. To be aware of how we got here does not mean to be tied by the dogmas of the past. The rearview mirror is not primarily to warn us that we are being chased. It suggests... that you cannot successfully navigate the future unless you keep always framed beside it a small, clear image of the past. Clio, [the Muse of History], deserves no throne; but may she not claim a corner seat at the conference table?5

Unlike their United States' brethren,4 historians working in the field of Australian constitutional history have not5 influenced the interpretation of the Commonwealth of Australia Constitution Act of 1900.6 Nor have they made their presence felt in the debate concerning the process or methodology of constitutional interpretation.7 This, of course, does not deny that historians have done much work of value on the Australian Constitution and its antecedents.8 Rather it suggests three lines of enquiry. First, the reasons for this situation. Second, whether any change is possible. Finally, whether it is desirable to effectuate any alteration so that constitutional interpretation falls more clearly within the jurisdiction of the historian.

In large measures the dilemma faced by Australian historians has resulted from rules of constitutional interpretation9 formulated by "the High Court of Australia".10 From the earliest constitutional law cases the High Court has expounded that the constitutional convention debates are not to be used by Australian courts as an aid to interpreting the Constitution.11 The judiciary can refer, though, to the draft Constitution Bills12 of 1891, 1897 and 1898.13 Other Constitution Bills are excluded from the interpretative process. For example, those drafted by Andrew Inglis Clark14 and Charles Cameron Kingston.15 Draft Bills prepared by Samuel Walker Griffith,16 drafting sub-committees17 and the Conventions when sitting as a Committee of the whole,18 in the process of finalising the Bills adopted by the 1891 and 1897-1898 Conventions may apparently be considered by the courts.19 Also, the Constitution Bill of 189920 may be used by the courts as an aid to interpretation.21 Even within these limits the High Court has rarely reproduced or quoted provisions of draft Constitution Bills.22 The Court does, however, permit, and more frequently indulge in, more general historical exposition23 including the formation of the Constitution,24 evolution of particular provisions25 and pre-Federation history.26 Finally, the Court refers to books written about and contemporaneously with these events.27

Using the resources permitted by these rules of interpretation the High Court produces a "judicial history"28 of particular words, phrases and provisions of the Constitution so as to ascertain their meaning in 1900.29 The obvious curiosity is, of course, the intentional refusal to resort to the primary evidence while relying on secondary source material to establish the meaning of constitutional terms.30
Apart from the notion that the Australian Constitution is a statute of the United Kingdom Parliament and should therefore be judicially interpreted according to rules of statutory interpretation, several other reasons may be adduced to explain the High Court’s reluctance to use, for interpretative purposes, historical materials pertaining to the evolution of the constitutional text. For example, all the Justices who sat on the Court during its first decade were men who attended and participated in the 1890’s Constitutional Conventions. Presumably they considered that they knew the intention behind the words embodied in the Constitution without the necessity of turning to the records of Convention proceedings. Furthermore, apart from the verbatim transcript of debates, other materials, such as draft bills and proposed amendments, were not readily accessible. Unfortunately, they continue to be inaccessible. Even if the historical material was more complete there would doubtless continue to be differing conclusions reached as to the framers’ intent and meaning of particular provisions. Finally, it has also been suggested that because “the Convention Debates are long and generally tedious, and barristers are busy men, and even law students often pressed for time” that the High Court has not relied on primary historical resources in interpreting the Constitution.

Despite an increasing amount of research devoted to discerning the original intention of the Founding Fathers, the High Court has continued to adhere to its exclusionary rules of interpretation and ignore publications dealing with federal constitutional history. That Court could change its attitude and adopt a different methodology of interpretation. No statute or constitutional injunction supports the present process of interpretation. The rules of constitutional interpretation which have been formulated by the Court can be altered by the Court. Whether, and to what extent, a change is desirable, so that the original intention plays a more fundamental role, is a question worthy of consideration by historians, lawyers and the High Court. Underlying and interwoven with this question is, of course, the more fundamental premise and larger issue of the appropriate role of tenured and appointed judges exercising the power to declare legislation and executive acts unconstitutional in a government system founded on the notion of majoritarian representative democracy.

At one end of the spectrum are those who advocate that “the principal, indeed the only, criterion for constitutional interpretation is the ‘intent’ of the framers.” The reason why the original intention is so important and binding on the judiciary, and others, when interpreting the Constitution has been enunciated by James Madison: if “the sense in which the Constitution was accepted and ratified by the Nation...be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers.” Were it otherwise, the High Court would become a “continuous constitutional convention” and the Constitution would be merely blank parchment whose words are empty vessels into which the judges can pour their own values and preferences. Thus the predominant inquiry in constitutional interpretation should be “what did the framers mean to accomplish; what did the words they used mean to them?” At this juncture Convention debates, draft constitution bills and other primary records are of the utmost importance.
The interpretative theory at the opposite end of the spectrum ignores this evidence. It postulates that ascertainment of the meaning of constitutional provisions should be by reliance on the text of the Constitution and a dictionary. It is argued that, apart from practical problems, for example, incompleteness of the historical record, there are also the usual difficulties, such as ambiguity, vagueness and apparent mistakes, associated with establishing the meaning and intention attributed to the text by those associated with the drafting, ratification and adoption of the Constitution. Thus, it could be concluded that judges who rely on meanings gathered from historical research may have a much greater opportunity for judicial activism and implementation of personal predilections under the guise of adhering to the original intention than judges who use a literal or textual approach to interpretation.

A more balanced approach, it is suggested, would first endeavour to ascertain the original intention of the framers. Where that intention is "clearly discernible" it should be the predominant and governing factor in constitutional interpretation. Where the intention is not of such a definitive nature but rather has deliberately left the constitutional text to gather meaning over time so that it may cater for an expanding future, history should be merely a guide, not the principal determinant. Other factors such as evolving principles of constitutional government, federalism, institutional integrity and individual liberty would have a part to play. Here the High Court needs to work towards a linkage between past values and evolving demands.

Given present Australian judicial practice, it is most unlikely that the High Court, of its own motion, will address these questions. Both the issue and underlying premises of the judicial interpretative process must therefore be given a more prominent place in discussions concerning Australian constitutional law. That both are vital components in any consideration of the Judiciary's role under a written constitution and vis-à-vis other branches of Commonwealth and State governments cannot be denied. Eventually, of course, it is this larger theme which must be addressed.
FOOTNOTES

1 J. A. La Nauze, "'A Little Bit of Lawyers' Language: This History of 'Absolutely Free' 1890-1900'", in A. W. Martin (ed.), Essays in Australian Federation (1969) 57-58.


5 The most notable exception is a quasi-historical commentary by two lawyers J. Quick & R. R. Garran, The Annotated Constitution of the Australian Commonwealth (1901), (Rep. 1976). Even concerning this “seminal work on Australia's federal history and first commentary on the federal constitution” it is “difficult to say...what influence [it] has had on particular judgments” of the High Court; G. Sawyer, supra, v. (Foreword). See note 27 infra.

6 63 & 64 Vict. c. 12 (1900).


9 See e.g., P. Brazil, "Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular" (1961) 4 U. Qld. L.J. 1, 16-21; W. A. Wynes, Legislative, Executive and Judicial Powers in Australia (5th ed. 1976) 19-20; P. H. Lane, note 7 supra, 1107-1120, 1175-1205. For a constitutional provision which authorises the courts to use the travaux préparatoires as an aid to interpretation, see J. Goldring, The Constitution of Papua New Guinea: A Study in Legal Nationalism (1978) 125.


11 Convention debates "are no higher than parliamentary debates, and are not to be referred to except for the purpose of seeing what was the subject-matter of discussion, what was the evil to be remedied, and so forth", Municipal Council of Sydney v. Commonwealth (1904) 1 C.L.R. 208, 213-214 per Griffith, C.J., arguendo (emphasis added). "[T]he expression of opinion of members of the Convention should not be referred to", Tasmania v. Commonwealth (1904) 1 C.L.R. 329, 333 per Griffith, C.J., arguendo. Stephens v. Abrahams (No. 2) (1903) 29 V.L.R. 229, 239, 241 per Williams J., arguendo. "[I]t is settled doctrine in Australia that the records of the discussions in the Conventions and in the Legislatures of the Colonies will not be used as an aid to the construction of the Constitution", A. G. (Cth); ex rel. McKinlay v. Commonwealth (1975) 135 C.L.R. 1, 17 per Barwick C.J. "[It is firmly settled that resort may not be had to the debates at the Conventions where the Constitution was discussed and formulated]", A. G. (Cth) v. T. & G. Mutual Life Society Ltd (1978) 52 A.L.R. 573, 583 per Aickin J.; "[T]he settled doctrine of the [High] Court is that [convention debates] are not available in the construction of the Constitution...", A. G. (Vic); ex rel. Black v. Commonwealth note 2 supra, 158 per Barwick C.J. The High Court is "forbidden to consider the debates of [the Australian] constitutional conventions for the purpose of discovering what the delegates thought was the meaning of a particular provision accepted by the convention...", supra, 167 per Gibbs J. "[I]t is not permissible to consider what was said in Parliament or at a constitutional convention by those who debated the measure...because it cannot be certain that what any particular speaker said received the acquiescence of the majority of those present", A. G. (Cth); ex rel. McKinlay v. Commonwealth this note supra, 47 per Gibbs J. But see, Deputy Federal Commissioner of Taxation (N.S.W.) v. Moran Pty Ltd (1939) 61 C.L.R. 735, 793-794, "In principle there is no reason whatever why...records of debates, must necessarily be excluded from the field of relevant evidence" where courts are considering whether a statute is unconstitutional, per Evatt J. Examples of the use of Constitutional Convention and U.K. parliamentary debates:

(i) Amalgamated Society of Engineers v. Adelaide Steamship Co. (1920) 28 C.L.R. 129, 143, quoting from speech in House of Commons on motion to introduce the Constitution Bill. "[T]he reference to the speech...has never been taken very seriously", P. Brazil, note 9 supra, 19. "[T]he quotation was rather for emphasis or for illustration than as an authority on construction", H. S. Nicholas, The Australian Constitution: An Analysis (2nd ed. 1952) 319. "[I]t is clear that the Court was not using the words of Lord Haldane in any authoritative sense but only as a means of expression", W. A. Wynes, note 9 supra, 20 (footnote omitted). But the citation in the Engineer's case from the speech in the House of Commons has also been taken as indicating that the High Court's refusal to look at or permit citation of convention debates "cannot now be regarded as an inflexible rule", D. Kerr, The Law of the Australian Constitution (1925) 50.

(ii) Re Webster (1975) 132 C.L.R. 270, 279 per Barwick C.J. (consulting the 1897 Adelaide and Sydney Convention debates as to section 44(v) of the Constitution). Hammond, "Pecuniary Interest of Parliamentarians: A Comment on the Webster Case" (1976) 3 Mon. L. Rev. 91, 95 n. 23 (quoting Barwick C.J. from transcript during hearing of the case — "One ought not to do it, but I did it; I went and looked at the original debates"). On one view this reference to the convention debates was "not for the purpose of relying on the views expressed by any of the members" of the Constitutional Convention, L. Zines, note 7 supra, 318 n. 21.

(iii) King v. Jones (1972) 128 C.L.R. 221, 270 per Stephen J.: A factor leading to the conclusion that "adult person" in section 41 of the Constitution refers simply to the age of 21 "is the wealth of published Australian material about the time of Federation in the form of...debates in Colonial and State legislatures..."
(iv) A. G. (Vic); ex rel. Black v. Commonwealth note 2 supra, 171 per Stephen J., summarizing H. B. Higgins' argument concerning the preamble to the Constitution and section 116 at the 1898 session of the Constitutional Convention. Mr Justice Stephen does not, however, allude to the fact that Higgins' argument was made in the convention debates. Higgins' argument is summarised in J. Quick & R. R. Garran, note 5 supra, 952. Also Wilson J., after noting that it was "not permissible to seek the meaning of s.116 in the Convention debates", observed that he found it "interesting that in the course of the Conventions the religion clause began as a denial of power to the States, then was re-addressed to both the States and the Commonwealth, and finally took its present form," A. G. (Vic); ex rel. Black v. Commonwealth note 2 supra, 188.


(vi) For reference to Parliamentary debates to interpret a statute, see e.g., Wacando v. Commonwealth (1981) 37 A.L.R. 317, 335-336 per Mason J.

A chronological list, indicating the title, date and location, of the "Successive Printed Versions of a Bill to Constitute the Commonwealth of Australia, 1890-1900" is in J. A. La Nauze, note 8 supra, 289-291. Also the 1891 Constitution Bill is reproduced in Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April 1891, 943-964. The 1897 Bill [Adelaide session of 1897-1898 Convention] is reproduced in Official Report of the National Australasian Convention Debates, Adelaide, March 22 to May 5 1897, 1221-1243. The 1897 Bill [Sydney session] is located in a bound volume compiled by Robert Garran, see J. A. La Nauze, note 8 supra, 289-290 [Bill No. 15]. The 1898 Bill is reproduced in 2 Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 20 January to 17 March 1898, 2523-2544. See also note 16 infra.

"We think that as [a] matter of history of legislation the draft bills which were prepared under the authority of the Parliaments of the several States may be referred to. That will cover the draft bills of 1891, 1897 and 1898", Tasmania v. Commonwealth note 11 supra, 333 per Griffith C.J. arguendo. This statement has been endorsed, see e.g., A. G., (Cth) v. T. & G. Mutual Life Society note 11 supra, 583 per Aickin J.; Seamen's Union of Australia v. Utah Development Co. (1978) 53 A.L.J.R. 83, 92 per Stephen J. As to the use of draft Bills in the process of constitutional interpretation "the argument that an expression put by an earlier Convention into a draft Constitution is to influence [the High Court] towards the construction of this Constitution which is afterwards in operation, acts as a two-edged sword, because the abandonment of the earlier provision shows if anything that the Convention relinquished the idea of submitting it to the people, whose approval was by law essential. The successive alterations of the drafts seem rather to point to the view, not that the final provisions are to be interpreted in the same sense as those struck out of the draft, but that the first intentions were given up, and that entirely different intentions, to be gathered from the language of the Constitution, are those by which we are to abide", Tasmania v. Commonwealth note 11 supra, 350-351 per Barton J. The drafting history of section 96 of the Constitution "does not assist in its construction nor ought [it] to be used for such a purpose, notwithstanding that now it has a place, however inconspicuous, as part of the history of the country. But it may explain why the terms in which it was drafted have been found to contain possibilities not discoverable in the text as it emerged from the Conventions...", Victoria v. Commonwealth (1957) 99 C.L.R. 575,603 per Dixon C.J., with whom Kitto J. concurred. "It is from the successive drafts of the document which ultimately become our Constitution that the true role of s.91 emerges... The precise use to which such material may be put is, however, perhaps not clear... It is... permissible to refer to the history of the origins of s.90 and s.91 as casting light upon provisions whose precise effect and interaction are otherwise subject to some obscurity...[T]he unreliable nature of any aid likely to be gained from reference to legislative history and 'preparatory works'...[does] not, in large part, apply to the quite special case of the evolving form of our Constitution; in particular no 'arcana imperii' supplies, and in doing so obscures, the origin and significance of these drafts", Seamen's Union of Australia v. Utah Development Co. this note supra, 91-92 per Stephen J.


Reproduced in S. W. Griffith, note 14 supra, 46-52. See also J. A. La Nauze, note 8 supra, 295-296.

Reproduced in S. W. Griffith, note 14 supra, 63-339. See also Griffith's 1890 document setting forth a "distribution of the respective powers and functions of the Legislatures of the United Provinces and the Separate Provinces" in connection with a proposal to divide Queensland into Southern Central and Northern Districts. The document is in (1891) 41 Journals of the Legislative Council of


18 See J. A. La Nauze, note 8 supra, 289-290.

19 "In considering the proper construction and operation of s.74 of the Constitution it is...necessary to bear in mind its history, not only in the various drafts of the Constitution prepared by the Conventions in the 1890s, but also as it was amended in the final discussions which took place in London in the first half of 1900", Attorney-General (Cth) v. T. & G. Mutual Life Society Ltd note 11 supra, 583 per Aickin J. (emphasis added). "That judicial recourse may be had to the state of successive drafts of the Constitution 'as a matter of history' is well established" Seamen's Union of Australia v. Utah Development Co. note 13 supra, 92 per Stephen J. (emphasis added).

20 The 1899 Constitution Bill is the 1898 Bill as amended by the 1899 Premiers' Conference. It is reproduced in H. B. Higgins, Essays and Addresses on the Australian Commonwealth Bill (1900) 141-168, and in colonial referendum legislation, see e.g., Australasian Federation Enabling Act 1899 (N.S.W.) (2nd Schedule — Amendments agreed to at 1899 Premiers' Conference) (3rd Schedule — 1899 Constitution Bill); Australasian Federation Enabling Act 1899 (Vic) (1st Schedule — Amendments agreed to at 1899 Premiers' Conference) (2nd Schedule — 1899 Constitution Bill). See also, The Commonwealth Bill Amendment Act 1899 (S.A.) and South Australian Parliamentary Papers, No's 153 and 154 of 1899.

21 "The form of the Constitution as originally presented to the Imperial government for enactment may, on any view, be studied and compared with its form as enacted. It is available from a number of sources, including the legislation of the various colonies which provided for its submission to the people at a referendum...", Attorney-General (Cth) v. T. & G. Mutual Life Society Ltd note 11 supra, 579 per Stephen J.; see also 583, 585 per Aickin J.; Amendments made in England in 1900 may also be examined: See supra, 583, 585-586 per Aickin J.; Baxter v. Commissioners of Taxation (N.S.W.) (1907) 4 C.L.R. 1087, 1115 per Griffith C.J., Barton & O'Connor J.J. For these amendments see, H. B. Higgins, note 20 supra, 141-168 and J. A. La Nauze, note 8 supra, 303-304.

22 Three judgments quote a portion of section 74 from the 1899 Bill: Deakin v. Webb (1904) 1 C.L.R. 585, 626 per Barton, J.; Baxter v. Commissioners of Taxation (N.S.W.) note 21 supra, 1114 per Griffith C.J., Barton & O'Connor J.J.; Attorney-General (Cth) v. T. & G. Mutual Life Society Ltd note 11 supra, 585 per Aickin J. Portions of section 91 through drafts at Conventions in 1891 (Sydney), 1897 (Adelaide) and 1898 (Melbourne) are quoted in Seamen's Union of Australia v. Utah Development Co. note 13 supra, 91-92 per Stephen J. A Tasmanian amendment to section 116 was quoted and used in Attorney-General (Vic); ex rel. Black v. Commonwealth note 2 supra, 188 per Wilson, J. "[T]he faculty of [reference to draft Bills] appears to have been rarely exercised", P. Brazil, note 9 supra, 19.

23 "[C]ourts may use the general facts of history as ascertained or as ascertainable from the accepted writings of serious historians...", Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1, 196 per Dixon J. "It is only if [the High Court] fail[s] to adduce reasonable meaning from [the words of the Constitution] that it can have resort to the history of the clause or the circumstances surrounding the framing of the Constitution", Deakin v. Webb note 22 supra, 630 per O'Connor J. "In all cases in order to discover the intention you may have recourse to contemporaneous circumstances — to the history of the law...In considering the history of the law...you must have regard to the historical facts surrounding the bringing [of] the law into existence. In the case of a Federal Constitution the field of inquiry is naturally more extended than in the case of a State Statute, but the principles to be applied are the same", Tasmania v. Commonwealth note 11 supra, 359 per O'Connor J.; see also, 350 per Barton J. "[T]he meaning of the...text of the Constitution having regard to the historical setting in which the Constitution was created...In case of ambiguity or lack of certainty, resort can be had to the history of the colonies, particularly in the period of and immediately preceding the development of the terms of the Constitution", Attorney-General (Cth); ex rel. McKinlay v. Commonwealth note 11 supra, 17 per Barwick, C.J.; "[I]n Australia it has been accepted that in construing the Constitution...regard may be had to the state of things existing when the [Constitution] was passed, and therefore to historical facts...", supra, 47 per Gibbs J. "It does not...follow from [the] proposition [that resort may not be had to convention debates] that we must close our eyes to historical facts as providing a background
against which to view the Constitution. This Court has...made it plain that this is so”, Attorney-General (Cth) v. T. & G. Mutual Life Society Ltd note 11 supra, 583 per Aickin J.; “[T]he events of 1900...may be established without recourse to those materials, however readily at hand, which have been regarded as not proper to be availed of by those engaged in the task of constitutional interpretation although...furnishing to historians the most reliable of source material”, supra, 579 per Stephen J. See also Watson v. Lee (1979) 26 A.L.R. 461, 481 per Stephen J.; 491 per Aickin J. Even if the events of 1900 are established one view is that “absent the possibility which [an]...ambiguity [in the text of the Constitution which cannot otherwise be resolved] may present, the task of elucidating the meaning of...words constitutionally employed derives...no assistance from a consideration of the process by which that text came into being”, Attorney-General (Vic); ex rel. Black v. Commonwealth note 2 supra, 157 per Barwick C.J.; It may be, however, that even on this view “the meaning of the words in which the Constitution is expressed [can be identified] by examination of its discursive development”, supra, 157 per Barwick, C.J.


26 See P. H. Lane, note 7 supra, 1109-1112 citing examples of sections 24, 41, 51 (x), (xxi), (xxii), (xxxv), 55, 77 (iii), 90, 122. See also Watson v. Lee, note 23 supra, 480-82 (section 51 (xxii)). Attorney-General (Cth) v. T. & G. Mutual Life Society Ltd note 11 supra, 579-581 [section 74], 586-587 (sections 58, 59, 60); Attorney-General (Vic); ex rel. Black v. Commonwealth note 2 supra, 169, 172-173, 175, 177 [section 116]; Western Australia v. Commonwealth (1975) 134 C.L.R. 201, 273-274 (preamble and covering clause 3).

28 An historian has said that it is "a curious sort of hypothetical history", J. A. La Nauze, note 1 supra, 58. A lawyer has termed it "pseudo-history", G. Sawer, "The Future of State Taxes: Constitutional Issues" in R. Matthews, (ed.), Fiscal Federalism: Retrospect and Prospect (1974) 193, 199. Another lawyer has described it as "a quasi-historical inquiry", M. Coper, "The High Court and Section 90 of the Constitution" (1976) 7 F.L. Rev. 1, 20 (footnote omitted). "[W]hatever the official position regarding the availability of historical material to construe the Constitution, its history is always fascinating and frustrating to constitutional lawyers... Both judges and counsel act like Adam and Eve faced with the forbidden fruit; but the sequel of succumbing to temptation is avoided", L. Zines, note 11 supra, 160.

29 "The words of the Constitution are to be read in that natural sense they bore in the circumstances of their enactment by the Imperial Parliament in 1900", King v. Jones note 11 supra, 229 per Barwick C.J. "The meaning which 'establishing' [in section 116] in relation to a religion bore in 1900 may need examination... to ensure that the then current meaning is adopted", Attorney-General (Vic); ex rel. Black v. Commonwealth note 2 supra, 159 per Barwick, C.J.

30 "It is absurd to allow reference to the speculations of Quick and Garran and Harrison Moore, themselves obviously based on Convention history, but deny reference to the history itself", G. Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 F.L. Rev. 17, 22 n. 27. It is also absurd to allow reference to draft bills but not debates. "How can you tell from these drafts and amendments just what was intended finally unless you can look at the debates to see what was said about it? Somebody might oppose a thing and say: It is too long, let us have something short and simpler. Somebody might say: Look, we have met your problem about the appropriation, it all comes under the establishment clause. How can one really assess the intention of these things unless you go further and look at what the people were saying, if they said anything?!", Attorney-General (Vic); ex rel. Black v. Commonwealth note 2 supra, (transcript of proceedings 25 March 1980, page 169 per Murphy J.). For an illustration as to how the employment of draft bills without examination of debates could give a misleading impression, see M. Coper, note 28 supra, 25-26. At least one Justice of the High Court has recognised that "materials... which have been regarded as not proper to be availed of by those engaged in the task of constitutional interpretation... [furnish]... to historians the most reliable of source material", Attorney-General (Cth) v. T. & G. Mutual Life Society Ltd note 11 supra, 579 per Stephen J. This difference has also been noted by an historian, J. A. La Nauze, note 1 supra, 59-60.


32 See note 6 supra.

33 "The Constitution is a statute... and is to be construed according to the general rules of statutory interpretation... [O]rdinary rules of statutory interpretation are applicable to the Constitution", J. Latham, note 31 supra, 8. On some occasions the High Court has recognised that because the Constitution is "a statute of a special kind", being "the instrument of government for Australia" — (Victoria v. Commonwealth (1971) 122 C.L.R. 353, 394-395) — allowance should be made for the fact that "it is a constitution we are expounding", McCulloch v. Maryland 17 U.S. (4 Wheat.), 316, 407 (1819) per Marshall C.J. (emphasis in original). See e.g., Baxter v. Commissioners of Taxation (N.S.W.) note 21 supra, 1105; Attorney-General (N.S.W.) v. Brewery Employees Union of N.S.W. (1908) 6 C.L.R. 469, 611-613 per Higgins J.; Commonwealth v. Kreglinger and Fernau Ltd (1926) 37 C.L.R. 393, 413 per Isaacs J.; Australian National Airways Pty Ltd v. Commonwealth (1945) 71 C.L.R. 29, 85 per Dixon J.; R v. Public Vehciles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty Ltd (1965) 113 C.L.R. 207, 225; Spratt v. Hermes (1964) 114 C.L.R. 226, 272 per Windley J.; North Eastern Dairy Co. Ltd v. Dairy Industry Authority of N.S.W. (1975) 134 C.L.R. 559, 615 per Mason J.; Attorney-General (Vic); ex rel. Black v. Commonwealth note 2 supra, 174 per Murphy J.; Western Australia v. Commonwealth
Chief Justice Griffith and Justices Barton, O'Connor, Isaacs and Higgins. Indeed, it should be noted that Griffith, Barton and O'Connor as members of the drafting committee at the 1891 and 1897-1898 Constitutional Conventions (see J. A. La Nauze, note 8 supra, 46, 129) were largely responsible for drafting the Constitution. See also Duncan v. Queensland (1916) 22 C.L.R. 556, 639 per Gavan Duffy & Rich J.J.: “We were impressed by Mr Mitchell's contention that sec. 92 applies only to the imposition of fiscal burdens, but in deference to the unanimous opinion of our brother judges, the majority of whom were distinguished members of the Convention, we shall assume that it has a wider significance”.

For a list of the published records of the 1890's federal Conferences and Conventions see E. M. Hunt, note 8 supra, 270-271; P. Brazil, note 9 supra, 22, J. A. La Nauze, note 8 supra, 355-356.

For example, the successive draft Constitution Bills (listed in J. A. La Nauze, note 8 supra, 289-291) have not been collected and published in a bound volume but remain scattered in various Australian archives.

But see note 56 infra. To interpret the Constitution the period in which it was written must also be understood. This temptation is to read constitutional language written many years ago with present day sensibilities. This requirement has been enunciated concerning the interpretation of an even older document:

“To understand any text remote from us in time, we must reassemble a world around that text. The preconceptions of the original audience, its tastes, its range of reference, must be recovered, so far as that is possible. We must forget what was learned, or what occurred, in the interval between our time and the text’s. We must resurrect beliefs now discarded. Most people remember this when approaching a culture radically different from ours — that of Sophocles, or Dante, or Chaucer. They keep it in mind, but not enough, when reading Shakespeare or Milton. Yet eighteenth-century, English is still read as ‘our’ language; and anything written in America is part of the modern world of our ‘young’ nation’s brief history. So we are tempted to read Jefferson as our contemporary.”


See e.g., Appendix A.

See e.g., Attorney-General (Vic); ex rel. Black v. Commonwealth note 2 supra. Several Justices expressed what they considered to be the history of the relationship between Church and State in Australia before 1900 and the meaning of establishment at 1900; See e.g., 159 per Barwick C.J.; 165 per Gibbs J.; 169 per Stephen J.; 172 per Mason J.; 175 per Murphy J. Only Murphy J. cited (supra, 175, 177) historical scholarship; namely, W. E. Gladstone, The State in its Relations with the Church (1st ed. 1838) (4th ed. 1841); R. Ely, Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891-1906 (1976). Mason J., refers to the plaintiffs’ “...very comprehensive researches into the history of the relationship between Church and State in the Australian colonies...”, A. G. (Vic); ex rel. Black v. Commonwealth note 2 supra, 172. For the historical material relating to Australia put before the High Court in the above case, see, e.g., Plaintiffs’ Submission on the Facts and the Law (Book A) 205-211; Plaintiffs’ Annexures on the Facts and the Law (Book C) 1-131, 165-167; Reply on Behalf of the Plaintiffs to the Submissions made on behalf of the Defendants (Book F) 27-31, 45-51, 159-182; Submissions on behalf of Defendants — The National Council of Independent Schools, etc. — 63-76; Submissions on Behalf of the First, Second, Third and Fourth named Defendants 42-44.

There are some indications that a change may occur, such as the increasing use of draft Bills (see notes 13, 19, 21, 22 supra) and, to a lesser extent, Convention debates (see note 11 supra). Does Justice Wilson’s remark that “...on present authority it is not permissible to seek the meaning of s.116 in the Convention debates...”, imply that a change is imminent?, Attorney-General (Vic); ex rel. Black v. Commonwealth note 2 supra, 188 (emphasis added); Cf. Chief Justice Barwick’s view that “...the settled doctrine of the Court is that [Convention debates] are not available in the construction of the Constitution...”, this note supra, 157, (emphasis added).

The rules [of statutory construction] are no more than rules of common sense... They are not rules of law”, Cooper Brookes (Wollongong) Pty Ltd v. Federal Commissioner of Taxation (1981) 35 A.L.R. 151, 170 per Mason & Wilson J.J. That this statement would also apply to constitutional interpretation is supported by the reference, this note supra, 169 to the Engineers’ Case (1920) 28 C.L.R. 129, 161-162, and by the notion that the Constitution is a statute (see notes 31 and 33 supra).


Professor Sawyer has expressed the hope “...that the High Court will forget its earlier inhibitions on [the use of Convention Debates] and treat the Convention Debates as contemporary evidence of meanings”, G. Sawyer, note 30 supra, 22 n.27. However, “...it is not altogether clear just how different the course of Constitutional interpretation would have been had the Court relied more on the convention debates, nor whether on balance its self-denying ordinance has worked for good or for evil”, G. Evans, “The Most Dangerous Branch: The High Court and the Constitution in a Changing Society” in D. Hambly & J. Goldring, (eds.), Australian Lawyers and Social Change (1976) 13, 39. “It is possible to exaggerate the significance of the High Court’s refusal, ever since its foundation in 1904, to refer to the vast bulk of the Constitution’s travaux preparatoires. The American experience does not suggest that either judicial unanimity or historical accuracy is a necessary consequence of allowing such references”, J. M. Finnis, “Separation of Powers in the Australian Constitution” (1967-70) 3 Adelaide L. Rev. 159, 176.


47 W. F. Murphy, “Historical Interpretation: The Art of the Historian, Magician, or Statesman?” (1978) 87 Yale L.J. 1752. The use of the word “only” perhaps overstates the argument advanced by Raoul Berger. See note 60 infra. There are three questions:

(1) What role does, and should, the original (that is, the framers’) intention have in constitutional interpretation?

(2) What did the words of the Constitution mean to the framers in 1900 and when they were drafting the Constitution between 1891 and 1899?

(3) Should that “original intention and meaning” be binding on present and future generations?

48 See note 7 supra.

49 Letter to Henry Lee, 25 June 1825 in G. Hunt, (ed.), The Writings of James Madison (1900-1910) ix, 191 quoted by R. Berger, note 46 supra, 3. It should be noted that Madison refers to “the Nation” and not to the framers. As to the difference and consequences of accepting the intent of the Nation and of the framers, see R. A. Ertman, Book Review (1979) 28 De Paul L. Rev. 559, 561 n.20.

50 J. A. Beck, The Constitution of the United States (1922) 221. See also R. Berger, note 46 supra, 2 n.5.

51 On this latter issue Thomas Jefferson warned: “Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction”, Letter to Wilson Cary Nicholas, 7 September 1803 in P. L. Ford, (ed.), The Writings of Thomas Jefferson (1897) viii, 247. See also, Lochner v. New York 198 U.S. 45; 75-76 (1905) (Holmes J. dissenting); R. Berger, note 46 supra, 341. Cf: Hughes’ statement: “We are under a Constitution, but the Constitution is what the judges say it is…”, Speech at Elmira, 3 May 1907 in Charles Evans Hughes, Addresses (1908) 139. For an explanation see, D. J. Danelski and J. S. Tuchin, (eds.), The Autobiographical Notes of Charles Evans Hughes (1973) 143-144 and M. J. Pusey, Charles Evans Hughes (1951), 204-205. See also Professor Frankfurter’s observation that “[p]eople have been taught to believe that when the Supreme Court speaks it is not the judges who speak but the Constitution, whereas, of course, in many vital cases, it is [the judges] who speak and not the Constitution”, Letter to Franklin Delano Roosevelt, 18 February 1937 in M. Freedman, (ed.), Roosevelt and Frankfurter: Their Correspondence 1928-1945 (1967) 383 (emphasis in original). See also, W. O. Douglas, The Court Years 1939-1975: The Autobiography of William O. Douglas (1980) 8: “the ‘gut’ reaction of a judge at the level of constitutional adjudications…was the main ingredient of his decision”.

52 R. Berger, note 46 supra, 8.

53 Except where the Constitution’s text or language is ambiguous. Then resort can be had to federation history. See e.g., Attorney-General (Commonwealth); ex rel. McKinnlay v. Commonwealth note 11 supra, 17 per Barwick C.J.; Attorney-General (Victoria); ex rel. Black v. Commonwealth note 2 supra, 157-158 per Barwick C.J.


56 Not only are the successive drafts of the Constitution difficult to obtain — see note 12 supra — but also account must be taken of Alfred Deakin’s observation at the 1891 Constitutional Convention:

“There is much unstated [in the Debates], because the delegates to this Convention have practically lived together for six weeks in private as well as in public intercourse, and from the natural action and reaction of mind upon mind have been gradually shaping their thoughts upon
this great question. The bill which we present is the result of a far more intricate, intellectual process than is exhibited in our debates; unless the atmosphere in which we have lived as well as worked is taken into consideration, the measure as it stands will not be fully understood.”


Professor La Nauze correctly concludes that “[w]hat happens overnight in conferences may be as important as what is said in debate”, J. A. La Nauze, note 8 supra, 44. As to the American Constitution “[t]he hard truth is that we have no collection of documents that anyone can plausibly argue constitutes a full and accurate record of what the founders said at Philadelphia””, W. F. Murphy, note 47 supra, 1764. For similar difficulties with the Fourteenth Amendment, see W. F. Murphy, note 47 supra, 1755-1756.

But see note 61 infra.


But the consequences of historical and textual interpretation may be reversed:

“English courts are often reproached for excessive attachment to the text and — deservedly, I think — for the way in which they altogether ignore the legislative history. The implication in the reproach is that the history would be less constraining than the text. We see [in R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977)] that it can be even more restrictive. The thoughts of our ancestors, meticulously recorded, leave little scope for the imagination. English judges, who proceed by attributing their own thoughts to an abstract entity, ‘Parliament’, may have in the end greater freedom. They are able to avoid any precise doctrine about whether a statute is speaking in a present or a future tense; they have a choice of tenses. ‘Parliament in its infinite wisdom,’ the judge can intone, ‘must be taken to have foreseen, etc., etc.’ Thus they can if they wish (which usually they do not) come very close to treating statutes as ‘living’ and words as ‘empty vessels’ [into which the judge can pour nearly anything he will].”


The “central issue” for Raoul Berger is, “given a clearly discernible intention, may the Court construe the Fourteenth Amendment in undeniable contradiction of that intention?”. R. Berger, “The Scope of Judicial Review: An Ongoing Debate” (1979) 6 Hast. Const. L.Q. 527, 530 (emphasis in original). “On traditional canons of interpretation, the intention of the framers being unmistakably expressed, that intention is as good as written into the text”, R. Berger, note 46 supra, 7 (footnote omitted) (emphasis added). For an elaboration and defence of the view that a court may (and, in the context of the Fourteenth Amendment, should) construe constitutional provisions in contradiction of the framers’ clearly discernible intentions, see M. J. Perry, Book Review (1978) 78 Colum. L. Rev. 685, esp. 694-705; M. J. Perry, note 46 supra. The Berger vs. Perry debate is taking place in the context of the current discussion (see note 63 infra) concerning the most fundamental issue in constitutional theory; namely, the legitimacy of judicial review in a majoritarian representative democracy. Is there any justification — textual, historical or functional — for noninterpretive judicial review as distinct from interpretivism? The latter indicates “that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the [former] the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document”, J. H. Ely, note 46 supra, 1 (footnote omitted). The answer has consequences for not only methods of interpretation but also the role of the court in constitutional adjudication.

The original intent may itself indicate that interpreters are not to be confined to the framers’ intentions and meanings. See e.g., Isaac Isac’s:

“We are taking infinite trouble to express what we mean in this Constitution; but as in America so it will be here, that the makers of the Constitution were not merely the Conventions who sat, and the states who ratified their conclusions, but the Judges of the Supreme Court...[T]he renowned Judges who have pronounced on the Constitution, have had just as much to do in shaping it as the men who sat in the original Conventions.”

Official Record of the Debates of the Australasian Federal Convention, i, 3rd Sess., Melbourne (1898) 283. See also, John Downer:

“With [Judges] rest the interpretation of intentions which we may have in our minds, but which have not occurred to us at the present time. With them rests the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any of us.”

Convention Debates, this note supra, 275. Raoul Berger argues that the Framers did not, even in seemingly open ended phrases such as ‘due process’ and ‘equal protection’ in the Fourteenth Amendment, which for Berger’s Framers have fixed and ascertainable meanings, intend “to leave it ‘to succeeding generations . . . to rewrite the ‘living’ constitution anew’ . . . ”, R. Berger, note 46


APPENDIX A

SOME WRITINGS ON THE HISTORY OF PARTICULAR SECTIONS
OF THE COMMONWEALTH CONSTITUTION


J. A. La Nauze, “‘Other Like Services’: Physics and the Australian Constitution” (1968) 1 Rec. Aust. Acad. Sci. 36.


Section of the Constitution
Preamble, [Covering Clause] 1
[Covering Clause] 5
[Covering Clause] 5, 51 (xxix), 75 (i).
[Covering Clause] 5, 71, 74, 76 (i)
44 (v)
51 (ii)
51 (v)
51 (xxiiiA)
51 (xxvi), 127
51 (xxvi), 127
51 (xxvi)
51 (xxxv)
51 (xxxvii)
51 (xxxviii)
K. Booker, "Section 51 (xxxviii) of the Constitution" (1981) 4(2) U.N.S. W.L.J. 91, 94.


C. L. Pannam, "Trial by Jury and Section 80 of the Australian Constitution" (1968) 6 Syd. L. Rev. 1, 2-4.


M. Coper, "The High Court and Section 90 of the Constitution" (1976) 7 F.L. Rev. 1, 21-26.


