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

By
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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...[1]

> [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 educing 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.[2]

> 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?[3]

Unlike their United States' brethren,[4] historians working in the field of Australian constitutional history have not[5] 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 interpretation[9] 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 Bills[12] of 1891, 1897 and 1898.[13] Other Constitution Bills are excluded from the interpretative process. For example, those drafted by Andrew Inglis Clark[14] and Charles Cameron Kingston.[15] Draft Bills prepared by Samuel Walker Griffith,[16] drafting sub-committees[17] 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 1899[20] 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 exposition[23] including the formation of the Constitution,[24] evolution of particular provisions[25] 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[31] that the Australian Constitution is a statute of the United Kingdom Parliament[32] and should therefore be judicially interpreted according to rules of statutory interpretation,[33] 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.[34] 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.[35] 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.[36] Even if the historical material was more complete[37] there would doubtlessly continue to be differing conclusions reached as to the framers' intent and meaning of paricular provisions.[38] 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.[39]

Despite an increasing amount of research devoted to discerning the original intention of the Founding Fathers,[40] the High Court has continued to adhere to its exclusionary rules of interpretation and ignore publications dealing with federal constitutional history.[41] That Court could change its attitude and adopt a different methodology of interpretation.[42] No statute or constitutional injunction supports the present process of interpretation.[43] The rules of constitutional interpretation which have been formulated by the Court can be altered by the Court.[44] 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.[45] 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.[46]

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".[47] The reason why the original intention is so important and binding on the judiciary, and others,[48] 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."[49] Were it otherwise, the High Court would become a "continuous constitutional convention"[50] and the Constitution would be merely blank parchment whose words are empty vessels into which the judges can pour their own values and preferences.[51] 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?"[52] 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[53] this evidence. It postulates that ascertainment of the meaning of constitutional provisions should be by reliance on the text of the Constitution[54] and a dictionary.[55] It is argued that, apart from practical problems, for example, incompleteness of the historical record,[56] there are also the usual difficulties, such as ambiguity, vagueness[57] 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.[58] 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.[59]

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.[60] 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,[61] history should be merely a guide, not the principal determinant.[62] Other factors such as evolving principles of constitutional government, federalism, institutional integrity and individual liberty would have a part to play.[63] 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-a-vis* other branches of Commonwealth and State governments cannot be denied. Eventually, of course, it is this larger theme which must be addressed.

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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.

2 *Attorney-General (Vic.); ex rel. Black* v. *Commonwealth* (1981) 55 A.L.J.R. 155, 157-158 *per* Barwick C.J.

3 Henkin, "Some Reflections on Current Constitutional Controversy" (1961) 109 *U. Pennsylvania L. Rev.* 637, 657.

4 See generally, C. A. Miller, *The Supreme Court and the Uses of History* (1969). See, *e.g., Novotny* v. *Great Am. Federal Sav. & Loan Association* 584 F. 2d 1235, 1254 n. 96 (1978) (3rd Cir,) (en banc), reversed 99 S.Ct. 2345 (1979); *Turpin* v. *Mailet 579 F. 2d. 152, 169 n. 3, 173 nn. 8, 9, 11, 14, & 15 (1978) (2nd Cir.) (en banc), vacated and remanded sub. nom. City of Westhaven* v. *Turpin* 99 S.Ct. 554, 555 (1978), reinstated in part and remanded, 591 F. 2d 426, 427 (1979) (2nd Circ.); *N.L.R.B.* v. *Houston Distrib. Servs. Inc.* 573 F. 2d 260, 266 n. 5 (1978) (5th Circ.), cert. denied, 99 S.Ct. 722 (1978); *People* v. *Pettinghill* 21 Cal. 3d 231, 254, 578 (1978); P. 2d 108, 122; 145 Cal. Rptr. 861, 875 (en banc); *Whorton* v. *Commonwealth* 570 S.W. 2d 627, 633 n. 3 (1978) (Ky.); *Nebraska State Bank* v. *Dudley* 278 N.W. 2d 334, 337 (1979) (Neb.). For Canada see generally, Kyer, "Has History a Role to Play in Constitutional Adjudication: Some Preliminary Considerations" (1981) 15 *L. Soc. Upper Canada Gaz.* 135.

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. Sawer, *supra*, v. (Foreword). See note 27 *infra*.

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

7 As to *judicial* processes of constitutional interpretation in Australia, see generally, Dixon C.J., speech upon assuming office as Chief Justice (1952) 85 C.L.R. xi, xiii-xiv; G. Sawer, *Australian Federalism in the Courts* (1967); P. H. Lane, *The Australian Federal System* (2nd ed. 1979) 1175-1205; L. Zines, *The High Court and the Constitution* (1981) 282-323; A. R. Blackshield, "Judicial Innovation as a Democratic Process", in *Future Questions in Australian Politics (1979) 35, 41-43;* Galligan, "Legitimating Judicial Review: The Politics of Legalism" *(1981) 8. J. Aust. Stud.* 33. The judiciary is not the only institution which interprets the Constitution. The *Executive* does; see *e.g.,* P. A. Freund, A. E. Sutherland, M. De Wolfe Howe & E. J. Brown, *Constitutional Law: Cases and other Problems* (4th ed. 1977) 13-16; G. Gunther, *Cases and Materials on Constitutional Law* (10th ed. 1980) 25-31. The *Legislature* does: see *e.g.,* P. Brest, *Process of Constitutional Decisionmaking: Cases and Materials* (1975) 15-46 (1977 & 1980 Supps.); P. Brest, "The Conscientious Legislator's Guide to Constitutional Interpretation" (1975) 27 *Stan. L. Rev.* 585; Cox, "The Role of Congress in Constitutional Determinations" (1971) 40 *U. Cin. L. Rev.* 199. Indeed, there may be some provisions of the Constitution which the judiciary cannot interpret. See generally, G. Lindell, *Justiciability of Political Questions Under the Australian and United States Constitutions* (1972) (LL.M. thesis, Adelaide University); Castles, "Justiciability: Political Questions", in L. A. Stein, (ed.), *Locus Standi* (1979) 202.

8 For some writings on the history of particular sections of the Commonwealth Constitution, see Appendix A. For bibliographies of more general writings on the history of the Constitution, see E. M. Hunt, *American Precedents in Australian Federation* (1930) 270-278; J. A. La Nauze, *The Making of the Australian Constitution* (1972) 355-361; L. F. Crisp, *The Later Australian Federation Movement 1883-1901: Outline and Bibliography* (1979). See also, *Australian Constitutional Law and History: Select Union List* (Commonwealth Attorney-General's Department, 1972); "Bibliography", in the Senate and Supply (Standing Committee D Special Report to Executive Committee) (Appendix G at 149-150), in *Minutes of the Proceedings and Official Record of Debates of the Australian Constitutional Convention* 26-28 July 1978 (n.d.); "Bibliography", in *Constitutional Seminar* (1977) 63-68; C. Howard & C. Saunders, *Cases and Materials on Constitutional Law* (1979) xxvii-xli; M. Coper, *The Judicial Interpretation of Section 92 of the Australian Constitution* (1981) 892-902 (Ph.D. thesis, University of N.S.W.); Advisory Council for Intergovernmental Relations, "Bibliography", in *Towards Adaptive Federalism: A Search for Criteria for Responsibility Sharing in a Federal System* 175-216 (Information Paper No. 9 1981); Knight, "The Study of Australian Federalism" (1980) 39 *Aust. J. Pub. Admin.* 318. For a number of overseas and comparative works see Kommers, "Comparative Constitutional Law: Casebooks for a Developing Discipline" (1982) *57 Notre Dame Lawyer* 642.

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 preparatoires* as an aid to interpretation, see J. Goldring, *The Constitution of Papua New Guinea: A Study in Legal Nationalism* (1978) 125.

10 S.71 Constitution. See generally, J. M. Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (1980); E. Neumann, *The High Court of Australia: A Collective Portrait 1903 to 1972* (2nd ed. 1973). Compared to Supreme Courts in other countries the history of the High Court has been neglected. For the United States, see *e.g.*, C. Warren, *The Supreme Court in United States History 1789-1835* i; *1836-1918* ii; (Rev. ed. 1926); P. A. Freund, (ed.) *History of the Supreme Court of the United States* (projected 11 volumes: published volumes, i (1971), ii (1981), v (1974), vi (1971)). For England, see *e.g.*, R. Stevens, *Law and Politics: The House of Lords as a Jucial Body 1800-1976* (1978); P. A. Howell, *The Judicial Committee of the Privy Council 1833-1876* (1979); Beth, "The Judicial Committee as Constitutional Court for the British Empire 1833-1971" (1977) 71 *Georgia J. Int. Comp. L.* 47.

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 Conventions 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.J.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.
(v) See also the exchanges between the High Court and counsel during argument in *Strickland* v. *Rocla Concrete Pipes Ltd* (1971) 124 C.L.R. 468, reproduced in L. Zines, Book Review (1972) 5 *F.L. Rev.* 158, 159-160, concerning section 51(xx) in the Convention debates.
(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.

12 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*.

13 "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.

14 Reproduced at (1958) 32 *A.L.J.* 67-75 and in S. W. Griffith, *Successive Stages of the Constitution of the Commonwealth of Australia* (1891) 27-44. (Griffith's manuscript is in the Dixson Library of the Library of N.S.W., Ms.Q. 198, Add. 501). See also J. A. La Nauze, note 8 *supra*, 292-294.

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

16 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*

Queensland 13-15 Part 1). See J. A. Nauze, note 8 *supra*, 49, 51, 338 n. 35; C. R. Doran, *North Queensland Separatism in the Nineteenth Century* (1981) 327-372 (Ph.D. thesis, James Cook University).

17 See J. A. La Nauze, note 8 *supra*, 289-290. There were also draft provisions provided by other sub-committees. See *e.g.*, "Report of the Committee Appointed to consider Establishment of a Federal Judiciary; Its Powers and Functions", in *Official Record of the Proceeding and Debates of the National Australian Convention*, Sydney, March-April 1891 clxiii-clxiv; "Report of the Committee Appointed to Consider Provisions Relating to the Establishment of a Federal Judiciary", in *Proceedings of the Australasian Federal Convention*, Adelaide, March-May 1897 32-34.

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 educing 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.

24 See *e.g.*, *Tasmania* v. *Commonwealth* note 11 *supra*, 350-351 *per* Barton J.; *Baxter* v. *Commissioners of Taxation (N.S.W.)* note 21 *supra*, 1107-1112 *per* Griffith C.J., Barton & O'Connor J.J.; *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91, 113 *per* Griffith C.J.; *Attorney-General (Cth)* v. *Colonial Sugar Refining Co. Ltd* (1913) 17 C.L.R. 644, 652-653 (Privy Council).

25 See *e.g.*, on section 51 (xxvi): *Koowarta* v. *Bjelke-Petersen* (1982) 39 A.L.R. 417, 428. On section 51 (xxix): *Koowarta* v. *Bjelke-Petersen*, this note *supra*, 449, 458. See *e.g.*, on sections 58, 59 and 60: *Attorney-General (Cth)* v. *T. & G. Mutual Life Society Ltd* note 11 *supra*, 586. On section 74: *Deakin* v. *Webb* note 22 *supra*, 626-627; *Baxter* v. *Commissioners of Taxation (N.S.W.)* note 21 *supra*, 1115; *A. G. (Cth)* v. *T. & G. Mutual Life Society Ltd* note 11 *supra*, 579, 581, 585-588; see also J. A. La Nauze, note 8 *supra*, 303-304; "Constitutional Validity of the Privy Council (Appeals from the High Court) Act 1975 Upheld" (1978) 52 *A.L.J.* 533, 535. On Section 75 (iii): *Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1, 363-367 *per* Dixon J. (referring to the 1891 Bill, Samuel Griffith's drafts and Report of Judiciary Committee) "the history of [section 75 (iii)], which explains, if indeed it does not illuminate, the whole matter", *supra*, 363. But see, G. Sawer, *Cases on the Constitution of the Commonwealth of Australia: Selected and Annotated* (3rd ed. 1964) 249. On Section 91: *Seamen's Union of Australia* v. *Utah Development Co.* note 13 *supra*, 91-92. On Section 92: *Tasmania* v. *Commonwealth* note 11 *supra*, 351-355 *per* Barton J., 360-361; [also sections 89 & 93] *per* O'Connor J.; *Peanut Board* v. *Rockhampton Harbour Board* (1933) 48 C.L.R. 266, 298 *per* Evatt J.; *Buck* v. *Bavone* (1976) 135 C.L.R. 110, 134 *per* Murphy J.; *Clark King & Co. Pty Ltd* v. *Australian Wheat Board* (1978) 140 C.L.R. 120, 151 *per* Barwick C.J. On section 96: *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty Ltd (1939) 61 C.L.R. 735, 803 per* Evatt J.; *Victoria* v. *Commonwealth* note 13 *supra*, 603. On section 116: *Attorney-General (Vic); ex rel. Black* v. *Commonwealth* note 2 *supra*, 188 *per* Wilson J. (The High Court was provided with drafting and amendment details in the written submissions on behalf of the First, Second, Third and Fourth named Defendants at pages 42-44.) However, the High Court sometimes assumes the intention of a specific provision without recourse to history. See *e.g.*, *Parton* v. *Milk Board (Vic)* (1949) 80 C.L.R. 229, 260 *per* Dixon J.

26 See P. H. Lane, note 7 *supra*, 1109-1112 citing examples of sections 24, 41, 51 (x), (xxi), (xxii), (xxiv), (xxvii), (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).

27 The most frequent citation is to J. Quick & R. R. Garran, note 5 *supra*. See *e.g.*, *King* v. *Jones* note 11 *supra*, 230, 257, 260, 267; *Attorney-General (Cth); ex rel. McKinlay* v. *Commonwealth* note 11 *supra*, 50; *Attorney-General (Vic.); ex rel. Black* v. *Commonwealth* note 2 *supra*, 169, 171; *Attorney-General (Cth)* v. *T. & G. Mutual Life Society Ltd* note 11 *supra*, 576, 577, 578, 585, 586, 587; *Western Australia* v. *Commonwealth* note 26 *supra*, 231, 246-247, 285; *Koowarta* v. *Bjelke-Petersen* note 25 *supra*, 428, 430, 449. See also note 5 *supra*. Also citations to W. H. Moore, *The Constitution of the Commonwealth of Australia* (1st ed. 1902) (2nd ed. 1910). See *e.g.*, *King* v. *Burgess; ex parte Henry* (1936) 55 C.L.R. 608, 679-680, 681; *King* v. *Jones* note 11 *supra*, 257-258, 267; *A. G. (Cth)* v. *T. & G. Mutual Life Society Ltd* note 11 *supra*, 579, 587; *Western Australia* v. *Commonwealth* note 26 *supra*, 285-286. But the High Court has neglected A. I. Clark, *Studies in Australian Constitutional Law* (1st ed. 1901) (2nd ed. 1905). This is somewhat surprising given Clark's prominent role in the constitutional convention. See *e.g.*, J. Reynolds, "A. I. Clark's American Sympathies and his Influence on Australian Federation" (1958) 32 *A.L.J.* 62; J. M. Neasey, "Andrew Inglis Clark Senior and Australian Federation" (1969) 15 *Australian J. Of Politics and History* 1; J. Reynolds, "The Clarks of Rosebank" (1955) 4 *Papers & Proc. Tas. Hist. Research Ass.* 5, 10-11.

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.

31 The orthodox view is that the Australian Constitution "is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions", O. Dixon, "The Law and the Constitution" (1935) 51 *L.Q. Rev.* 590, 597. See also J. Latham, "Interpretation of the Constitution" in R. Else-Mitchell, (ed.), *Essays on the Australian Constitution* (2nd ed. 1961) 1, 5; *Southern Centre of Theosophy Inc.* v. *S.A.* (1979) 27 A.L.R. 59; *China Ocean Shipping Co.* v. *S.A.* (1979) 27 A.L.R. 1; *Attorney-General (Cth); ex rel. McKinlay* v. *Commonwealth* note 11 *supra*, 17, 24. For the view that the Australian Constitution derives its legal force and supremacy from the sovereignty of the Australian people, see, *Bistricic* v. *Rokov* (1976) 135 C.L.R. 522, 566 *per* Murphy J.; *China Ocean Shipping Co.* v. *S.A.* this note *supra* 51-52 *per* Murphy J. R. D. Lumb, "Fundamental Law and the Processes of Constitutional Change in Australia" (1978) 9 *F.L. Rev.* 148, 154-158. But see, P. Bickovskii, "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution" (1977) 8 *F.L. Rev.* 460, 467-470; L. Zines, note 7 *supra*, 250-251.

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 Vehicles 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* Windeyer 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*

note 26 *supra*, 245-246 *per* Gibbs J.; *Koowarta* v. *Bjelke-Petersen* note 25 *supra*, 448 *per* Stephen J.; 458, 461-462 *per* Mason J.; *Actors and Announcers Equity* v. *Fontana Films Pty Ltd* (1982) 56 A.L.J.R. 366, 381 *per* Mason J. See generally V. Windeyer, *Some Aspects of Australian Constitutional Law* (1973) 37-38; P. H. Lane, note 7 *supra*, 1188-1193. Some commentators argue that rules of statutory interpretation should not apply to the interpretation of a constitution. See *e.g.*, D. Alfange, "On Judicial Policymaking and Constitutional Change: Another Look at the 'Original Intent' Theory of Constitutional Interpretation" (1978) 5 *Hast. Const. L.Q.* 603, 618-619. Others, however, are more wedded to the use of such rules in constitutional adjudication. See *e.g.*, R. Berger, "'Government by Judiciary': Judge Gibbons' Argument Ad Hominem (1979) 59 *B.U.L. Rev.* 783, 805-806.

34 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".

35 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.

36 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.

37 But see note 56 *infra*. To interpret the Constitution the period in which it was written must also be understood. The 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.":

G. Wills, *Inventing America: Jefferson's Declaration of Independence* (1978) 259.

38 As to s.92 of the Australian Constitution see F. R. Beasley, "The Commonwealth Constitution: Section 92 — Its History in the Federal Conventions" (1948-1950) 1 *U. W.A.L. Rev.* 97, 273, 433; R. L. Sharwood "Section 92 in the Federal Conventions: A Fresh Appraisal" (1958) 1 *Mel. U.L. Rev.* 331; J. A. La Nauze "A Little Bit of Lawyers' Language: The History of 'Absolutely Free' 1890-1900" in A. W. Martin, (ed.), *Essays in Australian Federation* (1969) 57. "[I]nvestigations that have been made into the intentions of the founding fathers on the much-litigated section 92 [have] failed to produce unanimity", P. Brazil, note 9 *supra*, 21 (footnote omitted). As to s.74, see note 25 *supra*. As to the "commerce clause" (Art.1, s.8, cl.3) of the U.S. Constitution, see *e.g.*, W. W. Crosskey & W. Jeffrey, *Politics and the Constitution in the History of the United States* (3 vols) (1953-1980); Finkelman, "The First American Constitutions: State and Federal" (1981) 59 *Texas L. Rev.* 1141, 1144, 1156-1167; Pollak, Book Review (1973) 82 *Yale, L. J.* 856, 863-864 nn. 38 & 39 (listing critical & favourable reviews of "Crosskey's extraordinary opus"). As to the Fourteenth Amendment to the U.S. Constitution, see *e.g.*, A. Soifer, "Protecting Civil Rights: A Critique of Raoul Berger's History" (1979) 54 *N.Y.U.L. Rev.* 651; R. Berger "Soifer to the Rescue of History" (1981) 32 *S.C.L. Rev.* 427; Dimond, "Strict Construction and Judicial Review of Racial Discrimination under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds" (1982) 80 *Mich. L.R.* 462. In regard to divergent conclusions drawn from historical records it should always be recalled that "[u]nder the sheep's covering of history lies the lion's skin of philosophy", P. A. Freund, *The Supreme Court of the United States; Its Business, Purposes, and Performance* (1961) 77. "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other", *Youngstown Sheet & Tube Co.* v. *Sawyer* 343 U.S. 579, 634-635 (1951) *per* Jackson J.

39 G. Sawer, "Foreword" in J. Quick & R. R. Garran, note 5 *supra*, v.

40 See *e.g.*, Appendix A.

41 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.

42 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).

43 "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*).

44 See the discussion as to statutory interpretation in *Cooper Brookes (Wollongong) Pty Ltd* v. *Federal Commissioner of Taxation* note 43 *supra*. Does the Commonwealth Parliament have constitutional power to alter the rules of statutory (or constitutional) interpretation? See s.15AA Acts Interpretation Act 1901 (Cth); G. Sawer, "The Constitutionality of the Recent Anti-Tax Avoidance Legislation", Paper delivered at the Business Law Education Centre, 10 August 1981, 11; *Sillery* v. *Queen* (1981) 55 A.L.J.R. 509, 513 *per* Murphy J. ("the constitutional separation of powers").

45 Professor Sawer 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. Sawer, 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.

46 This question has received very little attention in Australia: see *e.g.*, G. Evans, note 45 *supra*, 56-57; A. R. Blackshield, note 7 *supra*, 46-47. A good deal more consideration has been given to this subject in the United States: see *e.g.*, A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); J. S. Wright "Professor Bickel, The Scholarly Tradition and the Supreme Court" (1971) 84 *Harv. L. Rev.* 769; W. R. Bishin, "Judicial Review in Democratic Theory" (1977) 50 *So. Calif. L. Rev.* 1099; R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977) 1-10, 249-418; J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); J. H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980); M. J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (1982); Symposium: "Judicial Review versus Democracy (1981) 42 *Ohio St. L.J.* 1-434; Symposium: "Constitutional Adjudication and Democratic Theory" (1981) 56 *N.Y.U.L. Rev.* 259-544; Grano, "Judicial Review and a Written Constitution in a Democratic Society" (1981) 28 *Wayne L. Rev.* 1; Van Alstyne, "Slouching Toward Bethlehem with the Ninth Amendment" (1981) 91 *Yale L.J.* 207; Wellington, "The Nature

of Judicial Review" (1982) 91 *Yale L.J.* 486. Freedman, Book Review (1982) 48 *Brooklyn L. Rev.* 391; Caplan, "The Paradoxes of Judicial Review in a Constitutional Democracy" (1981) 30 *Buffalo L. Rev.* 451; P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982). See also, G. Calabresi, *A Common Law for the Age of Statutes* (1982); Coffin, "The Problem of Obsolete Statutes: A New Role for Courts?" (1982) 91 *Yale L.J.* 827.

47 W. F. Murphy, "Constitutional 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. Tulchin, (eds.), *The Autobiographical Notes of Charles Evans Hughes* (1973) 143-144 and M. J. Pusey, *Charles Evans Hughes* (1951) i, 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 so 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. McKinlay* 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.

54 See *e.g.*, *A.G. (Cth); ex rel. McKinlay* v. *Commonwealth* note 11 *supra*, 17 *per* Barwick C.J.: "The only true guide...is to read the language of the constitution...". *A.G. (Vic); ex rel. Black* v. *Commonwealth* note 2 *supra*, 157-158 *per* Barwick C.J.: "the text of our own Constitution is always controlling". *Uebergang* v. *Australian Wheat Board* (1980) 54 A.L.J.R. 581, 590 *per* Barwick C.J.: "What falls for construction are the words of the Constitution..."

55 A dictionary to help assign the meaning to the words used in the Constitution. But is that the current meaning or "the sense in which the words of the text were understood in the day of their expression"?, *A.G. (Vic); ex rel. Black* v. *Commonwealth* note 2 *supra*, 157. The Justices do not always indicate whether they are using a 1900 or 1901 or more modern edition of a dictionary. See *e.g.*, *A.G. (Vic); ex rel. Black* v. *Commonwealth* note 2 *supra*, 164 *per* Gibbs J., "Oxford Dictionary"; 168 *per* Stephen J., "Shorter Oxford Dictionary"; 172 *per* Mason J., "standard English dictionaries"; 175 *per* Murphy J., "The Oxford Dictionary 1901". *Koowarta* v. *Bjelke-Petersen* note 25 *supra*, 430, 449, "Oxford English Dictionary". There was no Australian English Dictionary in 1900. Note the distinction between connotation, as in 1900, and denotation, in post 1900 times, stressed by Barwick, C.J.: See *e.g.*, *Uebergang* v. *Australian Wheat Board* note 53 *supra*, 590; *A.G. (Vic); ex rel. Black* v. *Commonwealth* note 2 *supra*, 157-158. See also, *Koowarta* v. *Bjelke-Petersen* note 25 *supra*, 454, 462-463, 483-484. But see, P. H. Lane, note 7 *supra*, 1117.

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.":

Official Report of the National Australasian Convention Debates, Sydney, (1891) 914.

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.

57 But see note 61 *infra.*

58 See *e.g.,* J. A. Thomson, "A United States Guide to Constitutional Limitations Upon Treaties as a Source of Australian Municipal Law" (1977) 13 *U. W.A.L. Rev.* 110, 120-129.

59 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].":

Devlin, "Judges, Government and Politics" (1978) 41 *M.L. Rev.* 501, 503-504.

60 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 noninterpretative 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.

61 The original intent may itself indicate that interpreters are not to be confined to the framers' intentions and meanings. See *e.g.,* Isaac Isaacs:

"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 (emphasis added). 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

supra, 363, quoting from Miller, "An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis upon the Doctrine of Separation of Powers" (1973) 27 *Ark. L. Rev.* 584, 595. See also R. Berger, "Government by Judiciary: John Hart Ely's 'Invitation'" (1979) 54 *Ind. L.J.* 277.

62 For recent literature concerning the role of history and intentions of the founding fathers in constitutional interpretation engendered by R. Berger, note 46 *supra*, see *e.g.*, W. F. Murphy, note 47 *supra*; D. Alfange, note 33 *supra*; Nathanson, "Constitutional Interpretation and the Democratic Process" (1978) 56 *Texas L. Rev.* 579; Clark, "History and Constitutional Interpretation" (1978) 56 *Texas L. Rev.* 947; Gibbons, Book Review (1978) 31 *Rutgers L. Rev.* 839: M. J. Perry, Book Review, note 60 *supra*; Monaghan, "The Constitution Goes to Harvard" (1978) 13 *Harv. Civ. Lib. — Civ. Rts. L. Rev.* 117: P. Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 *B.U.L. Rev.* 204; Symposium (1979) 6 *Hast. Const. L.Q.* 403-612. For Raoul Berger's response see, *e.g.:* R. Berger, "The Scope of Judicial Review and Walter Murphy" (1979) 74 *Nw. U.L. Rev.* 311; R. Berger, "Government by Judiciary: Some Countercriticism" (1978) 56 *Texas L. Rev.* 1125; R. Berger, note 33 *supra*; R. Berger, "Paul Brest's Brief for an Imperial Judiciary" (1981) 40 *Maryland L. Rev.* 1. See also, Monaghan, "Our Perfect Constitution" (1981) 56 *N.Y.U.L. Rev.* 353, 374-387; Dworkin, "The Forum of Principle" (1981) 56 *N.Y.U.L. Rev.* 469, 471-500.

63 There is presently in the U.S.A. another "outburst of writing about...modes of constitutional interpretation and about limits on judicial subjectiveness and open-endedness...", Gunther, "Some Reflections on the Judicial Role: Distinction, Roots and Prospects" [1979] *Wash. U.L.Q.* 817, 827-828. See also, note 60 *supra*. For some of the "outbursts" see generally, J. H. Ely, note 46 *supra*; J. H. Choper, note 46 *supra*; M. J. Perry, note 46 *supra*; Symposia in *Ohio St. L.J.* and *N.Y.U.L. Rev.* note 46 *supra*; Estreicher, "Platonic Guardians of Democracy; John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture" (1981) 56 *N.Y.U.L. Rev.* 547. See also, P. Brest, note 7 *supra*; C. Ducat, *Modes of Constitutional Interpretation* (1978); Murphy, "The Art of Constitutional Interpretation: A Preliminary Showing", in M. Harmon, (ed.), *Essays on the Constitution of the United States* (1978) 130; Murphy, "An Ordering of Constitutional Values" (1980) 53 *So. Cal. L. Rev.* 703; C. J. Antieau, *Constitutional Construction* (1982); W. F. Murphy, J. E. Fleming and W. F. Harris, *American Constitutional Interpretation* (forthcoming).

APPENDIX A

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

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J. A. La Nauze, "The Name of the Commonwealth of Australia" (1966) 12 *Hist. Stud. Aust. & N.Z.* 59-71.	Preamble, [Covering Clause] 1
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J. A. Thomson, "A United States Guide to Constitutional Limitations Upon Treaties as a Source of Australian Municipal Law" (1977) 13 *U.W.A.L. Rev.* 110, 120-129.	[Covering Clause] 5, 51 (xxix), 75 (i).
J. A. Thomson, *Judicial Review in Australia: The Courts and the Constitution* (1979) 239-294 (S.J.D. thesis, Harvard).	[Covering Clause] 5, 71, 74, 76 (i)
Hammond, "Pecuniary Interest of Parliamentarians: A Comment on the *Webster* case" (1976) 3 *Mon. L. Rev.* 91, 95-100.	44 (v)
D. Rose, "Discrimination, Uniformity and Preference — Some Aspects of the Express Constitutional Provisions", in L. Zines, (ed.), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (1977) 191, 212-213.	51 (ii)
J. A. La Nauze, "'Other Like Services': Physics and the Australian Constitution" (1968) 1 *Rec. Aust. Acad. Sci.* 36.	51 (v)
I. K. F. Birch, *Constitutional Responsibility for Education in Australia* (1975) 1-55.	51 (xxiiiA)
An Investigation of the Origins and Intentions of Section 51, Placitum xxvi, and Section 127 of the Constitution of the Commonwealth of Australia (Prepared by the National Library of Australia) (June 1961) (Manuscript of 17 pages).	51 (xxvi), 127
G. Sawer, "The Australian Constitution and The Australian Aborigine (1966) 2 *F.L. Rev.* 17, 18-23, 27-29.	51 (xxvi), 127
M. Crommelin, "Opinion on Section 51 (xxvi)", in *Report on Aboriginals and Torres Strait Islanders on Queensland Reserves,* Senate Standing Committee on Constitutional and Legal Affairs (November 1978) (Annexure G, 91, 94-98).	51 (xxvi)
J. J. Macken, *Australian Industrial Laws* (2nd ed. 1980) 3-14.	51 (xxxv)
G. A. R. Johnson, "The Reference Power in the Australian Constitution" (1973) 9 *M.U.L.R.* 42-45.	51 (xxxvii)
M. Crommelin, "Offshore Mining and Petroleum: Constitutional Issues" (1981) 3 *Aust. Mining & Petroleum L. J.* 191, 194-197. [P. Brazil, Commentary, *id.*, 223].	51 (xxxviii)

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C. Howard & C. Saunders, "The Blocking of the Budget and Dismissal of the Government", in G. Evans, (ed.), *Labor and the Constitution 1972-1975* (1977) 251, 252-260. [See also Saunders, "Senate Powers and Deadlocks: Historical Background", in The Senate and Supply (Standing Committee D: Special Report to Executive Committee) (1977) (Appendix F, 139), in *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention* (26-28 July 1978) (n.d.).]	53, 54, 55
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